THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

Mx North Gallery.

UNIVERSITY OF LONDON
LIBRARY

11 JUN 1991

THE
ALL ENGLAND
LAW REPORTS
REPRINT

1935

AFRICA: BUTTERWORTH & CO. (AFRICA) Ltd.
DURBAN: 33/35 BEACH GROVE

AUSTRALIA: BUTTERWORTH & CO. (AUSTRALIA) Ltd.
SYDNEY: 8 O'CONNELL STREET
MELBOURNE: 430 BOURKE STREET
BRISBANE: 240 QUEEN STREET

CANADA: BUTTERWORTH & CO. (CANADA) Ltd.
TORONTO: 1367 DANFORTH AVENUE

NEW ZEALAND: BUTTERWORTH & CO. (AUSTRALIA) Ltd.
WELLINGTON: 49/51 BALLANCE STREET
AUCKLAND: 35 HIGH STREET

THE
ALL ENGLAND
LAW REPORTS
REPRINT

Being a selection from the
LAW TIMES REPORTS
1843–1935

REVISED AND ANNOTATED

1935

Editor
G. F. L. BRIDGMAN
of the Middle Temple, Barrister-at-Law

Assistant Editors
O. M. W. SWINGLAND
of Gray's Inn, Barrister-at-Law
HENRY SUMMERFIELD
of Gray's Inn, Barrister-at-Law

LONDON
BUTTERWORTH & CO. (PUBLISHERS) LTD.

BIBL. LONDIN UNIV. 1957

These Reports are cited thus:

[1935] All E.R. Rep.

©
Butterworth & Co. (Publishers) Ltd.
1957

Made and printed in Great Britain by
William Clowes and Sons, Limited, London and Beccles

Publishers' Note

For a quarter of a century, more or less, there has been increasing difficulty in obtaining a full set of law reports. Even if one could find a set and afford the cost on the second hand market, there was yet another stumbling block in the way of the practitioner—the problem of shelf space.

Butterworths claim to have solved the problem by publishing the All England Law Reports Reprint. Working backwards from 1935 (the All England Law Reports are available from 1936 onwards) they are reprinting from the Law Times Reports, which commenced in 1843, a large and carefully selected number of "living cases". The Reprint contains some 4,000 cases after the dead wood has been cut out. The Editor has revised and annotated as he went along, but the judgments, of course, remain unaltered.

The selection of "living cases" is based principally on those cases referred to twice or more in the All England Law Reports since 1936, but the Editor, as a result of many years' experience, has added a number of other cases which he feels may be required by the practitioner from time to time, though they have been less frequently referred to.

By this means, together with their All England Law Reports, Butterworths are providing ready access to cases covering the past 115 years.

BUTTERWORTH & CO. (PUBLISHERS) LTD.

London
July, 1957

CASES REPORTED IN THIS VOLUME

PAGE

Aitchison *v.* Page Motors, Ltd. [K.B.D.] 594
Alexander *v.* Rayson [C.A.] 185
Arbitration between the Ecclesiastical Commissioners for England and the National Provincial Bank, Ltd., *Re* An [C.A.] 830
Astor *v.* Perry (Inspector of Taxes) [H.L.] 713
Attorney-General *v.* Gravesend Corporation [Ch.D.] 706
Attorney-General *v.* Lloyds Bank, Ltd. [H.L.] 518
Attorney-General *v.* Valle-Jones [K.B.D.] 175
B. *v.* B. [Div.] 428
Baker, *Re* [Ch.D.] 843
Beldis, *The* [C.A.] 760
Belton *v.* Crowle District Drainage Board [K.B.D. Divl. Ct.] 382
Berrey, *Re*, Lewis *v.* Berrey [Ch.D.] 826
Berry and Another *v.* Tottenham Hotspur Football and Athletic Co., Ltd. [Ch.D.] 726
Birmingham Corporation *v.* Barnes [H.L.] 533
Bowden, *Re*, Hulbert *v.* Bowden [K.B.D.] 933
Boyer, *Re*, Neathercoat *v.* Lawrence [Ch.D.] 274
Brine and Davies's Contract, *Re* [Ch.D.] 871
British Coal Corporation *v.* Regem [P.C.] 139
British Homophone, Ltd. *v.* Kunz and Crystallate Gramophone Record Manufacturing Co., Ltd. [K.B.D.] 627
Bromage, *Re*, Public Trustee *v.* Cuthbert [Ch.D.] 80
Brown and Others *v.* Monmouthshire County Council [C.A.] 836
Burnett *v.* Burnett [Div.] 490
Butterworth (Inspector of Taxes) *v.* Page [H.L.] 943
Carras *v.* London and Scottish Assurance Corporation, Ltd. [C.A.] 246
Clack *v.* Clack [K.B.D. Divl. Ct.] 228
Coles *v.* Odhams Press, Ltd. [K.B.D. Divl. Ct.] 598
Cook *v.* Alfred Plumpton, Ltd. and Another [K.B.D. Divl. Ct.] 806
Corfield *v.* Dolby [K.B.D. Divl. Ct.] 801
Cotterill *v.* Penn [K.B.D. Divl. Ct.] 204
Coutts & Co. *v.* Somerville [Ch.D.] 478
Cowan (otherwise Youell) *v.* Cowan [Div.] 781
Daglish *v.* Daglish [Div.] 903
Danneberg *v.* White Sea Timber Trust [C.A.] 328
Davis and Collett, Ltd., *Re* [Ch.D.] 315
Debtor, *Re* (No. 11 of 1935) [Ch.D.] 615
Debtor, *Re* (No. 24 of 1935) [C.A.] 744
Debtor, *Re* (No. 591 of 1934), *Ex parte* The Debtor *v.* Petitioning Creditors and Official Receiver [C.A.] 823
Deen *v.* Davies [C.A.] 9
Denby (William) & Son, Ltd. *v.* Minister of Health [K.B.D.] 304
De Trafford *v.* Attorney-General [H.L.] 219
Dewar *v.* Inland Revenue Commissioners [C.A.] 568
Drages, Ltd. *v.* Owen [K.B.D.] 342
Druce & Co., Ltd. *v.* Beaumont Property Trust, Ltd. [K.B.D.] 404
Duncan and Others *v.* Adamson (Inspector of Taxes) [H.L.] 713
Duncan *v.* Jones [K.B.D. Divl. Ct.] 710
Dunn Trust, Ltd. *v.* Feetham [C.A.] 280

PAGE

Ecclesiastical Commissioners for England and the National Provincial Bank, Ltd., *Re* An Arbitration between [C.A.] 830
Elderton *v.* United Kingdom Totalisator Co., Ltd. [Ch.D.] 18
Elliot *v.* Joicey [H.L.] 578
Evans *v.* Employers Mutual Insurance Association, Ltd. [C.A.] 659
Eyre *v.* Milton Proprietary, Ltd. [Ch.D.] 286
Finn, *In the Estate of* [Prob.] 419
Fishenden *v.* Higgs and Hill, Ltd. [C.A.] 435
Fleetwood-Hesketh *v.* Inland Revenue Commissioners [C.A.] 682
Forster *v.* Williams Deacon's Bank, Ltd. [Ch.D.] 374
Fredman *v.* Minister of Health [K.B.D.] 916
Gonzalez (Marcelino) y Compania *v.* James Nourse, Ltd. [K.B.D.] 358
Grant *v.* Australian Knitting Mills, Ltd. [P.C.] 209
Great Western Rail. Co. *v.* West Midland Traffic Area Licensing Authority [H.L.] 396
Greg *v.* Planque [C.A.] 237
Gunning, *In the Estate of* [Prob.] 84
Gutsell *v.* Reeve [C.A.] 117
H.M. Postmaster-General *v.* Birmingham Corporation [C.A.] 856
Hannaford *v.* May [K.B.D. Divl. Ct.] 368
Harold Wood Brick Co., Ltd. *v.* Ferris [C.A.] 603
Harwood, *Re*, Coleman *v.* Innes [Ch.D.] 918
Hay *v.* Carter [C.A.] 482
Hearts of Oak Assurance Co., Ltd. *v.* James Flower & Sons [Ch.D.] 420
Heath, *Re*, Public Trustee *v.* Heath [Ch.D.] 677
Heaton (Vernon) Co., Ltd., *Re* [Ch.D.] 295
Hector Whaling, Ltd., *Re* [Ch.D.] 302
Hillen *v.* I.C.I. (Alkali), Ltd. [H.L.] 555
Hodgson, *Re*, Nowell *v.* Flannery [Ch.D.] 161
Hogg *v.* Toye & Co., Ltd. [C.A.] 618
Holmes *v.* Watt [C.A.] 496
Inland Revenue Commissioners *v.* Duke of Westminster [H.L.] 259
Inland Revenue Commissioners *v.* Ramsay [C.A.] 847
Investment Trust Corporation, Ltd. *v.* Singapore Traction Co., Ltd. [C.A.] 348
James, *Re*, James *v.* James [Ch.D.] 235
John Shaw & Sons (Salford), Ltd. *v.* Shaw [C.A.] 456
Jutson *v.* Barrow [K.B.D. Divl. Ct.] 644
Kate, *The* [Adm.] 912
Kimber & Co. *v.* Inland Revenue Commissioners [K.B.D.] 609
Knott *v.* Knott [Div.] 38
L.H.B., *Re* (*in Camera*) [C.A.] 517
Lever, *In the Estate of* [Prob.] 455
Lilley and Skinner, Ltd. *v.* Essex County Valuation Committee [K.B.D. Divl. Ct.] 54
London Corporation, The [C.A.] 393
London Corporation *v.* Lyons, Son, & Co., Ltd. [C.A.] 540
London County Council *v.* Royal Arsenal Co-operative Society, Ltd. [K.B.D. Divl. Ct.] 471
London Passenger Transport Board *v.* Sumner [K.B.D. Divl. Ct.] 778
Lovegrove, *Re*, *Ex parte* Applestone and Another *v.* The Trustees [C.A.] 749

PAGE
Low *v.* Fry [K.B.D.] 506
Lowthorpe-Lutwidge *v.* Lowthorpe-Lutwidge [Prob.] 338
MacIver's Settlement, *Re*, MacIver *v.* Rae [Ch.D.] 889
Mair, *Re*, Richards *v.* Doxat [Ch.D.] 736
Manchester (Ringway Airport) Compulsory Purchase Order, 1934, *Re* [K.B.D.] 510
Manchester Corporation *v.* Markland [H.L.] 667
Marcelino Gonzalez y Compania *v.* James Nourse, Ltd. [K.B.D.] 358
Maritime National Fish, Ltd. *v.* Ocean Trawlers, Ltd. [P.C.] 86
Matania *v.* The National Provincial Bank, Ltd., and Others [K.B.D.] 923
Matheson *v.* Matheson and Hartley [Div.] 414
McPherson *v.* McPherson [P.C.] 105
Mechanical and General Inventions Co., Ltd., and Lehwess *v.* Austin and the Austin Motor Co., Ltd. [H.L.] 22
Monroe Bros., Ltd. *v.* Ryan [C.A.] 163
Moore *v.* Tweedale [K.B.D. Divl. Ct.] 292
Nicholson *v.* Southern Rail. Co. and Cheam Urban District Council [K.B.D.] 168
Njegos *The* [Adm.] 863
North and South Insurance Corpn., Ltd. *v.* National Provincial Bank, Ltd. [K.B.D.] 640
North-Western Utilities, Ltd. *v.* London Guarantee and Accident Co., Ltd. [P.C.] 196
Offer *v.* Minister of Health [C.A.] 148
Orlebar, *Re*, Orlebar *v.* Orlebar [Ch.D.] 502
Owen *v.* Sykes [C.A.] 90
Papadopoulos *v.* Papadopoulos [Div.] 311
Peel, *Re*, Tattersall *v.* Peel [Ch.D.] 179
Penman *v.* Fife Coal Co., Ltd. [H.L.] 46
Postmaster-General *v.* Birmingham Corporation [C.A.] 856
Powell *v.* Sheffield Corporation [K.B.D.] 318
Powell *v.* Streatham Manor Nursing Home [H.L.] 58
Purfleet Urban District Council *v.* Minister of Health and Essex County Council [H.L.] 421
R. *v.* Income Tax Special Commissioners, *Ex parte* Elmhirst [C.A.] 808
R. *v.* Kent Justices, *Ex parte* Metropolitan Police Commissioner [K.B.D. Divl. Ct.] 817
R. *v.* Murray [C.C.A.] 732
R. *v.* Peckham [C.C.A.] 173
R. *v.* Sandbach, *Ex parte* Williams [K.B.D. Divl. Ct.] 680
Raahe O/Y Osakeytio *v.* Goddard [K.B.D.] 277
Ridley *v.* Lee [Ch.D.] 526
Rissik, *Re* [Ch.D.] 932
Robey *v.* Vladinier [K.B.D. Divl. Ct.] 695
Robinson *v.* Graves [C.A.] 935
Rye and Eyre *v.* Inland Revenue Commissioners [H.L.] 897

PAGE
St. Pierre and Others *v.* South American Stores (Gath & Chaves), Ltd. [C.A.] 408
Sallis and Another *v.* Jones [Prob.] 872
Salmon *v.* Weight (Inspector of Taxes) [H.L.] 904
Sandiford (No. 2), *Re*, Italo-Canadian Corporation, Ltd. *v.* Sandiford [Ch.D.] 364
Saxton *v.* Nicholson & Co., Ltd. [K.B.D.] 653
Shaw (John) & Sons (Salford), Ltd. *v.* Shaw [C.A.] 456
Sheffield Burgesses *v.* Minister of Health [K.B.D.] 703
Shenton, *Re* [Ch.D.] 920
Simeon *v.* Minister of Health [K.B.D.] 360
Simpson, *In the Estate of*; *In the Estate of* Gunning [Prob.] 84
Simpson (Inspector of Taxes) *v.* Grange Trust, Ltd. [H.L.] 671
Skarp, *The* [Adm.] 560
Slater *v.* Spreag [K.B.D.] 900
Smith (James) & Sons (Norwood), Ltd. *v.* Goodman [C.A.] 697
Sociedad Anonima Commercial de Esportacion e Importacion (Louis Dreyfus & Co.) *v.* National S.S. Co. [K.B.D.] 181
Sowter *v.* Steel Barrel Co., Ltd. [K.B.D. Divl. Ct.] 231
Square *v.* Square (otherwise Bewicke) (Cowan Intervening) [Div.] 781
Stevenson *v.* Fulton [K.B.D. Divl. Ct.] 431
Stuart *v.* Haughley Parochial Church Council [Ch.D.] 890
Symons *v.* Southern Rail. Co. [C.A.] 296
Tattersall *v.* Drysdale [K.B.D.] 112
Thomas *v.* Sawkins [K.B.D. Divl. Ct.] 655
Tower Bridge, *The* [Adm.] 635
Trickett *v.* Queensland Insurance Co., Ltd. and Others [P.C.] 729
Uranienborg, *The* [P.D.A.] 70
Van den Berghs, Ltd. *v.* Clark (Inspector of Taxes) [H.L.] 874
Vann *v.* Eatough [K.B.D. Divl. Ct.] 911
Vernon Heaton Co., Ltd., *Re* [Ch.D.] 295
Walker *v.* Bairds and Dalmellington, Ltd. [H.L.] 153
Walker's Settlement Trust, *Re*, Royal Exchange Assurance Corpn. *v.* Walker and Others [C.A.] 790
Wath-upon-Dearne Urban District Council *v.* John Brown & Co., Ltd. [Ch.D.] 127
Watkins *v.* Herefordshire Assessment Committee [K.B.D. Divl. Ct.] 739
Wessex Dairies, Ltd. *v.* Smith [C.A.] 75
Whaling, Hector, Ltd., *Re* [Ch.D.] 302
Wickhambrook Parochial Church Council *v.* Croxford [C.A.] 95
Wilks, *Re*, Keefer *v.* Wilks [Ch.D.] 787
William Denby & Son, Ltd. *v.* Minister of Health [K.B.D.] 304
Witty *v.* World Service, Ltd. [Ch.D.] 243
Woolmington *v.* Director of Public Prosecutions [H.L.] 1
Yagerphone, Ltd., *Re* [Ch.D.] 803

THE
ALL ENGLAND
LAW REPORTS
REPRINT

WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS

[HOUSE OF LORDS (Lord Sankey, L.C., Lord Hewart, C.J., Lord Atkin, Lord Tomlin, and Lord Wright), April 4, 5, May 13, 1935]

[Reported [1935] A.C. 462; 104 L.J.K.B. 433; 153 L.T. 232; 51 T.L.R. 446; 79 Sol. Jo. 401; 25 Cr. App. Rep. 72; 30 Cox C.C. 234]

Criminal Law—Murder—Burden of proof—Defence of accident.

On a charge of murder it is the duty of the prosecution to prove the prisoner's guilt subject to the defence of insanity and any statutory exception. If, at the end and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused, and (b) malice of the accused. It is not correct to say that once the prosecution have proved that the deceased person died through an act of the prisoner that is presumed to be murder unless the prisoner can satisfy the jury that what happened was something which could be reduced to manslaughter, or was accidental, or could be justified.

Notes. Applied: *R.* v. *Prince*, [1941] 3 All E.R. 37. Distinguished: *Mancini* v. *Director of Public Prosecutions*, [1941] 3 All E.R. 272. Explained: *R.* v. *Haddy*, [1944] 1 All E.R. 319; *Stirland* v. *Director of Public Prosecutions*, [1944] 2 All E.R. 13. Considered: *R.* v. *Jarmain*, [1945] 2 All E.R. 613; *Holmes* v. *Director of Public Prosecutions*, [1946] 2 All E.R. 124. Referred to: *Mahades* v. *R.*, [1936] 2 All E.R. 813; *R.* v. *Jackson* (1936), 80 Sol. Jo. 977; *R.* v. *Carr-Briant*, [1943] 2 All E.R. 156; *R. v. Gauthier* (1943), 29 Cr. App. Rep. 113; *R.* v. *Leckey*, [1943] 2 All E.R. 665; *Emmanuel* v. *Emmanuel*, [1945] 2 All E.R. 494; *Dharmasena* v. *R.*, [1951] A.C. 1; *R.* v. *Whybrow* (1951), 95 Sol. Jo. 745; *Chan Kai* v. *R.*, [1955] 1 All E.R. 266.

As to proof of murder, see 10 HALSBURY'S LAWS (3rd Edn.) 704, and for cases, see 15 DIGEST (Repl.) 930 et seq.

Cases referred to:

(1) *R.* v. *Greenacre* (1837), 8 C. & P. 35; 14 Digest (Repl.) 109, *748*.

(2) *R.* v. *Mackalley* (1611), 9 Co. Rep. 61 b.; Cro. Jac. 279; 14 Digest (Repl.) 104, *676*.

(3) *R.* v. *Mawgridge* (1706), 1 East P.C. 276; Kel. 119; 17 State Tr. 57; Holt K.B. 484; Fost. 274; 14 Digest (Repl.) 501, *4830*.

(4) *R.* v. *M'Naghten* (1843), 10 Cl. & Fin. 200; 4 State Tr. N.S. 847; 1 Town.

St. Tr. 314; 1 Car. & Kir. 130, n.; 8 Scott N.R. 595; 14 Digest (Repl.) 60, *246.*

(5) *R.* v. *Smith (Oliver)* (1910), 6 Cr. App. Rep. 19; 14 Digest (Repl.) 65, *276.*

(6) *Bromage* v. *Prosser* (1825), 4 B. & C. 247; 1 C. & P. 673; 6 Dow. & Ry. K.B. 296; 3 L.J.O.S.K.B. 203; 15 Digest (Repl.) 1205, *12,241.*

(7) *Weeks* v. *Sparke* (1813), 1 M. & S. 679; 11 Digest (Repl.) 36, *494.*

(8) *The State* v. *Brady* (1902), Iowa; 91 N.W. 801.

(9) *R.* v. *Stoddart* (1909), 2 Cr. App. Rep. 217; 73 J.P. 348; 25 T.L.R. 612; 53 Sol. Jo. 578; 14 Digest (Repl.) 149, *1118.*

(10) *R.* v. *Legg* (1662), Kel. 27.

(11) *R.* v. *Abramovitch* (1912), 107 L.T. 416; 76 J.P. 287; 23 Cox C.C. 179; 7 Cr. App. Rep. 145; 14 Digest (Repl.) 65, *280.*

(12) *R.* v. *Davies,* [1913] 1 K.B. 573; 82 L.J.K.B. 471; 108 L.T. 576; 77 J.P. 279; 29 T.L.R. 300; 57 Sol. Jo. 376; 23 Cox C.C. 351; 8 Cr. App. Rep. 179; 15 Digest (Repl.) 937, *11,041.*

Appeal from the Court of Criminal Appeal (AVORY, LAWRENCE and GREAVES-LORD, JJ.) under a certificate given by the Attorney-General under s. 1 (6) of the Criminal Appeal Act, 1907.

The facts appear in the opinion of LORD SANKEY, L.C.

T. J. O'Connor, K.C., and *Casswell* for the appellant.

Trapnell, K.C., and *Reginald Knight* for the respondent.

The House took time for consideration.

May 13. **LORD SANKEY, L.C.**—The appellant, Reginald Woolmington, after a trial at the Somerset Assizes at Taunton on Jan. 23, 1935, at which, after an absence of one hour and twenty-five minutes, the jury disagreed, was convicted at the Bristol Assizes on Feb. 14 of the wilful murder of his wife on Dec. 10, 1934, and was sentenced to death. He appealed to the Court of Criminal Appeal, substantially upon the ground that the learned judge had misdirected the jury by telling them that in the circumstances of the case he was presumed in law to be guilty of the murder unless he could satisfy the jury that his wife's death was due to an accident.

The appeal came before the Court of Criminal Appeal upon Mar. 8 and was dismissed. The court said that "it may be that it would have been better" had the learned judge who tried the case said to the jury that if they entertained reasonable doubt whether they could accept his explanation they should either acquit him altogether or convict him of manslaughter only, but, relying upon s. 4 (1) of the Criminal Appeal Act, 1907, which provides

> "that the court may, notwithstanding they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider no substantial miscarriage of justice has actually occurred,"

they dismissed the appeal.

Thereupon the Attorney-General gave his fiat certifying that the appeal of Reginald Woolmington involved a point of law of exceptional public importance, and that, in his opinion, it was desirable in the public interest that a further appeal should be brought. The matter now comes before your Lordships' House.

The facts are as follows: Reginald Woolmington is twenty-one-and-a-half years old. His wife, who was killed, was seventeen-and-a-half years old last December. They had known each other for some time and upon Aug. 25 they were married. Upon Oct. 14 she gave birth to a child. Shortly after that there appears to have been some quarrelling between them, and she left him upon Nov. 22 and went to live with her mother. Woolmington, apparently, was anxious to get her to come back, but she did not come. The prosecution proved that at about 9.15 in the morning of Dec. 10 Mrs. Daisy Brine was hanging out her washing at the back of her house at 25 Newtown, Milborne Port. While she was engaged in that occupation, she heard voices from the next door house, No. 24. She knew that in that house her niece, Reginald Woolmington's wife, was living. She heard and could recognise the voice of Reginald Woolmington saying something to the effect: "Are you going to come back home?" She could not hear the answer. Then the back door in No. 24 was slammed. She heard a voice in the kitchen, but could not tell what it said. Then she heard the sound of a gun. Upon that she looked out of the front window and she saw Reginald Woolmington, whose voice she had heard just before speaking in the kitchen, go out and get upon his bicycle which had been left or was standing against the wall of her house, No. 25. She called out to him, but he gave no reply. He looked at her hard and then he rode away.

According to Reginald Woolmington's own story, having brooded over and deliberated upon the position all through the night of Dec. 9, he went on the morning of the 10th in the usual way to the milking at his employer's farm and while milking conceived this idea, that he would take the old gun which was in the barn and he would take it up that morning to his wife's mother's house where she was living and that he would show her that gun and tell her that he was going to commit suicide if she did not come back. He would take the gun up for the purpose of frightening her into coming back to him by causing her to think that he was going to commit suicide. He finished his milking, went back to his father's house, had breakfast, and then left, taking with him a hack-saw. He returned to the farm, went into the barn, got the gun which had been used for rook shooting, sawed off the barrels of it, then took the only two cartridges which were there and put them into the gun. He took the two pieces of the barrel which he had sawn off and the hack-saw, crossed a field about 60 yds. wide and dropped them into the brook. Having done that, he returned on his bicycle with the gun in his overcoat pocket to his father's house and changed his clothes. Then he got a piece of wire flex which he attached to the gun so that he could suspend it from his shoulder underneath his coat and so went off to the house where his wife was living. He knocked at the door, went into the kitchen and asked her: "Are you coming back?" She made no answer. She came into the parlour, and on his asking her whether she would come back she replied she was going into service. He then, so he says, threatened he would shoot himself and went on to show her the gun and brought it across his waist, when it somehow went off and his wife fell down and he went out of the house. He told the jury that it was an accident, that it was a pure accident—that while he was getting the gun from under his shoulder and was drawing it across his breast it accidentally went off and he was doing nothing unlawful, nothing wrong, and this was a pure accident. There was considerable controversy whether a letter in which he set out his grievances was written before or after the above events. But when he was arrested at 7.30 on the evening of the 10th and charged with having committed murder he said: "I want to say nothing except I done, I done it. They can do what they like with me; it was jealousy I suppose. Her mother enticed her away from me. I done all I can to get her back. That's all."

The learned judge in summing up the case to the jury said:

> "If you accept his evidence, you will have little doubt that she died in consequence of a gunshot wound which was inflicted by a gun which he had taken to this house, and which was in his hands, or in his possession, at the time that it exploded. If you come to the conclusion that she died in consequence of injuries from the gun which he was carrying, you are put by the law of this country into this position: 'The killing of a human being is homicide, however he may be killed, and all homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse, or justification. In every charge of murder, the fact of the killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him, for the law will presume that the attack would be founded in malice unless the contrary be shown.' That has been the law of this country for all time since we had law. Once it is shown to a jury that somebody has died through the act of another, that is presumed to be murder,

> unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something less, something which might be alleviated, something which might be reduced to a charge of manslaughter, or was something which was accidental, or was something which could be justified."

At the end of his summing up he added:

> "The Crown has got to satisfy you that this woman, Violet Woolmington, died at the prisoner's hands. They must satisfy you of that beyond any reasonable doubt. If they satisfy you of that, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter, or which excuse the homicide altogether by showing that it was a pure accident."

In the argument before the Court of Criminal Appeal cases were cited by the learned counsel on either side and textbooks of authority were referred to, but the learned judges contented themselves with saying "there can be no question to start with that the learned judge laid down the law applicable to a case of murder in the way in which it is to be found in the old authorities." They repeated the learned judge's words and said: "No doubt there is ample authority for that statement of the law." They then relied, as I have already mentioned, upon the proviso to s. 4 of the Criminal Appeal Act, 1907, and dismissed the appeal.

It is true, as stated by the Court of Criminal Appeal, that there is apparent authority for the law as laid down by the learned judge. But your Lordships' House has had the advantage of a prolonged and exhaustive inquiry dealing with the matter in debate from the earliest times, an advantage which was not shared by either of the courts below. Indeed your Lordships were referred to legal propositions dating as far back as the reign of King Canute (994–1035). I do not think it is necessary for the purpose of this opinion to go as far back as that. Rather would I invite your Lordships to begin by considering the proposition of law which is contained in Foster's Crown Law, written in 1762, and which appears to be the foundation for the law as laid down by the learned judge in this case. It must be remembered that Sir Michael Foster, although a distinguished judge, is for this purpose to be regarded as a textbook writer, for he did not lay down the doctrine in any case before him, but in an article which is described as "The Introduction to the Discourse of Homicide." In the folio edition, published at Oxford at the Clarendon Press in 1762, at p. 255, he states:

> "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice until the contrary appeareth. And very right it is, that the law should so presume. The defendant in this instance standeth upon just the same foot that every other defendant doth: the matters tending to justify, excuse, or alleviate must appear in evidence before he can avail himself of them."

Now the first part of this passage appears in nearly every textbook or abridgment which has been since written. To come down to modern times, the passage appears in Stephen's Digest of the Criminal Law, 7th ed., at p. 235; also in the well-known treatise of Archbold's Criminal Pleading, Evidence and Practice, which is the companion of lawyers who practise in the criminal courts: see 29th ed., 1934, at p. 873. It also appears almost textually in Russell on Crimes, 8th ed. (1923), vol. 1, p. 615, and in the second edition of Halsbury's Laws of England, vol. 9, which purports to state the law as on May 1, 1933, where it is said at p. 426:

> "When it has been proved that one person's death has been caused by another, there is a primâ facie presumption of law that the act of the person causing the death is murder, unless the contrary appears from the evidence either for

> the prosecution or for the defence. The onus is upon such person when accused to show that his act did not amount to murder."

The authority for that proposition is given as Foster, p. 255, and also *R.* v. *Greenacre* (1).

The question arises: Is that statement correct law? Is it correct to say, and does Sir Michael Foster mean to lay down, that there may arise in the course of a criminal trial a situation at which it is incumbent upon the accused to prove his innocence? To begin with, if that is what Sir Michael Foster meant, there is no previous authority for his proposition, and I am confirmed in this opinion by the fact that in all the textbooks no earlier authority is cited for it. Before, however, one considers the earlier criminal law several facts have to be remembered.

First, it was not till 1907 that the Court of Criminal Appeal was set up. It is perfectly true that from time to time there have been famous occasions on which the judges and barons were called together to give their opinion upon the law bearing on murder. Examples of this will be found. In the year 1611, in *R.* v. *Mackalley* (2) all the judges and barons were moved to give their opinion; in 1706, in *R.* v. *Mawgridge* (3), which was argued before all the judges, and all of them except Trevor, L.C.J., were of opinion that Mawgridge was guilty of murder; and in 1843, in *R.* v. *M'Naghten* (4), where all the judges gave answers to your Lordships' House upon the test of insanity.

M'Naghten's case stands by itself. It is the famous pronouncement on the law bearing on the question of insanity in cases of murder. It is quite exceptional and has nothing to do with the present circumstances. In *M'Naghten's* case the onus is definitely and exceptionally placed upon the accused to establish such a defence: see *R.* v. *Oliver Smith* (5) where it is stated (6 Cr. App. Rep. at p. 19) that the only general rule that can be laid down as to the evidence in such a case is that insanity, if relied upon as a defence, must be established by the defendant. But it was added that all the judges had met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if he thought fit: see also Archbold, 29th ed., pp. 18 and 874. It is not necessary to refer to *M'Naghten's* case again in this judgment for it has nothing to do with it.

It is true that, at a later period, certain cases were reserved by the judges for the consideration of the Court of Crown Cases Reserved, but many of the propositions with regard to criminal law are contained either in the summing up of the judges or in textbooks of authority as distinguished from a court sitting *in banc*.

The learned author of Stephen's Digest of the Criminal Law, 7th ed. (1926), has an interesting note on the definition of murder and manslaughter at p. 461. But his remarks are rather directed to the ingredients of the crime than to the proof of it. None the less, the author does not hesitate to tread a path of very robust criticism of the previous authorities. He speaks of the "intricacy, confusion, and uncertainty of this branch of the law." He refers to the definition of Coke (1552–1623) and says:

> "These passages, overloaded as Coke's manner is, with a quantity of loose, rambling gossip, form the essence of his account of murder."

He describes (at p. 463) Coke's chapter on manslaughter as "bewildering," and adds that Hale (1609–1676) treats manslaughter in a manner so meagre and yet so confused that no opinion of it can be obtained except by reading through chapters 38 to 40 and trying to make sense of them, and concludes by saying, p. 466, that:

> "Sir Michael Foster to some extent mitigates the barbarous rule laid down by Coke as to intentional personal violence."

Next, it must be remembered that prisoners were not entitled to be represented by counsel except in cases of felony, where counsel might argue the law on their behalf. Thirdly, it must not be forgotten that the prisoner himself was not allowed to give evidence before the Act passed in 1898.

Bearing these considerations in mind, I now turn to some of the cases cited to us. I doubt whether in any of the early ones the question of the burden of proof was considered. Rather they were concerned with the ingredients of the crime of murder. One of the first difficulties was to settle the meaning of express and implied malice. It was not till 1825 that Bayley, J., in *Bromage* v. *Prosser* (6) gave his famous definition of malice as meaning a wrongful act, done intentionally without just cause or excuse. The older cases were rather concerned to give examples of what might be malice. This was so in *Mackalley's* case (2). The prisoner was there accused of murdering a serjeant of London. The courts were already considering cases of express or implied malice, and the passage in Coke appears simply to mean that if a man does acts calculated to kill and actually does kill that is evidence of malice or intent—in other words, evidence of one of the ingredients of murder, but it does not seem to be at all concerned with onus of proof or to support the statement of Sir Michael Foster on that point.

One of the most famous of the earlier treatises on criminal law was the History of the Pleas of Sir Matthew Hale. That celebrated judge died on Christmas Day, 1675. It was known that he had left a treatise on the subject and upon Nov. 29, 1680, it was ordered by the House of Commons that the executors of Sir Matthew Hale be desired to print the manuscript relating to Crown Law and a committee be appointed to take care of the printing thereof. It is not said that anything appears in Hale suggesting that the burden of proving his innocence lay on the prisoner. Looking at the edition of 1800, c. 37, vol. 1, p. 454, is again concerned with what malice is. It is headed "Concerning murder by malice implied, presumptive or malice in Law," and *Mackalley's* case (2) is duly cited.

As appears from Foster's Pleas of the Crown, Sir Michael Foster was familiar with Hale's treatise (see his preface), and although in the course of his book he makes reference to Hale, he gives no authority for the proposition which is under discussion. It cannot be doubted that at that time in English courts of justice the law of evidence was in a very fluid condition. Indeed, in some civil cases it differed on different circuits: see *Weeks* v. *Sparke* (7) and also the note 20, p. 182, in Stephen's Digest of the Law of Evidence, 10th ed. (1922). It was only later that the courts began to discuss such things as presumption and onus. In Wigmore on Evidence, vol. 4, s. 2513, note p. 3562, a reference is made to the judgment of Weaver, J., in *The State* v. *Brady* (8). This was cited in *R.* v. *Stoddart* (9):

> "The use of the terms 'presumption of guilt' and 'primâ facie evidence of guilt' with reference to the possession of stolen goods has perhaps been too long indulged in by courts and text-writers to be condemned; but we cannot resist the conclusion that, when so employed, these expressions are unfortunate, and often misleading. . . . 'Presumptions' of guilt and 'primâ facie' cases of guilt in the trial of a party charged with crime, mean no more than that from the proof of certain facts the jury will be warranted in convicting the accused of the offence with which he is charged."

We were referred to *R.* v. *Legg* (10) where it is said that

> "at the Newgate Session in 1674, one John Legg being indicted for the murder of Mr. Robert Wise, it was upon the evidence agreed that if one man kill another and no sudden quarrel appeareth, this is murder."

Mackalley's case (2) is quoted as an authority and the report goes on, "and it lieth upon the party indicted to prove the sudden quarrel." With regard to Kelynge's Reports, the critics have greatly differed. Sir John Kelynge was Chief Justice of the King's Bench. He died in 1671, and, whatever opinion may be held about him as a judge, upon which see Foss's The Judges of England (1870), p. 381, the critics have differed greatly upon the value of his reports. Lord Campbell in his Life of Kelynge, Lives of the Chief Justices (1849), vol. 1, p. 511, says: "He compiled a folio volume of decisions in criminal cases which are of no value whatever." But, on the other hand, there are others who regard the book as of high authority: see The Reporters, by Wallace (Boston, 1882), p. 327.

The report of *Legg's* case (10) is meagre and unsatisfactory, and cannot, I think, be held to mean that, unless the prisoner prove the sudden quarrel, he must be convicted of murder. The word "onus" is used indifferently throughout the books, sometimes meaning the next move or next step in the process of proving or sometimes the conclusion of the whole matter.

Mawgridge's case (3) was cited to us from Kelynge's Reports, but it was not reported by Kelynge for the simple reason that it was not tried till 1706. Campbell (ubi sup.), vol. 2, p. 176, says it was reported by Holt and makes caustic comments on Holt's English composition. It was added by Holt to his edition of Kelynge's Reports and is described as a case of "great expectation," and gives the history of murder trials in English courts from the earliest times. The case, however, is no authority for saying that the prisoner at any time is called upon to prove his innocence; quite the contrary. It is another of those cases which deal with malice and with what is such provocation as will make the act of killing to be manslaughter only.

In Hawkins' Pleas of the Crown, 8th ed. (1824), vol. 1, p. 88, s. 25, it is stated:

> "It is also agreed that no one can excuse the killing another by setting forth in a special pleading that he did it by misadventure or se defendendo, but that he must plead 'Not Guilty' and give the special matter in evidence."

This points to the fact that the verdict must be given, not on any special pleading given by the prisoner, but upon, and as the result of, the whole of the case, and it nowhere suggests that the burden of proof either at the beginning or at the end of a case is not on the prosecution.

The case of *R.* v. *Greenacre* (1) was certainly heard by a very distinguished judge, Tindale, C.J. But it is to be observed that the dictum relied upon by the prosecution in this case, namely,

> "that where it appears that one person's death has been occasioned by the hand of another, it behoves that other to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to the crime of murder,"

was contained in the summing up of the learned judge to the jury. It is the passage in Sir Michael Foster and this summing up which are usually relied on as the authority for the proposition that at some particular time of a criminal case the burden of proof lies on the prisoner to prove his innocence. The presumption of innocence in a criminal case is strong, see Taylor on Evidence, 11th ed. (1920), vol. 1, pars. 113 and 114, and it is doubtful whether either of these passages mean any such thing. Rather do I think they simply refer to stages in the trial of a case. All that is meant is that, if it is proved that the conscious act of the prisoner killed a man and nothing else appears in the case, there is evidence upon which the jury may—not, must—find him guilty of murder. It is difficult to conceive so bare and meagre a case, but that does not mean that the onus is not still on the prosecution.

If at any period of a trial it was permissible for the judge to rule that the prosecution had established its case and that the onus was shifted on the prisoner to prove that he was not guilty, and that, unless he discharged that onus, the prosecution was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the prisoner guilty and so make the judge decide the case and not the jury, which is not the common law. It would be an entirely different case from those exceptional instances of special verdicts where a judge asks the jury to find certain facts and directs them that on such facts the prosecution is entitled to succeed. Indeed, a consideration of such special verdicts shows that it is not till the end of the evidence that a verdict can properly be found and that at the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt.

But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence, and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

This is the real result of the perplexing case of *Rex* v. *Abramovitch* (11) which lays down the same proposition, although, perhaps, in somewhat involved language. Juries are always told that, if conviction there is to be, the prosecution must prove the case beyond reasonable doubt. This statement cannot mean that in order to be acquitted the prisoner must "satisfy" the jury. This is the law as laid down in the Court of Criminal Appeal in *R.* v. *Davies* (12) the head-note of which correctly states that where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental. Throughout the web of the English criminal law one golden thread is always to be seen—that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. When dealing with a murder case the Crown must prove (*a*) death as the result of a voluntary act of the accused and (*b*) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted. It is not the law of England to say, as was said in the summing up in the present case,

> "if the Crown satisfy you that this woman died at the prisoner's hands, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing it was a pure accident."

If the proposition laid down by Sir Michael Foster or in the summing up in *R.* v. *Greenacre* (1) means this, those authorities are wrong.

We were then asked to follow the Court of Criminal Appeal and to apply the proviso of s. 4 of the Criminal Appeal Act, 1907, which says:

> "the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider no substantial miscarriage of justice has actually occurred."

There is no doubt that there is ample jurisdiction to apply that proviso in a case of murder. The Act makes no distinction between a capital case and any other case, but we think it impossible to apply it in the present case. We cannot say that if the jury had been properly directed they would have inevitably come to the same conclusion. In the result we decline to apply the proviso and, as already stated, we order that the appeal should be allowed and the conviction quashed.

LORD ATKIN, who is engaged in the Privy Council, has asked me to say that he concurs in the judgment I have just read.

LORD HEWART, C.J.—I concur.

LORD TOMLIN.—I also concur.

LORD WRIGHT.—I concur.

Appeal allowed.

Solicitors: *C. Butcher & Simon Burns*, for *Clarke, Willmott & Clarke*, Taunton; *Director of Public Prosecutions.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

DEEN *v.* DAVIES

[COURT OF APPEAL (Slesser and Romer, L.JJ., and Singleton, J.), April 5, 1935]

[Reported [1935] 2 K.B. 282; 104 L.J.K.B. 540; 153 L.T. 90; 51 T.L.R. 398; 79 Sol. Jo. 381]

Animal—Negligence of owner—Horse insecurely tethered in stable adjoining highway—Escape of horse into street—Injury to pedestrian.

In so far as a horse allowed unattended on a highway in a town may prove a danger to others, it is the duty of a person bringing that horse into the town and stabling it there temporarily for his convenience to see that it is properly tethered. He must have regard to the fact that the horse will naturally tend to stray and guard against the dangers which persons in the street may run by the horse not having been securely tethered.

The owner of a quiet horse rode it from the country into the town and there fastened it in a stable so insecurely that it got loose, and while trying to make its way home injured a pedestrian lawfully on the highway.

Held: that the owner of the horse had been guilty of negligence, that the injuries to the pedestrian were the natural and probable result of that negligence, and that she was entitled to recover damages from the owner for the injuries sustained.

Notes. Considered: *Aldham* v. *United Dairies* (*London*), *Ltd.*, [1939] 3 All E.R. 522; *Brackenborough* v. *Spalding U.D.C.*, [1940] 1 All E.R. 384. Referred to: *Aldham* v. *United Dairies* (*London*), *Ltd.*, [1939] 3 All E.R. 478; *Lathall* v. *Joyce & Son*, [1939] 3 All E.R. 854; *Toogood* v. *Wright*, [1940] 2 All E.R. 306; *Brackenborough* v. *Spalding U.D.C.*, [1942] 1 All E.R. 34; *Searle* v. *Wallbank*, [1947] 1 All E.R. 12; *Wright* v. *Callwood*, [1950] 2 K.B. 515; *Wormald* v. *Cole*, [1954] 1 All E.R. 683.

As to Negligence in regard to animals, see 1 HALSBURY'S LAWS (3rd Edn.) 663 et seq., and in regard to highways, ibid., 635 et seq.; and for cases on the subject see 2 DIGEST 229–236, *198–237*.

Cases referred to:

(1) *Cox* v. *Burbidge* (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 32 L.J.C.P. 89; 9 Jur. N.S. 970; 11 W.R. 435; 2 Digest 233, *218*.

(2) *Hadwell* v. *Righton*, [1907] 2 K.B. 345; 76 L.J.K.B. 891; 97 L.T. 133; 71 J.P. 499; 23 T.L.R. 548; 51 Sol. Jo. 500; 5 L.G.R. 88; 2 Digest 233, *222*.

(3) *Jones* v. *Lee* (1911), 106 L.T. 123; 76 J.P. 137; 28 T.L.R. 92; 56 Sol. Jo. 125; 2 Digest 234, *224*.

(4) *Heath's Garage, Ltd.* v. *Hodges*, [1916] 2 K.B. 370; 85 L.J.K.B. 1289; 115 L.T. 129; 80 J.P. 321; 32 T.L.R. 570; 60 Sol. Jo. 554; 14 L.G.R. 911; 2 Digest 234, *226*.

(5) *Haynes* v. *G. Harwood & Son*, [1935] 1 K.B. 146; 104 L.J.K.B. 63; 152 L.T. 121; 51 T.L.R. 100; 78 Sol. Jo. 801; Digest Supp.

(6) *Gayler and Pope, Ltd.* v. *B. Davies & Son, Ltd.*, [1924] 2 K.B. 75; 93 L.J.K.B. 702; 131 L.T. 507; 40 T.L.R. 591; 68 Sol. Jo. 685; Digest Supp. A

(7) *Tolhausen* v. *Davies* (1888), 57 L.J.Q.B. 392; 59 L.T. 436; 52 J.P. 804; 2 Digest 236, *234*.

(8) *Watson* v. *Weekes* (1887), see 57 L.J.Q.B. 394; 52 J.P. 804; 2 Digest 230, *205*.

(9) *Snee* v. *Durkie* (1903), 6 F. 42 (Ct. of Sess.); 41 Sc. L.R. 39; 11 S.L.T. 397; 2 Digest 229, *201 ii*. B

(10) *Chasemore* v. *Richards* (1859), 7 H.L. Cas. 349; 29 L.J. Ex. 81; 33 L.T.O.S. 350; 23 J.P. 596; 5 Jur. N.S. 873; 7 W.R. 685; 1 Digest 34, *261*.

(11) *Fardon* v. *Harcourt-Rivington* (1932), 146 L.T. 391; 48 T.L.R. 215; 76 Sol. Jo. 81; Digest Supp.

(12) *Sycamore* v. *Ley* (1932), 147 L.T. 342; Digest Supp. C

(13) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J. Ex. 161; 19 L.T. 220; 33 J.P. 70; 2 Digest 228, *195*.

(14) *Turner* v. *Coates*, [1917] 1 K.B. 670; 86 L.J.K.B. 321; 115 L.T. 766; 33 T.L.R. 79; 2 Digest 235, *230*.

Appeal by the defendant, Morgan William Davies, from a judgment given at D Merthyr Tydfil County Court on July 11, 1934, awarding to the plaintiff, Eileen Deen, £150 damages for personal injuries which she alleged were due to the negligence of the defendant.

The plaintiff brought her action against Mr. Davies, a farmer, and a Mr. Collins, a stable proprietor. On May 31, 1934, the plaintiff, who is a cripple, was on the footpath of Penry-street, Merthyr Tydfil, when the defendant's pony came along E the street. In seeking to avoid the pony she fell and sustained serious injuries. The defendant Davies had tied up the pony in a stable adjoining the street and belonging to the defendant Collins, but it broke loose and escaped. The county court judge found that the pony caused the plaintiff to fall, that its conduct was what was to be expected from the pony if it escaped, but that it did not exhibit dangerous or savage propensities. He found that Davies was guilty of negligence F in omitting to tie the pony up securely in the stable, and that there was no negligence on the part of Collins. There was, he said, no authority which compelled him to say that the owner of a horse was not liable for damage caused by it if it escaped through his negligence. He, therefore, gave judgment for the plaintiff against Davies, but dismissed the action against Collins. The defendant Davies appealed. G

Joshua Davies for the defendant, Davies.

W. S. Morrison, K.C., and *Derek Parsons* for the plaintiff.

SLESSER, L.J.—The defendant, Morgan William Davies, has a farm about two miles outside Merthyr Tydfil. From time to time it is his habit to ride into Merthyr Tydfil on a Welsh mountain pony some eight years old, ride through the H streets of Merthyr Tydfil, and ride home again when he has transacted his business. There is no evidence in this case, nor is it suggested, that the pony is anything but a quiet, tame, normal animal. On the occasions when Mr. Davies rides into Merthyr Tydfil it is his custom to stable the pony from time to time in a stable which belongs to Mr. Collins. On the occasion which gave rise to this action Mr. Davies tied the pony to a stall, to a piece of wood which he believed to be firm, as I was his custom, rather than tethering it to a staple which was there provided.

The pony was taken into Mr. Collins's stable at about midday on the date when the accident happened. At two o'clock Mr. Davies came back and found the pony in the same stall. But it appears that the pony pulled at the piece of wood to which it was tethered, the wood gave way, and the pony dragged the wood attached to the halter through Penry-street. There is no evidence that the pony was bolting or was doing anything but trotting home in the ordinary way through that street. Unfortunately, there was in the street the plaintiff, Miss Eileen Deen, who was more or less a cripple. On this particular occasion she was proceeding along Penry-

A street when the pony ran out across the road from the stable door. There is some conflict of evidence whether Miss Deen was or was not actually hit by the pony. She said: "The horse hit me down, knocked me down." Although another witness spoke to the same effect, other witnesses took a different view, and, in particular, a Mr. Ernest James Wagstaffe, who gave evidence on behalf of the defendant. He was about three or four yards from Miss Deen when she was picked up. He stated: B "The horse passed Miss Deen at a distance of 9 in. to 1 ft., and did not touch her. She seemed to half turn towards the direction of the horse and then she dropped quietly with her crutches on the side of her. She said"—this is Mr. Wagstaffe speaking—"the horse had not touched her."

On that the learned county court judge came to the following conclusion: "That the evidence does not establish satisfactorily that the plaintiff was knocked down C by the pony or the piece of wood, but I am satisfied that the conduct of the pony caused the plaintiff to fall, and without any negligence or lack of care on her part." So, there is a finding by the judge, a finding, in my opinion, supported by evidence, that Miss Deen fell and sustained her injuries by reason of the conduct of the pony. If the fact that the pony passed her so near and caused her so to fall was the result of a failure of duty on the part of Mr. Davies, then, I think, it cannot but be that D that negligence, that failure of duty, was, or, at any rate, the judge was entitled to find that it was, the cause of her damage. Therefore, I think, we have not to consider whether the fact of the pony escaping was or was not sufficiently the cause of Miss Deen's damage, but rather the more difficult point (on which we have heard very interesting and exhaustive arguments) whether in the circumstances there was any duty on Mr. Davies which he failed to perform so as to render him liable E to an action for negligence.

I think that the authorities establish that there may be circumstances—I do not say there always are; it is a question of fact—in which it is negligent to allow a horse or a horse and cart to be unattended in a highway. As GREER, L.J., has said in *Haynes* v. *G. Harwood & Son* (5) ([1935] 1 K.B. at p. 153):

> "Of course it does not follow that in all circumstances it is negligence to leave F horses unattended in a highway; each case, with all its circumstances, has to be considered."

Then he mentions matters which may be the proper subject of consideration—whether it is a crowded street in which many people, including children, were likely to be about, and so on. That decision appears to me to be in harmony with a G decision of MCCARDIE, J., in *Gayler and Pope, Ltd.* v. *B. Davies & Son, Ltd.* (6), where he said that he was of opinion that to leave unattended a horse or a horse and cart might constitute negligence, and that he found authority for that in *Tolhausen* v. *Davies* (7), a case of a runaway horse and cart in a highway, where, in the Divisional Court, A. L. SMITH, J., said (57 L.J.Q.B. at p. 394):

> "I held in the case of *Watson* v. *Weekes* (8), in which I was affirmed by the H Court of Appeal, that upon proof given by a plaintiff that the defendant's horse, harnessed to a cart, was running away unattended along a highway, whereby the plaintiff, being lawfully thereon, was injured, a judge could not rightly non-suit, for that such facts were more consistent with the absence of ordinary care in the superintending the horse than with such care having been used."

In the present case, this being entirely a question of law, if the judge could not I non-suit, it became a question of fact for the jury whether there was or was not sufficient evidence of negligence in the particular case. A Scottish decision to the same effect (*Snee* v. *Durkie*) (9) decided that where a runaway horse and carriage run down a person in broad daylight in a public street the presumption is that the owner of the horse and carriage is in fault.

Counsel for the defendant says that, even if he were not disposed to dispute that as a general proposition, a distinction can be drawn in the present case by reason of the fact that, although the pony was unattended when it was in the public street, it only came to be in that position because it broke away from a piece of wooden structure to which it was attached, the structure being in a stable which was not on the highway. He cited a number of authorities, some of which are easier to understand than others, but which have the general effect that the owner or occupier of land, and, I think, also a person who is a licensee, who is entitled to pasture, to place horses, cattle, sheep, fowls, or any other tame animal in a field, is not responsible if, by reason of the absence of hedges, those animals get on the highway. I do not think that that general proposition can be disputed. It is pointed out in the cases that in early days the majority of roads had no hedges at the sides of them and that there is no obligation in law on persons to hedge their fields to keep animals from straying. But there does appear very clearly at least one exception to that general rule—where the animal is known to be of a vicious propensity, known to be a danger. The general doctrine, as contained in *Chasemore* v. *Richards* (10), and the other authorities, that a person detains a dangerous thing in a particular place at his peril, then applies, and he cannot take advantage of the privilege of not being bound to fence or hedge his property, but counsel for the appellant is quite right in saying that this is not such a case, that there is no suggestion that this animal is of a dangerous or vicious propensity, and it is not necessary to consider that class of case.

It is equally clear from the authorities that, whereas that is the general rule, there may be circumstances in a case which may make a person liable for negligence—that is, may put a particular duty on him. Irrespective of the general duty to control on one's property what is dangerous, there may arise from the nature of the circumstances of a particular case a particular duty. LORD ATKIN makes the distinction very clear where he said in *Fardon* v. *Harcourt-Rivington* (11) (146 L.T. at p. 392):

> "In the first place he [counsel for the plaintiff, who was the appellant] relied upon the liability of the owner of an animal of known mischievous propensities to keep it under control, with the consequence that damage caused by the mischievous propensities is damage which falls upon the person who fails to exercise the control. That is a liability which exists only in the case either of wild animals, which have by their nature a mischievous propensity, or of tame animals, which are known to the persons having control to have a particular propensity."

He goes on to say:

> "But it is also true that, quite apart from the liability imposed upon the owner of animals or the person having control of them by reason of knowledge of their propensities, there is the ordinary duty of a person to take care either that his animal or his chattel is not put to such a use as is likely to injure his neighbour—the ordinary duty to take care in the cases put upon negligence."

GREER, L.J., in *Sycamore* v. *Ley* (12) (147 L.T. at p. 345), speaks first of the dog which is not a tame dog, where he is known to be dangerous, and he says that the liability to keep him under control is absolute, like the liability of the defendant in *Rylands* v. *Fletcher* (13). He then states:

> "But that is not the end of his liability. He may, in my judgment, be liable for the conduct of a dog which has not been taken out of the category of tame animals if he puts it in such a position and in such circumstances as render it likely that the dog will get excited, will lose its temper, and will cause damage to people lawfully passing along the highway."

In my judgment, on the facts of this case, and having regard to all the circumstances, Mr. Davies did so put his pony in such a place that if it were not properly tethered it was likely to cause damage to persons who were on the highway. The county court judge has found as a fact that he ought to have tied the pony to the staple. He said: "The defendant Davies was guilty of negligence in omitting to tie up the pony properly in the stall where he had placed it." There was evidence, some to the effect that the pony was perfectly properly tied to this piece of wood, and other evidence, mostly given on behalf of Mr. Collins, the owner of the stable, to the effect that the proper way of dealing with the pony was to tie it to the staple. Mr. Collins said that he always himself tied it to the staple and that he never had a horse break it before. There was ample evidence on which the county court judge could come to the conclusion to which he did come, that Mr. Davies was guilty of negligence in omitting to tie up the pony properly in the stall. That means that, if he had the duty not to place the pony in such a position and deal with it in such circumstances that it would be a danger, he failed to satisfy that duty just as much as if he had not tied up the pony at all, but had left it loose in the stable.

Are the circumstances of this case so particular that, whatever may be the general immunity of persons with regard to horses which break out of their fields, it can be said that no liability exists? I think not. In so far as a horse allowed unattended on a highway in a town may prove a danger to others, it is the duty of a person bringing that horse into the town and stabling it there temporarily for his convenience to see that it is properly tethered. He must have regard to the fact that the horse will naturally tend to stray. Be that as it may, there is in this case, in addition, an express finding on the evidence that this particular pony would tend, if it were loose, to stray home. The evidence is that Mr. Davies anticipated that the pony would return home if it were not securely tethered—indeed, the object of tethering it was for the very purpose of preventing its returning home, and necessarily so through the streets where it might be a danger to persons. No doubt, equally, Mr. Davies had the motive that he did not want to lose his pony, although that motive cannot have weighed quite so seriously with him in this sense that, when he got home, he would have found the pony, but he would have had to walk home and would not have had the amenity of riding back. Whatever his motives may have been, he tethered the pony (on the evidence) anticipating all the risks and the dangers which might arise if it were not tethered, and, as I see it, for the express purpose of preventing its doing the very sort of things which in this case it did. It is impossible, I think, on the facts, to say that Mr. Davies did not anticipate all the dangers. He failed to guard against the dangers which persons in the street might run by the pony not having been securely tethered.

Finally, *Turner* v. *Coates* (14) is an illustration of what I was saying that, notwithstanding that there is a right normally to bring a horse on a highway, there may be particular circumstances which render such an act negligent. The headnote in *Turner* v. *Coates* states:

> "A young unbroken colt belonging to the defendant, a farmer, was being taken along a highway on a dark night. It was allowed to go loose behind a mare which was being led and in front of a trap driven by the defendant. The plaintiff, who was riding a bicycle, was coming from the opposite direction when the colt, being startled by the light on the bicycle, suddenly ran across the road and collided with and injured the plaintiff."

The county court judge found:

> "That it was well known, especially to a farmer, that a young unbroken colt when loose on the highway is apt, when startled, to rush about and to kick, and that there is grave risk of danger to the public in allowing such a colt to go loose on the highway in the dark,"

and he held that the defendant was guilty of negligence in allowing the colt to be on the highway in the dark without being under proper control. The case was appealed to the Divisional Court which upheld the decision of the county court judge. LUSH, J., referring to what LORD COZENS-HARDY, M.R., had stated in *Heath's Garage, Ltd.* v. *Hodges* (4), said ([1917] 1 K.B. at p. 674):

> "The Master of the Rolls implies, therefore, that if an animal, having regard to its natural propensities under such circumstances as those with which we are dealing, is likely to come into collision with a person on a bicycle or with a motor car, what he was saying will not apply."

What the Master of the Rolls had said in *Heath's Garage, Ltd.* v. *Hodges* (4) ([1916] 2 K.B. at p. 376) was this:

> "I am prepared to hold that in ordinary circumstances, in an ordinary highway, it is no breach of duty not to prevent harmless animals like sheep from straying on to the highway, and that it makes no difference whether the action is sought to be based on negligence or on a nuisance on the highway."

LUSH, J., came to the conclusion that the case of the colt in the dark behind the mare is one of those exceptional cases where the circumstances are such that a duty to take care is specifically cast on the person responsible for the colt, and that for a failure of that duty he may be liable, notwithstanding the more general right, to take animals unrestrained on the highway. BAILHACHE, J., came to the same conclusion and quoted what, I think is rather important here—a passage from the judgment of BRAY, J., in *Hadwell* v. *Righton* (2) ([1907] 2 K.B. at p. 349):

> "In the absence of anticipated danger, there is no room for the suggestion of negligence."

I think that in the present case there was danger which either was or ought reasonably to have been anticipated, namely, the danger that if the pony got loose, through improper tethering, from the stable, it would try to go home, that it would pass along the highway, and that, being unattended on the highway, it would be liable to cause damage to persons there. For these reasons I am of opinion that the appeal fails.

ROMER, L.J.—I have arrived at the same conclusion. Counsel for the defendant, in the course of his argument, very properly called our attention to a series of cases in which the courts had to deal with the position of the owner of an animal which escapes from land adjoining a highway on to the highway and injures somebody who is lawfully using the highway. In reading the judgments in these cases it is essential to distinguish between those parts where the court is dealing with the question of what duty is owed to the public by the owner of an animal which is in a field—say, adjoining the highway—and where it is dealing with the question whether, if he does owe a duty not to let the animal escape on to the highway, the damage sustained by a plaintiff is the natural consequence of his breach of that duty. An interesting illustration of that is to be found in *Cox* v. *Burbidge* (1) where a horse which had no vicious propensities escaped on to the highway. Having got on to the road, it damaged the plaintiff by kicking him. The decision, which was in favour of the defendant, could have been supported on either of two grounds—either because, as the horse had no vicious propensity, there was no duty on the part of the defendant to prevent its getting on the highway, or because, if there was a duty to prevent its getting there, the damage done to the plaintiff was not the necessary or probable cause of that breach of duty, since it was not the habit of that horse to kick. The result would have been a little strange if the court had arrived at the conclusion that the owner of an animal which is in a field adjoining a highway owes a duty to the public to prevent its getting on to the highway, because, if the plaintiff had then been damaged merely by the horse trotting along the highway in a natural manner, the defendant would have been liable, but if the plaintiff had been damaged by reason of the horse kicking him, which was an unnatural act on the part of the animal, the defendant would not have been liable.

However, the court decided in favour of the defendant on both grounds—first of all, on the ground that the defendant owed no duty to the plaintiff to prevent his horse from getting on to the highway because he did not know that the horse was of a vicious character, if, indeed, the horse was of a vicious nature; secondly, that supposing there was such a duty, yet, inasmuch as the plaintiff had been damaged by the horse behaving not in a natural manner, but in a way which the defendant could not reasonably have expected it to do, the damage was too remote. Bearing that distinction in mind, I do not think it emerges clearly from the authorities to which our attention was called that, whether he does or does not know that it is a

A natural tendency of an animal to get on the highway from a field if it can, the owner of an animal which is being depastured on land adjoining or near a highway owes no duty to the public to prevent the animal from straying on to the highway. I say that because I observe that ERLE, C.J., in dealing with the question of duty of the owner of such an animal, in *Cox* v. *Burbidge* (1), said:

B
> "The owner of a horse must be taken to know that the animal will stray if not properly secured."

I should think it is common knowledge that sheep will get out of a field if they can, if there is a gap in the hedge, and if one gets out the whole lot will come out, and that if chickens can get on to a highway to dust themselves they will do so. But C neither the owner of a chicken which is feeding near the highway nor the owner of a sheep which is being depastured near a highway owes any duty to the public to prevent the chicken or the sheep from getting on to the highway unless he knows that the chicken or the sheep—or, in the case of a horse, the horse—is of a vicious propensity and is likely to damage His Majesty's lieges. If, therefore, Mr. Davies had turned his pony into a field while he was pursuing his lawful occupation in the D town, and the pony had escaped on to the highway through a gap in the hedge or through an open gate and had damaged Miss Deen, he would not, in my opinion, have been liable.

But there is another series of cases to which our attention was called, again very properly, by counsel for the appellant. In those cases the court had to deal with the position of the owner of an animal which he himself had brought on the highway E and which, having been so brought, damaged somebody else who was lawfully using the highway. Again, on examining those cases, it is very necessary to draw a distinction between two different matters—(i) whether the owner of such an animal owes any duty at all to the public, and, (ii) whether, if he does owe such a duty, he has committed a breach of it, because, if he does owe a duty to take all reasonable care that the animal which he has brought on to the highway does not F damage other parties, what is reasonable care in one case may not be reasonable care in another. It will be found in some cases that where a man has so brought an animal on to the highway he has been held liable for damage caused to another party, and in other cases that he has not been held liable. As I read those cases, bearing that distinction again in mind, it has been clearly established that the owner of an animal who brings it on to the highway does owe a duty to those who G are using the highway to use all reasonable care to prevent the animal damaging other persons. What may be reasonable care in the country may not be reasonable care in the town. What may be reasonable care in the case of one animal may not be reasonable care in the case of another.

In one case to which SLESSER, L.J., has just referred (*Turner* v. *Coates*) (14) the owner of a colt, which he had tethered behind a cart or which was following a cart, which colt was of an excitable disposition (as most untamed colts are), was held H liable for the damage done to a person using the highway by the colt suddenly swerving to one side. It was held that, having regard to the nature of the animal, the owner had not taken all reasonable care to prevent it from damaging somebody else. As I say, it appears to me that in those cases the general principle is established that the owner of an animal which he brings on to the highway must use all reasonable care to prevent the animal from doing damage. One can instance many I cases of animals doing damage in spite of reasonable care being taken. Sheep driven along a road will very likely cause damage, and it has been held, in general, that the owner of a flock of sheep, driving them along a road, is not liable for the damage which they have done because it was not shown that he has not taken all reasonable care to prevent them from causing damage.

In the present case the difficulty, as it seems to me, is to ascertain within which of those two principles the defendant in this case is brought. In my opinion, he is brought within the second principle. He had his pony on the highway and he rode it into a town. While he was riding it into the town he owed a duty to take all reasonable care to prevent its doing damage to other persons. If he had tethered it in the street he would have owed a duty to take all reasonable care to see that it was so securely tethered, and tethered in such a place, that it could not do damage to other people. What he did was to put it into a stable the door of which opened on to the street and was, in fact, open at the time the pony eventually escaped from the stable into the street. The pony was tethered, not to the staple (which was, apparently, used by the owner of the stable for tethering horses), but to a bit of wood nailed—as the defendant thought, securely nailed—against the side of the stable. In my opinion, the defendant's duty had not ceased when he so tethered his pony. It is not necessary to say whether in general the first principle to which I have referred extends to a thing like a stable opening on to the road of a town. Speaking for myself, I doubt very much whether it does. I do not know that anyone really knows the origin of the principle which excuses the owner of an animal depasturing near a highway from the duty of seeing that the animal does not get on to the road, but it probably was that which, I think, lies at the bottom of the judgment of Neville, J., in *Heath's Garage, Ltd.* v. *Hodges* (4), that in days long before country roads existed it was the habit of our ancestors to depasture their cattle all over the place, and that when the road was subsequently dedicated to the public by the owner of the land the dedication was made subject to this well-known habit of landowners. If that is so, it is difficult to imagine that when a highway through a town was dedicated it was dedicated subject to any right of known habit on the part of the public to let their domestic animals roam over the road from the houses of the town.

However that may be, I think this case can be decided on its particular facts. In my opinion, the defendant had not discharged the duty which he owed to the public—a duty which began when he took his pony on to the highway and rode it along the highway into the street—and that duty had not come to an end and had not been fully discharged when he tethered it in the stable.

Two other questions only remain. The first is this: Was the defendant negligent —that is to say, did he fail to take all reasonable care to prevent the pony from getting on to the highway? So far as I can judge, on the evidence which was given, I should not have arrived at the same conclusion as that at which the learned county court judge arrived. Nevertheless, it seems to me impossible to say that there was no evidence on which he could arrive at the conclusion that the defendant had been negligent.

The second question is whether the damage sustained by the plaintiff was too remote to enable her to recover. If this unfortunate crippled woman had been damaged by reason of the pony doing something which could not reasonably have been expected of such a well-behaved pony, then the defendant would be entitled to escape. But the county court judge has found (and so far as I can see he was justified in finding) that the pony was behaving in a way which was normal in an ordinary pony unattended on the roadway in a town, and that it was by reason of that behaviour that the plaintiff was injured. That being so, it seems to me impossible to say that the damage was too remote. Therefore, while feeling some sympathy for the defendant, I think that the appeal fails.

SINGLETON, J.—I am of the same opinion. We are not concerned in this court with the learned county court judge's findings of fact if and so far as there is evidence on which those findings could be based. I agree in general with the conclusions of law at which he arrived.

[His Lordship stated the facts and continued:] It is to be noticed that in the course of the case evidence was called on both sides as to what a pony of this character might be expected to do if, being placed in a strange stable and not safely fastened, it became hungry and desired to get to its home. That evidence, we were told, was given on a suggestion of the county court judge, who, no doubt, had considered the case of *Turner* v. *Coates* (14). In that case, Lush, J., said ([1917] 1 K.B. at p. 674):

A
> "I see no objection to evidence being given that under certain circumstances a particular animal exhibits habits which are dangerous to mankind."

In this case evidence was given by a witness on each side of what ponies would do generally, and evidence was also given by the defendant of what one might expect this pony to do. I observe that LUSH, J., in *Turner* v. *Coates* (14) said:

B
> "Therefore, without taking reasonable care, the defendant turned on to the highway an animal likely to cause damage, not by doing something mischievous, but by doing exactly what under the circumstances this colt was likely to do."

It seems to me that, among a large number of authorities which have been cited to us, that is nearest to the circumstances generally of this case. I do not think C that those authorities (accepting, as I do completely, the principle with regard to the escape of a horse or sheep or a chicken or a pig, or any other animal of a tame or domestic nature, from a field on to a highway because of fences being defective) meet the circumstances of this case. GREER, L.J., pointed out recently [in *Haynes* v. *G. Harwood & Son* (5)]—indeed, it has been pointed out many times—that every case depends on its own circumstances, and to ascertain whether or not in the D particular circumstances the defendant has been negligent or not one must, in the first place, ask oneself what is the duty which he owed in order to find out whether or not there had been any breach of that duty.

One must bear in mind that the pony in this case was taken from the country into a town; that, being in the town, it was thought right by its owner to place it in a stable both for its own protection and the protection of the public; that he E placed it in a stable hoping, no doubt, that it would be safe; that he did not take care to see that the place to which he tied it was safe; that the pony thereafter did that which he—and everybody who knew anything about ponies or horses—ought to have anticipated a pony would do—that is, that when it got tired of being in the place or when it got hungry it would pull at its manger and, if the piece of wood gave, walk out; and that if then it walked directly from the doorway through the F yard and into the street the natural thing was, if it got into a crowded place, that its speed would tend to increase.

The circumstances are quite different from the facts and circumstances in most of the authorities which have been cited to us. Merthyr Tydfil is a large and busy town; I gather it has some 80,000 inhabitants. I cannot think that one who takes into the middle of that town a pony from the country and leaves it in such a G position that it is not only able but likely to get on to the road is fulfilling his duty to the public. I agree with the Lords Justices that, if a defendant in such circumstances takes into the middle of a town a pony or a horse, he does not discharge his duty by placing that animal in a stable without securing it in any way, or without securing it satisfactorily. Counsel for the appellant agreed that, if the pony had been left in the highway and had then caused damage of the very kind H which should have been anticipated from its nature, there would be liability on the defendant. For myself, I wholly fail to appreciate that there is a distinction between the case of a man who leaves a pony of that kind in a street and the man who places it just off the street in a stable or in a yard without any security or without taking steps to prevent its getting on to the highway, to which, according to the evidence, it would naturally go. Each case must depend on its own circumstances. I

I agree entirely with the judgment of the learned county court judge and with the judgments of the Lords Justices, and I think that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Beamish, Hanson, Airy & Co.*, for *Taliesin, Griffiths & Son*, Merthyr Tydfil; *John Vaughan & Son*, Merthyr Tydfil.

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

ELDERTON *v.* UNITED KINGDOM TOTALISATOR CO., LTD.

[CHANCERY DIVISION (Eve, J.), January 18, February 6, 1935]

[Reported [1935] Ch. 373; 104 L.J.Ch. 105; 152 L.T. 549; 99 J.P. 179; 51 T.L.R. 237; 79 Sol. Jo. 126; 33 L.G.R. 176]

Gaming—Football pool—Conduct by bookmakers in or through newspaper—Stakes divided among competitors—Pool betting—Betting and Lotteries Act, 1934 (*Geo.* 5, *c.* 58), *s.* 26 (1) (*a*).

The plaintiff claimed an injunction to restrain the defendant company, who were bookmakers within s. 20 (1) of the Betting & Lotteries Act, 1934, from conducting in or through a newspaper a competition in which prizes were offered for forecasts of the results of football matches, contrary to s. 26 (1) of the Act. Lists of matches pending were printed on coupons contained in a newspaper published by the defendants, and the public were invited to fill in the coupons with forecasts of the results of the matches and send them to the company. Later, those who did not correctly forecast the results sent their stakes to the defendants, and the money less 10 per cent. was distributed among those who had correctly forecasted.

Held: the wagering was not made with the company by those who sent in coupons, but was made between the latter inter se, and the company was not conducting any competition within the mischief of s. 26 (1).

A.-G. v. *Luncheon and Sports Club* (1) ([1929] A.C. 400) applied.

Notes. Not followed: *Bretherton* v. *United Kingdom Totalisator Co., Ltd.*, [1945] 2 All E.R. 202. Distinguished: *Elderton* v. *United Kingdom Totalisator Co., Ltd.*, [1945] 2 All E.R. 624. Referred to: *R.* v. *Watson, Ex parte Bretherton*, [1944] 2 All E.R. 562.

As to competitions promoted through newspapers, see 18 HALSBURY'S LAWS (3rd Edn.) 199, and as to the conduct of pool betting, see ibid., 230, 231, and for Betting and Lotteries Act, 1934, see 10 HALSBURY'S STATUTES (2nd Edn.) 785.

Case referred to:

(1) *A.G.* v. *Luncheon and Sports Club, Ltd.*, [1929] A.C. 400; 98 L.J.K.B. 359; 141 L.T. 153; 45 T.L.R. 294, H.L.; Digest Supp.

Motion by which the plaintiff claimed an injunction to restrain the defendant company, its servants and agents, from conducting in or through a newspaper any competition in which prizes were offered for the forecast of the results of football matches and of goals, contrary to the prohibition contained in s. 26 of the Betting and Lotteries Act, 1934.

The plaintiff was a director of the defendant company, incorporated in 1930, to carry on the business of sporting accountants in football, horse-racing, dog-racing, and other sports. They advertised regularly in a newspaper inviting the public to fill in forms predicting the results, with scores, of a selection of football matches to be played on the following Saturday, and to fill in the stake proposed. Six betting pools were so advertised. Each person entering signed a form promising to remit £ , the total amount invested by him on such matches, and to abide by the rules and conditions printed on the back of the forms. By r. 1 all business was conducted on a credit basis, and through the post only. Lists containing investments were to be posted not later than the Friday before the day of the matches. Ready money was not accepted (as infringing the Football (Ready Money) Betting Act, 1920). Losing clients were to send on the following Monday a remittance for the amount lost, and any client who did not so settle was blacklisted. No commissions were accepted from defaulters or from any person under twenty-one.

Rule 13 guaranteed payment to winning clients of the whole of the moneys in that pool, less a commission of 10 per cent. and expenses at the company's discretion.

They also advertised a "goals points pool," in which competitors were not asked to predict results, but to make a X against the five matches which would produce most goals. There was a list of forty-three matches to select from. Fifty per cent. of the pool was to be paid to the competitor whose five matches totalled up the most points and the competitor who scored the lowest number was to receive a consolation prize of £5.

Section 26 of the Betting and Lotteries Act, 1934, provides:

> "(1). It shall be unlawful to conduct in or through any newspaper, or in connection with any trade or business or the sale of any article to the public (*a*) any competition in which prizes are offered for forecasts of the result either of a future event or of a past event the result of which is not yet ascertained or not yet generally known; (*b*) any other competition success in which does not depend to a substantial degree upon the exercise of skill; Provided that nothing in this sub-section with respect to the conducting of competitions in connection with a trade or business shall apply in relation to pari-mutuel or pool betting operations carried on by a person whose only trade or business is that of a bookmaker as defined in Part I of this Act."

By s. 29:

> "Where a person convicted of an offence under this Act is a body corporate, every person who at the date of the commission of the offence was a director or officer of the body corporate shall also be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge."

Morle for the motion.

Beyfus, K.C., and *R. F. Levy* for the defendants.

Cur. adv. vult.

Feb. 6. **EVE, J.**, read the following judgment: The plaintiff claims an injunction to restrain the defendant company, its servants and agents, from conducting in or through a newspaper called the *Winner*, or any other newspaper, any competition in which prizes are offered for forecasts of the results of football matches contrary to the provisions of s. 26 of the Betting and Lotteries Act, 1934.

The company, incorporated in 1930, is a bookmaker within the meaning of s. 20 (1) of the Act, and the plaintiff, who alleges that the company's main activities constitute an offence under s. 26, is a director of the company and as such seriously involved by reason of the fact that by s. 29 of the Act, where a person convicted of an offence under the Act is a body corporate every director of that body is also to be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge, and this the plaintiff does not suggest he can do. Section 26 of the Act deals with lotteries and prize competitions. So far as it is relevant on the present occasion it reads as follows. Subsection 1 says:

> "It shall be unlawful to conduct in or through any newspaper or in connection with any trade or business or the sale of any article to the public—(*a*) any competition in which prizes are offered for forecasts of the result either of a future event, or of a past event the result of which is not yet ascertained or not yet generally known; (*b*) any other competition success in which does not depend to a substantial degree upon the exercise of skill."

Then follows a proviso, the construction and effect of which are not quite clear; but, as the plaintiff's claim for an injunction is based on the allegation that the defendant company has conducted a competition in or through a newspaper, it is not necessary on this occasion to inquire further as to the meaning and effect of the proviso, which it will be seen relates mainly to competitions conducted in connection with a trade or business. The proviso is as follows:

> "Provided that nothing in this sub-section with respect to the conducting of competitions in connection with a trade or business shall apply in relation to pari-mutuel or pool betting operations carried on by a person whose only trade or business is that of a bookmaker as defined in Part I of this Act."

The particular operations to which the plaintiff takes exception and upon which the claim to an injunction is founded are two pools, the one known as the "United Kingdom Totalisator football pool No. 6" and the other as the "United Kingdom goals points pool." Both are conducted in or through the newspaper known as the *Winner*, and in the case of the second one, the "goals points pool," it is clearly a competition in which prizes are offered for forecasts of future events, including a consolation prize to the competitor who scores the lowest number of points. The defendants do not contend that this is not within s. 26, and they offer, and the plaintiff is ready to accept, an undertaking to discontinue operating or conducting this kind of pool in the future.

The arguments relating to the football pools call for some further consideration. In approaching this part of the case it must be noted that pari-mutuel, or pool betting, was recognised as an existing and lawful business when the Act was passed. It is one of the four classes of betting on which restrictions are imposed by the first four sections of the Act. The restrictions affecting this particular class of betting are to be found in s. 3 of the Act, and it is not suggested that the defendant company has in any way contravened any of the provisions of that section. According to the plaintiff's evidence, which is accepted as correct, the defendants' pools are conducted in the following manner: Coupons containing a list of a number of football matches then about to be played are published in the *Winner* newspaper, and members of the public are invited to fill up the coupons with their respective forecasts of the results of the said matches and with the amounts of their respective stakes thereon and to forward the coupons so filled up to the defendant company before the determination of the said results. Participants whose forecasts are proved by the results of the matches to be incorrect are required to, and do, forward the amount of their respective stakes to the defendant company upon a date specified in the advertisement, and the total amount invested by investors less 10 per cent. is distributed by the defendant company among those persons whose forecasts are proved to be correct. A copy of the newspaper for Monday, Dec. 17 last, is in evidence (Exhibit "B") containing the advertisement of Pool 6 and the standard rules regulating the operations are to be found in Exhibit "C." The advertisements and rules are framed to keep the operation within the statutory restrictions imposed on this class of betting and to avoid everything in the nature of ready-money betting.

The relationship established between the investors or clients who subscribe to the pool and the promoters or organisers, and also between the subscribers inter se, are to be found fully described and explained in the speeches of the learned Lords in *A.G.* v. *Luncheon and Sports Club, Ltd.* (1). That was a case wherein the question was raised whether the participants were betting with the operating company or inter se, and in order to decide this question it was necessary to ascertain the procedure and the relationship thereby brought about between the investors in such a pool. At [1929] A.C., p. 403, Lord Buckmaster describes the course pursued by the would-be investor in the following language:

> "He [the intending participant] 'operates' in the following manner. In anticipation of a horse-race he hands in to the clerk in charge of the machine a credit voucher numbered and dated, on which is placed the name of a horse with a space containing the words 'Win or Place,' the irrelevant word to be struck out or, if not struck out, the 'investment' is taken to be on 'win.' Thereupon the clerk in charge of the instrument makes the consequent alteration and the machine duly records the amount 'invested' on each horse, so that each investor can estimate what he will be likely to receive if his investment is successful by the following calculation: After 10 per cent. of the gross amount shown on the vouchers has been retained by the company 'in respect of the facilities provided' and expenses of management, the balance is divided among the investors on the winning horse in the proportion of their respective stakes. The winnings for each week are paid by the respondents from their own funds on every Saturday, irrespective of any possible loss owing to dishonour of the

> vouchers. The respondents thus take the risk of bad debts but, owing to their control of membership, this is probably not serious, 2½ per cent. of the 10 per cent. being regarded by the respondents as sufficient security against such a contingency. Apart from this possible loss, the respondents can lose nothing on any race nor, apart from their 10 per cent., which is immutable, can they ever gain. This then is the respondents' [the Luncheon and Sports Club, Ltd.] position in relation to the members of the pool:—They receive the vouchers; they manipulate the machine; they collect the money which the vouchers represent; they distribute the moneys represented by the vouchers received; they guarantee the honesty of its members, and they take a percentage for their pains."

Then he deals with the rules of that particular pool, and on the opposite page he says:

> "What is the contract each member makes with the respondents? It is nothing but this: in consideration of your providing me with the use of the machine, placing at my disposal the clerical assistance, undertaking to pay me, if I win, the money other members have promised me to pay and guaranteeing the amount, you shall have 10 per cent. of my stake. In this I can see no trace of gaming or wagering with the respondents. To them the rise and fall of odds, the success or failure of a horse and all the hopes and hazards of the turf are completely immaterial. They can never lose except to the extent of discredited vouchers, and loss due to that act of dishonesty is itself independent of the race. Rowlatt, J., and Lord Hanworth, M.R., who alone decided in favour of the appellant, base their judgment on the view that the club are principals, but, even if this view were right, it does not follow they are principals in making bets. . . . A bet has been defined as something staked to be lost or won on the result of a doubtful issue, but no doubtful issue affects the respondents—they neither win nor lose on any such chance. Nor does it seem to me that the test applied by both these learned judges 'that the winners look to the club and the club to the losers' is a critical test of whether or no they made a bet. To guarantee the honesty of a gambler, though it may be taking a risk, is not making a bet."

That judgment was concurred in by Lord Sumner, Viscount Dunedin and Lord Blanesburgh.

Such being the relations subsisting between the company and its clients and between the clients inter se, where does the plaintiff find any justification for asserting that those operations, perfectly legal under Part I of the Act, are not part of the pool betting business regulated by s. 3 of the Act, but are prize competitions within s. 26? If so, who are the competitors, what is the competition, and where are the prizes? It is true that in rule 13 the word "prize" occurs, but that, it will be seen, is in connection with the goals points pool. The language used is: "In the points pool should the dividend for the second and third prize work out higher than that for the first and second prize respectively the awards will be adjusted at company's option," and in the paper Exhibit "B," par. 24, where the results of the goals points pool are tabulated, "competitors" are mentioned, and a statement is added that "Six competitors with five points share the consolation prize."

One does not compete with a man with whom a bet is made, nor does the winner regard the money paid by the loser as a prize. In my opinion, there is nothing in the Act or in the rules or procedure to justify me in holding that in operating the football pools the defendant company is conducting any competition within the mischief of s. 26.

If the costs have not been provided for, the judgment, after reciting the agreement of the parties to treat the hearing of this motion as the trial and the undertaking given by the company in relation to the goals points pool, will dismiss the action with costs to be paid by the plaintiff except in so far as they have been increased by the claim in respect of the goals points pool. The excepted costs to be paid by the company, and there will be the usual set-off.

Judgment for defendant.

Solicitors: *Samuel Coleman*; *Percy Bono & Griffith.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

MECHANICAL AND GENERAL INVENTIONS CO., LTD., AND LEHWESS *v.* AUSTIN AND THE AUSTIN MOTOR CO., LTD.

[House of Lords (Lord Sankey, L.C., Lord Blanesburgh, Lord Atkin, Lord Macmillan and Lord Wright), January 24, 25, 28, 29, 31, February 1, 4, 5, 7, 8, 11, 12, March 14, 1935]

[Reported [1935] A.C. 346; 104 L.J.K.B. 403; 153 L.T. 153]

Court of Appeal—Damages—Assessment by jury—Test for intervention by appellate court.

Counsel—Cross-examination—Principles of conduct.

The Court of Appeal has power to review an award of damages by a jury where no reasonable proportion exists between the assessment and the circumstances of the case. The question to be decided is whether the evidence so preponderates against the verdict as to show that it was unreasonable and unjust. If the finding of the jury is absolutely unreasonable, the Court of Appeal may consider that that shows that they have not really performed the judicial duty cast upon them, but the principle must be that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal. The rule of conduct for an appellate court when considering whether a verdict should be set aside on the ground that the damages given by the jury are excessive is as nearly as possible the same as where the court is asked to set aside a verdict on the ground that it is against the weight of evidence.

Observations of Lord Fitzgerald in *Metropolitan Rail. Co.* v. *Wright* (6) (1886) (11 App. Cas. 155), of Lord Halsbury (ibid., p. 156), and of Lord Esher, M.R., in *Praed* v. *Graham* (12) (1889) (24 Q.B.D. 55) applied.

Per Lord Sankey, L.C.: A protracted and irrelevant cross-examination not only adds to the cost of litigation, but it is also a waste of public time. Such a cross-examination becomes indefensible when it is conducted without restraint and the courtesy and consideration which a witness is entitled to expect in a court of law. It is not sufficient for the due administration of justice to have a learned, patient, and impartial judge. Equally with him, the solicitors who prepare the case and the counsel who present it to the court are taking part in the great task of doing justice between man and man.

Notes. As to the review by an appellate court of an award of damages by a jury, see 11 Halsbury's Laws (3rd Edn.) 310 et seq., and for cases, see 17 Digest (Repl.) 74 et seq. As to the cross-examination of witnesses by counsel, see 3 Halsbury's Laws (3rd Edn.) 67 et seq., and for cases on the duties of counsel in court, see 3 Digest 348 et seq.

Cases referred to:

(1) *M'Grath* v. *Bourne*, [1876] I.R. 10 C.L. 160; 17 Digest (Repl.) 184, **652*.

(2) *Tolley* v. *J. S. Fry & Sons, Ltd.*, [1931] A.C. 333; 100 L.J.K.B. 328; 145 L.T. 1; 47 T.L.R. 351; 75 Sol. Jo. 220, H.L.; Digest Supp.

(3) *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K.B. 250; 73 L.J.K.B. 568; 91 L.T. 157; 52 W.R. 612; 20 T.L.R. 455; 48 Sol. Jo. 435, C.A.; 17 Digest (Repl.) 186, *825*.

(4) *Banbury* v. *Bank of Montreal*, [1918] A.C. 626; 87 L.J.K.B. 1158; 119 L.T. 446; 34 T.L.R. 518, H.L.; 17 Digest (Repl.) 187, *828*.

(5) *Allcock* v. *Hall*, [1891] 1 Q.B. 444; 60 L.J.Q.B. 416; 64 L.T. 309; 39 W.R. 443; 7 T.L.R. 260, C.A.; Digest, Practice 599, *2398*.

(6) *Metropolitan Rail. Co.* v. *Wright* (1886), 11 App. Cas. 152; 55 L.J.Q.B. 401; 54 L.T. 658; 34 W.R. 746; 2 T.L.R. 553, H.L.; Digest, Practice 599, *2391*.

(7) *Millar* v. *Toulmin* (1886), 17 Q.B.D. 603; 55 L.J.Q.B. 445; reversed (1887), 12 App. Cas. 746; 57 L.J.Q.B. 301; 58 L.T. 96; 3 T.L.R. 836, H.L.; 1 Digest 505, *1739*.

(8) *Wood* v. *Gunston* (1655), Sty. 462, 466; 32 Digest 105, *1358*.

(9) *Barker* v. *Dixie* (1736), 2 Str. 1051; Lee *temp.* Hard. 279; 17 Digest (Repl.) 190, *872*.

(10) *Solomon* v. *Bitton* (1881), 8 Q.B.D. 176, C.A.; Digest, Practice 598, *2386*.

(11) *Webster* v. *Friedeberg* (1886), 17 Q.B.D. 736; 55 L.J.Q.B. 403; 55 L.T. 409; 34 W.R. 728, C.A.; Digest, Practice 599, *2387*.

(12) *Praed* v. *Graham* (1889), 24 Q.B.D. 53; 59 L.J.Q.B. 230; 38 W.R. 103, C.A.; Digest, Practice 602, *2426*.

Appeal by plaintiffs from a decision of the Court of Appeal (LORD HANWORTH, M.R., SLESSER and ROMER, L.JJ.) reversing a judgment of HAWKE, J., in an action tried by him with a special jury. There was also a cross-appeal.

Sir Stafford Cripps, K.C., and *Lloyd Jacob* for the appellants.

Sir William Jowitt, K.C., K. G. Shelley and Patrick Devlin for the respondents.

The House took time for consideration.

Mar. 14. **LORD SANKEY, L.C.**—This is an appeal and cross-appeal from an order of His Majesty's Court of Appeal (England) dated March 27, 1934, varying the judgment of HAWKE, J., dated Nov. 15, 1933, after a hearing by him and a special jury.

The appellants, who were the plaintiffs in the court of first instance, are Dr. Edouard Ernest Lehwess, a French subject resident in Paris, and a British company, Mechanical and General Inventions Company, Limited, of which he is a director. The respondents, who were defendants in the court of first instance, are Sir Herbert Austin and the Austin Motor Company, Limited, Sir Herbert being the chairman of directors of that company. A firm of Stephen Watkins, Son and Groves, who are chartered patent agents and who acted for Sir Herbert and the Austin Company were also defendants in the court of first instance. The action was for damages for breach of contract and conspiracy. Substantially, the appellants relied upon two alleged agreements.

The questions raised by this appeal are: (*a*) Whether the Court of Appeal was right in law in setting aside a finding by the jury that there was an agreement between the appellants and the respondents, the Austin Motor Company, Limited, giving the respondent company an option for a licence under letters patent then being applied for by the appellants, upon the ground that no jury properly directed could reasonably find that there was any such agreement; and (*b*) whether the Court of Appeal was right in law in holding that upon the evidence only nominal damages could result from the breach by the respondents of another agreement by which certain information, to be communicated by the appellants to the respondents, relating to the said application should be used confidentially, that is, only for certain specified purposes, and in setting aside a finding of the jury that the damages resulting from the breach of such agreement were £35,000, and substituting therefor a finding of nominal damages, namely, 40s.

The appellants were patentees of a system of fitments for motor car bodies of the "sunshine roof" type, having upon May 22, 1928, applied for provisional protection in this country in respect of certain features thereof under number 14956/28. The said system was known as "the Solcar system." In July, 1928, the appellant Mr. Lehwess approached the respondent, Sir Herbert Austin, giving him certain particulars (including a mémoire descriptif and a sheet of drawings) relating to the Solcar system, with a view to interesting him in its development in this country in connection with Austin motor cars. The appellants, on Aug. 2, 1928, filed at the Patent Office a cognate provisional specification under number 22412/28 and a complete specification with claims covering both provisional specifications. Later in the same day Mr. Lehwess, at the invitation of Sir Herbert Austin, visited the works of the respondent company at Longbridge, Birmingham. The Solcar system was outlined by Mr. Lehwess to Sir Herbert Austin, and the appellants contended that as a result thereof it was agreed that certain information should be disclosed by the appellants to the respondents, and in particular the patent documents and drawings which had been filed at the Patent Office, upon the terms that such information and documents were to be used confidentially only, and were not to be disclosed to others except for the purpose of deciding whether the respondents desired to become licensees of the patent. This alleged agreement has been conveniently called the "confidence agreement."

With regard to the second alleged agreement, Mr. Lehwess and Sir Herbert Austin met on Sept. 3, 1928, and had before them a letter of Aug. 31. One of the main issues at the trial was whether at this meeting a concluded oral agreement was reached between the parties. The appellants contended that a binding agreement was reached upon the terms set out in the said letter subject to certain alterations as to the time and manner of the giving of notice by the respondent company of their intentions with respect to the exercise of the options given. This agreement has been conveniently called the "licence agreement."

The conspiracy alleged was a combination between all three defendants to commit the alleged breach of the confidence agreement. The defendants relied primarily upon a denial that either agreement had ever been made or that there had been any conspiracy.

The action was tried before Hawke, J., and a special jury in the King's Bench Division. The trial began on Oct. 18, 1933, and lasted fourteen-and-a-half days. The jury found that both agreements had been broken and that the conspiracy alleged had been entered into by Sir Herbert and the Austin company but not by the firm of Watkins. They awarded £63,550 as damages for breach of the licence agreement and £35,000 as damages for breach of the confidence agreement and for conspiracy.

The claims under the two agreements were alternative in the sense that the appellants, as they conceded, could not have suffered any damage under the breach of the confidence agreement if the licence agreement were implemented. The learned judge directed judgment to be entered for the appellants against the Austin company for £63,550 with costs, and against Sir Herbert Austin and the Austin company for £35,000 with costs, with the proviso that any sum recovered by the plaintiffs under either of the judgments should be taken to be in satisfaction pro tanto of the liability under the other judgment.

There was no evidence that the Austin company had acted in the matter through any agent other than Sir Herbert himself; but the judge allowed the finding of a conspiracy between the two to stand.

The defendant firm of Watkins was successful in the only issue in which it was involved—that of conspiracy—and judgment was entered for it with costs against the plaintiffs, but the judge ordered that the plaintiffs should recover such costs against the two unsuccessful defendants.

The unsuccessful defendants appealed and the appeal was heard before the Court of Appeal (Lord Hanworth, M.R., Slesser and Romer, L.JJ.) on and after Feb. 12, 1934, the arguments occupying ten-and-a-half days. Judgment was delivered on March 27, 1934, and was unanimous. The court set aside the judgment on the licence agreement on the ground that no jury could reasonably have found that such an agreement had been made. The court refused to disturb the finding of the jury that the confidence agreement had been made and broken, but they found that no substantial damage had been suffered by reason of the breach and reduced the amount of the judgment to 40s. The whole costs of the appeal were awarded to the appellants, and the court ordered that there should be no costs, on either side, of the proceedings in the court of first instance.

The issues were simple, namely, whether the two agreements were made, and, if so, were they broken and what were the damages? Unfortunately, however, the facts were of a somewhat complicated character, as may be gathered when one considers that the case for the appellants occupied nineteen pages of print and contained seventeen reasons why the Court of Appeal was wrong and the case for the respondents occupied no less than seventy-seven pages of print and contained thirteen reasons why the Court of Appeal was wrong on certain issues. The transcript of the proceedings before the learned judge occupies nearly 1,000 closely printed pages. I will now state the facts as briefly as possible, taking first the licence agreement.

Whether there was such an agreement depends primarily upon the interview which took place between Mr. Lehwess and Sir Herbert Austin on Sept. 3, and upon this the jury saw and heard both these gentlemen. It is enough to say that they accepted the evidence of Mr. Lehwess and did not believe the evidence of Sir Herbert Austin—a fact which is not surprising having regard to the admissions of Sir Herbert Austin made in the course of his cross-examination. No doubt, if the only material before the jury had been the evidence of these two gentlemen, it would have been open to counsel for Sir Herbert Austin to argue that his evidence should be accepted and to suggest improbabilities in the evidence of Mr. Lehwess and on that it would have been difficult to impeach a verdict for the plaintiff. The matter, however, does not entirely depend upon what took place at this interview. There is a very large amount of correspondence which has to be taken into account and carefully weighed and considered. Especially are there a number of letters in July and August of 1929 written by Mr. Lehwess which throw very great doubt upon his story. It may well be that at the time of the interview he thought that he had got an agreement with Sir Herbert Austin, but the letters point to quite an opposite conclusion. For example, a letter of July 20 from one company to the other, where Mr. Lehwess's company say, "we should like to know whether you are willing to adopt our Solcar hood licence or not. Our Mr. Lehwess, who has been conducting these negotiations personally with Sir Herbert Austin is most anxious that we should come to some final arrangement with your firm before we offer our system elsewhere." Again on July 27 Mr. Lehwess's company write: "We should be glad if you will give us an appointment at the latest towards the middle of next month to try and settle on a definite agreement in this matter." Sir Herbert Austin writes on July 30: "I am still awaiting the copies of the patent's specifications which you promised to send to me showing what rights you could give us a licence for to manufacture this type of body." And Mr. Lehwess writes on Aug. 1 to Sir Herbert Austin: "I sincerely trust that round about Aug. 15 you will be able to see me at Northfields or in London, so as to settle something regarding the manufacture of the Solcar."

Now these letters upon their face were really fatal to the contention that there was any such agreement as Mr. Lehwess no doubt thought he had concluded upon Sept. 3 in the previous year. Both gentlemen were examined and cross-examined upon these letters and no satisfactory explanation was given by Mr. Lehwess of letters which showed almost to demonstration that the agreement that he thought he had concluded had not really been arrived at. It is true that the jury found that such an agreement had been made and I should be very loath to set aside any verdict of a jury arrived at after they had seen the witnesses and heard them. I cannot help thinking, however, that in the present case, after a prolonged trial and thousands of questions in examination and cross-examination, it was impossible for the jury to have kept all the facts in their minds. Both in the Court of Appeal and in your Lordships' House we have had the advantage of a transcript of the shorthand note, a copy of all the letters and a book containing all the documents. A By one counsel or another we have been repeatedly referred to letters and to passages in the evidence which we had in front of us in order that we should see them and weigh them. If the jury had had the same advantages as we have had in this long and complicated case of having such a transcript of the evidence before them and the whole of the correspondence under their eyes, they could not have arrived at the conclusion that the licence agreement was made. I agree with the B Master of the Rolls who says that no jury properly directed could reasonably find that there was any such agreement and the verdict on this point must be set aside.

In reaching this result I must not be thought to impugn the ability of the jury to come to a proper verdict, but rather to stress the difficulty of their task. The appeal, in so far as it concerns the licence agreement, must be dismissed.

With regard to the confidence agreement, the appellants are in this position that C they have in their favour a verdict of the jury for £35,000, though a judgment of the Court of Appeal for nominal damages of 40s. only. It is unnecessary to lengthen this judgment by reciting all the facts and the considerations for or against the verdict. The real point at issue is whether there was evidence on which a jury properly directed could come to the conclusion that the confidence agreement had been made and broken. There are no such letters as there were in the case of the D licence agreement to throw any doubt upon this and there were abundant facts upon which a jury were entitled to come to the conclusion they did. I can see no misdirection by the learned judge and I again find myself in agreement with the learned Master of the Rolls where he says:

> "there is evidence given by Mr. Lehwess that the documents were sent to the E defendant Austin on the basis of an agreement that they should be treated as confidential and only used for the purpose of considering whether a licence to use the patent should be taken or not."

The one difficulty is the question of damages. Were the Court of Appeal right in setting aside the verdict of the jury, £35,000, and awarding only nominal damages of 40s.? Undoubtedly, £35,000 is a very large amount, but it must be F remembered that this was essentially a case for the jury to assess damages. If there was an agreement and if there had been a breach of it, it is very difficult to say that the jury were wrong. To begin with, it is impossible to say it was a case for nominal damages only. What are the facts? It must be remembered that the jury were entitled to take into consideration that one of the things that might have happened was that the Austin company, a great and prosperous concern, G might have taken and pushed the invention. The hood was the sort of hood which might have got a good market. It was a good proposition and it was actually put on the road and advertised by the Austin company. There was evidence as to the number of cars upon which a rival roof was placed and the profits derived therefrom. Over and above that, when the time arrived at which Mr. Lehwess's patent would have been dealt with not only was there a "slump" throughout the country, H but a rival patent had got in first. It was said that Mr. Lehwess really waited because he thought he had a licence agreement, which turned out not to be a fact, and that, therefore, he is to a very great extent the author of his own wrong or misfortune and it was due to his dilatoriness that the patent was not a success. But the learned judge told the jury that they must take this matter into account. He says:

> "To a certain extent, of course, your damages will have to be estimated, I can I see that, but they must be as near the actual truth as you can get from the evidence and, of course, I say that at this moment, I shall have to return to it, but I say that at this moment because of the minorisation or lessening of the damages from his lack of diligence, it must be very difficult."

The judge later on says:

> "Well, on whatever date you think it would have been reasonable for him to say, 'well, I am dealing with a lot of people who do not intend to carry out

> their bargain and do not intend to do anything, and I must do what I can'; when you have decided in your own mind what would be a reasonable date for him to take up that attitude, you have then got the even more difficult question; that is to say, what do you think he could have made, with reasonable diligence, after that date?"

It was pointed out to the jury that if Sir Herbert Austin had turned the invention down in November instead of, as it was put in the Court of Appeal, "keeping Mr. Lehwess on a string," the plaintiffs might have been able to interest some other big motor company in their invention and to get them to take it. In other words, the plaintiffs were delayed in their exploitation by the conduct of the defendant company. All these were matters for the jury and, although, undoubtedly, the sum is a large one, in my view, this is not a case for sending the matter down for a new trial for the assessment of damages only. The jury were the proper constitutional tribunal to assess the damages and it is impossible to say they have gone so wrong that their assessment must be set aside. It is not a case merely for nominal, but for substantial damages of which the jury were the judges. In the result, the judgment of the Court of Appeal should be varied, the appeal should be allowed and the appellant company should have judgment for the sum of £35,000. I should very much hope that, to save the expense of a protracted and long discussion, the parties might agree amongst themselves as to the costs. If they do not, I am for making the following order. The plaintiffs should have the costs of the action except in so far as they have been increased by the claim under the licence agreement, which costs should be awarded to the defendants. The defendants should have the costs of the appeal to the Court of Appeal, except in so far as they were increased by their appeal against the £35,000 verdict on the confidence case, which costs should be awarded to the plaintiffs; and in this House the plaintiffs should have the costs except in so far as they have been increased by the appeal against the licence agreement, which costs should be awarded to the defendants.

I cannot part from this case without referring to the remarks made in the Court of Appeal upon the method in which it was conducted in the court of first instance. The learned Master of the Rolls said:

> "There remains one feature of this case upon which, in association with my colleagues, I desire to make serious comment—that is the cross-examination to which the leading actors on either side, Mr. Lehwess and Sir Herbert Austin, were subjected. Measured by the shorthand note, it appears that Mr. Lehwess's examination occupied eighty pages; his cross-examination occupied 265. The examination of Sir Herbert Austin occupied thirty-nine pages and his cross-examination 148 pages. There is a tedious iteration in some of the questions asked, and prolonged emphasis is laid on some matters, trivial in relation to the main issues. Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion, and with due regard to the assistance to be rendered by it to the Court, not forgetting at the same time the burden that is imposed upon the witness. We desire to say that in our opinion the cross-examination in the present case did not conform to the above conditions, and at times it failed to display that measure of courtesy to the witness which is by no means inconsistent with a skilful, yet powerful, cross-examination."

With that censure I agree, except that I cannot think it can be justly applied to the counsel who appeared on behalf of the plaintiffs or to any of the counsel who appeared at the Bar of your Lordships' House. It is right to make due allowance for the irritation caused by the strain and stress of a long and complicated case, but a protracted and irrelevant cross-examination not only adds to the cost of litigation, but is a waste of public time. Such a cross-examination becomes indefensible when it is conducted, as it was in this case, without restraint and without the courtesy and consideration which a witness is entitled to expect in a court of law. It is not sufficient for the due administration of justice to have a learned, patient and impartial judge. Equally with him, the solicitors who prepare the case and the counsel who present it to the court are taking part in the great task of doing justice between man and man.

LORD BLANESBURGH.—Except only upon one question, I find myself in full accord with my noble and learned friend on the Woolsack in everything he has said. I have been privileged to read his judgment in print. Subject to that one reservation I would, if I may, without another word in support of them, associate myself with all its conclusions. As a result of these very little of the jury's original verdict remains in being. Their significant finding on the conspiracy issue against the respondents alone, to the exclusion of Mr. Watkins and his firm, did not survive the Court of Appeal. It was not revived in this House. Their findings on the licence agreement are now finally set aside. Their assessment of damages at the sum of £63,550 for breach of that agreement shares, of course, the fate of the agreement itself. It may remain significant for illustrative purposes. But that is all. The verdict upon the confidence agreement stands. That my noble and learned friend leaves intact. It is there my difficulty arises. I regret that I cannot go so far. As in duty bound and with no reluctance I accept the finding that there was such an agreement and that it was broken by the respondents to the extent found by the jury. There was evidence to justify them in so finding. But their assessment of damages for that breach at £35,000, is, in my considered judgment, an assessment incapable of justification. It can, I believe, be shown affirmatively, and what follows is an attempt on my part to show, that, applying the language of FITZGERALD, J., approved by PALLES, C.B., in *M'Grath* v. *Bourne* (1) no reasonable proportion exists between the assessment and the circumstances of the case. If that be so (it may be a large "if," I agree), but if it be so, then especially, in a case like this where the damages assessed are for breach of contract and not in tort, it will hardly, I take it, be gainsaid that in a court of review, such an assessment will not be allowed to stand.

The verdict of the jury in question now was not a verdict at large. This assessment of damages was based upon their own answers to specific questions submitted to them. Its real meaning can only, I think, be fully appreciated if the range of these questions with the answers be kept clearly in view. The questions on this as on all other issues were agreed by counsel on both sides and accepted by the learned judge as the only questions upon which the jury's assistance was required. It would overburden a judgment like this again to set forth at length those now relevant. It will suffice to describe as the result of both question and answer the situation with reference to which in relation to the confidence agreement the jury were required to assess damages.

(*a*) There was nothing to be taken as confidential between the appellants and the respondents except in relation to the "plaintiffs' specification and drawings," *i.e.*, their draft complete specification and drawings deposited at the Patent Office on Aug. 2, 1928, and accepted with slight modification on Nov. 22, 1929.

(*b*) The breach of confidence complained of and found consisted exclusively in the taking out by Sir Herbert Austin of the Letters Patent No. 320486 applied for on Sept. 8, 1928, and accepted on Oct. 12, 1929.

(*c*) It was in respect of that breach and that breach only that the assessment of damages was called for.

And there was something more. There were two heads, and two only, under which the appellants were alleged to have been damaged by the respondents' breach, (*a*) they were thereby delayed in the exploitation of their construction: and (*b*) they were thereby prevented from entering into a formal licence agreement with the respondent company. This second allegation in the amended statement of claim was, except for the addition of the word "formal," a survival of one in the original statement of claim in which the existence of a licence agreement was not alleged, and ROMER, L.J., I see, so construes the amended pleading as to exclude this second allegation from consideration in relation to the confidence agreement. But although its original application was to something quite different, the allegation appears to have been treated at the trial as applicable to a breach of the confidence agreement. And I will so regard it.

The question, therefore, is whether an award of £35,000 as damages under heads (*a*) and (or) (*b*) for the only breach as alleged and found of the only confidence reposed in the respondents, also as found, can be justified? Does any reasonable proportion exist between that assessment and the circumstances of the case—to repeat the Irish judicial test?

There are two "circumstances of the case" which are important to be remembered now. The breach of confidence was in respect only of the terms of the appellants' British patent which until that patent was accepted on Nov. 22, 1929, had not been published to the world. The licence agreement was to be for an exclusive licence of that patent for its full term under minimum royalties, but with no covenant on the part of the licensees either to work or develop the invention. The value to the appellants of such an agreement under which the whole beneficial interest in the patent would have passed to the respondents was hailed by Dr. Lehwess himself in his letter to Mr. Jameau of Sept. 3, 1928, as being £75,000—the amount of the minimum royalties extending over the whole sixteen years of the patent. The value of these royalties at the date of the writ was at the trial agreed at £39,900. That is one circumstance. The second is that on June 10, 1930, the appellants pressed upon the respondents for their acceptance a proposal to sell their whole patent rights for £1,000 a year over sixteen years, payments, that is to say, with a present value of probably not more than £11,000. With these two circumstances remembered, each of the jury's assessments of damages asks for criticism—the first assessment, of course, being only now relevant as throwing some light on the second. But the facts are that while the whole present value to the appellants of the licence agreement on the terms that the whole beneficial interest in the patent rights had passed to the respondents was £39,900, the jury awarded to the appellants £63,550 as damages for repudiation by the respondents of that contract, and on the footing that all the patent rights remained with the appellants: while they awarded to the appellants in respect of the breach of the confidence agreement the sum already stated of £35,000—which either by accident or design is seven-eighths of the value at the date of the writ of the minimum royalties payable under the licence agreement, *i.e.*, £34,975, with £25 added to make a round figure, and again on the terms that the patent rights remain with the appellants—the assessment being £24,000 above the price asked by the appellants in June, 1930, for their entire interest in the patent.

But it is not necessary to rely upon such general considerations, striking as they seem to be. It is safer to consider this present assessment in detail. It is one that can be tested.

And it is convenient to deal first with the second allegation already stated, namely, that as a result of the respondents' breach the appellants were delayed in the exploitation of their construction and were prevented from entering into a formal licence agreement with the respondent company. It is hardly, I think, open to doubt that the sum of £35,000 at which the jury quantified the appellants' damages in respect of the confidence agreement resulted from their acceptance of the view that, owing to the taking out of the Austin letters patent, the appellants lost the chance they would otherwise have had of an acceptance by the respondent company of a licence in the terms specified in the licence agreement. That £35,000, as the sum quantified, is not a mere coincidence, is a conclusion I could elaborate if it were necessary. But it is really unimportant whether the explanation already offered of the jury's figure is more than a guess. The real question is whether an award of damages on this head for any sum at all can be justified.

Owing possibly to some error in the shorthand note the learned judge's direction to the jury here is not quite clear. The passage is as follows, and will be found at p. 233:

> "Sir Stafford [Cripps] tabulated his claims, and one of the things he suggested was loss of a contract with Sir Herbert Austin. Well on this part of the case —I am not now talking about the licence at all—there is not any agreement by Sir Herbert to make a contract with the plaintiffs and Mr. Pritt is quite right in saying that you must not take that into consideration. Of course, if the plaintiffs had had a chance and assuming that they have lost that chance because in breach of contract the defendants have taken it from them, why then it may be that if that chance had not been taken away the public demand for these cars might have become so great it may be that Sir Herbert or his company would have been driven to using them. You must take that into consideration."

Now, here the learned judge does seem to direct the jury that loss resulting from Sir Herbert Austin's refusal to enter into an agreement with the appellants must not be considered, but if his further observations amounted to a direction to them to take this so-called "chance" into consideration it was, I suggest to your Lordships, a serious misdirection. For it is, I submit, clear that the taking out by Sir Herbert of his patent could in reason have had no connection with or influence upon the question whether or not the respondents should take a licence from the appellants. It is not only that there is no evidence, so far as I can find, that the existence of his own patent influenced Sir Herbert Austin at all in his decision that his company should not take a licence. His own evidence was that he abandoned the whole idea of the appellants' construction because in his view it was not wanted in the market and was in itself unsatisfactory. But apart from all evidence does it not stand to reason that the taking out of this patent of his own could have had no influence upon his decision?

He did not, by taking out a patent subsequent in date to the appellants', annex the appellants' construction or any part of it or strengthen his or his company's position as against the appellants in any way. His patent in this respect even if it made claims included in the appellants' specification gave him as against them no rights which he did not possess without one. His taking out of his patent made a licence from the appellants neither more nor less desirable for the respondent company from a business point of view than it had been before. Apart from the extravagance of such a sum as £35,000 being the measure of damages on this head —a subject to which I have already alluded—I suggest to your Lordships that an award of any damages at all on this score is quite inadmissible.

In this result I find myself in agreement with the Master of the Rolls. Nor can I find any answer to Romer, L.J., when he says:

> "Neither the defendant Austin nor the defendant company can be made liable to the plaintiffs in damages because the company refused to enter into a licence agreement with the plaintiffs whatever may have been the reason for that refusal."

But, although this claim of the appellants may well have been the real basis of the jury's assessment, little was made of it in this House. Here the assessment was mainly sought to be justified on the first head pleaded—that of delay. The registration of the Austin patent on the file of the Patent Office it was said was a complete bar while it continued to the exploitation of the appellants' construction, and by the time that patent was removed every possibility of marketing the appellants' monopoly had disappeared. An award of £35,000 on that head could be justified: for as a result of the appellants' delay in exploitation due to the registration of Sir Herbert's patent the appellants' patent had become worthless. It will be seen that this claim is alternative to the first. The two claims are not concurrent.

Now there are many answers to these contentions, if in truth they were ever even considered by the jury, which I gravely doubt.

First of all the assertion that his patent was, even at the time of the trial, worthless was one that Dr. Lehwess would not have permitted himself to make. But the final answer is that if it had become worthless and if its worthlessness was due to delay in exploitation, that delay was in no way attributable to the registration of the Austin patent or to any interference with the appellants' activities by reason of its existence. On Dec. 10, 1929, so soon as Mr. Watkins heard of the acceptance of the appellants' patent he intimated Sir Herbert's intention to withdraw all competing claims from his patent accepted a month or so earlier. On Jan. 10, 1931, Sir Herbert consented to a revocation of his patent; but this consent was not accepted by the appellants, as they claimed to have the patent registered in their name, a claim which failed but which delayed the formal revocation of the patent until July, 1931. It is difficult to suppose in these circumstances that the appellants were ever delayed in the exploitation of their patent by the presence on the register of the respondent's patent—one subsequent in date and with all competing claims withdrawn. Some reason for their failure to exploit their system which, to the great surprise of the learned judge, Dr. Lehwess stated continued up to the trial in November, 1933, must be looked for, and I suggest to your Lordships that if it did not result from doubts as to its monopoly value it was due to the fact that the appellants so soon as they realised that the respondents had abandoned the projected licence agreement, set themselves by negotiations to induce them to enter into a fresh agreement even to purchase their patent outright. They always expected, said Mr. Negon, to come to such an arrangement. But to be able to do so it was essential that they should retain their patent rights intact so that they might be included either in a sale or in a licence to the respondents, could such be arranged. I have been at a loss to understand, as I have said, how failure to negotiate successfully for a sale or licence to the respondents could be attributable to the existence of Sir Herbert's patent: I am at a loss here to understand how any damage can be claimed to result from the appellants' inability to negotiate for sale in another direction when that inability was the necessary accompaniment of their abortive negotiations with the respondents by which they hoped to benefit.

It was asked whether a plaintiff was to be prejudiced by an attempt to settle. Surely not. But if he considers it to be to his interest to make that attempt and as a term incident to its success it is necessary that he do not offer the subject of negotiation elsewhere, a claim for damages for any loss thereby sustained on that score is like a gambler seeking a return of his stake after he has lost his bet. I suggest to your Lordships that no kind of damage on this head was proved traceable to the existence of the Austin patent—certainly none that had any relation to such a sum as £35,000.

The jury in this case were clearly of opinion that the appellants had been shabbily treated by Sir Herbert Austin. They doubtless enjoyed his polite but severe cross-examination just as much as they resented the attack on the veracity of Dr. Lehwess made also in cross-examination. They resented such a cross-examination at the instance of the respondents. They were warned by the learned judge not to punish the respondents. Their verdict in nearly every part of it indicates in my eyes that the warning was unheeded. The exoneration from the charge of conspiracy of Mr. Watkins and the impossible finding of a conspiracy between Sir Herbert and himself under the alias of his company: the two assessments of damage with no feature in common except the magnitude of their amount all indicate this to me.

I hold no brief for either Sir Herbert or his company in this matter. Had I been sitting in a court of honour I would not in relation to his conduct have discriminated too closely between the mémoire descriptif with Fig. 1 and the draft complete specification. I would have seen in each and not in one more than the other an obligation in honour on the part of Sir Herbert not to utilise for his own purposes any information thereby disclosed to him for the first time without at least informing the appellants of his intention so to do. But the jury were not sitting as a court of honour. The punishment of the respondents for any offence was beyond their province. The endowment of the appellants out of the proceeds was even more indefensible. The proper compensation of the appellants for any legal wrong alleged and proved to have been done them by the respondents was their only duty. And I conceive it to be one of the most important functions of the court in any case in which it finds that a jury has yielded to the besetting weakness, disclosed, as I think, here, to correct it. If it were to hesitate in the exercise of that function, a jury in civil cases would soon become a tribunal for the punishment of defendants for other than legal wrongs committed or for the denial to plaintiffs of their legal rights, and all according to the length of its own foot, instead of being, as in this case it alone was, a tribunal for compensating the appellants for legal wrong suffered by them at the hands of the respondents.

This assessment should, therefore, I think, be set aside as excessive and unreasonable, but I am not prepared to say, as did the Court of Appeal, that no damage has been proved. I am not therefore ready to support their order for nominal damages only. That does not mean, however, that the issues on the confidence agreement shall all be sent for a new trial. It only means that, following the precedent set by this House in *Tolley* v. *J. S. Fry & Sons, Ltd.* (2), the new trial will be one confined strictly in its scope to an assessment of damages on this head. Fortunately this should be a simple inquiry enough, one that need not be either heated or prolonged in the circumstances which I find existing. I note also that both the appellants and the respondents unite in proposing the adoption of that course. The appellants make the suggestion in their printed case and the respondents in theirs.

I will close with the citation of an authoritative statement of the function of the court in cases of this kind which is to be found in *Johnston* v. *Great Western Rail. Co.* (3) where Vaughan Williams, L.J., says ([1904] 2 K.B. at p. 254):

> "If the court from the circumstances of the case and the amount of damages can draw the inference that the jury must have applied a wrong measure of damages in contravention of the direction of the judge, the court may order a new trial, although it is not in a position to say that the mere quantum of excess is so large that no reasonable jury could have arrived at such an amount."

And, my Lords, I have reached the conclusion, satisfactory at all events to my own mind, that the inference referred to by the Lord Justice is, in this case, inevitable.

LORD ATKIN.—I have had the advantage of reading the opinion read by the Lord Chancellor and the opinion about to be read by my noble and learned friend Lord Wright, and, as I agree with their reasoning and conclusions, I should have added nothing were it not that we are differing in one respect from the decision of the Court of Appeal. On the important question as to the duty of an appellate court when dealing with the verdict of a jury, I desire to endorse in every respect the detailed exposition contained in the opinion of Lord Wright. I would only desire to add that once it has been decided that a civil case has to be tried by a jury, that tribunal and that tribunal alone is the judge of fact, and no appellate court can substitute its own findings for those of the lawful tribunal. An appellate court has a revising function to see, first, whether there is any evidence in support of the issue found by the jury; and, secondly, whether the verdict can stand having regard to the considerations which I will not re-state lest I should appear to seek to vary the expressions in the two opinions I have mentioned. If in the latter kind of dispute it is obvious that no verdict for the plaintiff on all the available evidence could be supported the court may save the waste of time in ordering a new trial which could have only one possible result by ordering the verdict and judgment to be entered for the defendant. I do not think that the rules of court go beyond that: and, if they did, I should doubt whether they would be within the rule-making power.

In the present case as far as the licence agreement is concerned it appears to me that the finding of the jury is inconsistent with and impossible to reconcile with ascertained facts, namely, the contemporaneous correspondence, and, therefore, cannot stand.

I do not think that this decision should throw any doubt on the correctness of the finding of the jury on the other facts of the case. It is plain that they accepted Dr. Lehwess as in substance a witness of truth. His bona fides in maintaining that the parties had come to an agreement on important points at the interview on Sept. 3 was made manifest by the terms of a contemporaneous letter to a business associate in Paris, rightly admitted in the circumstances by the trial judge. But it is plain from the correspondence that Dr. Lehwess did not, in fact, consider that the measure of agreement, large as it was, which the parties had reached in conversation, was sufficient in itself to constitute a contract by which the parties were bound. The documents which are referred to by the Lord Chancellor and LORD WRIGHT make it clear that he did not consider the Austin company bound. In these circumstances the letters plainly show that there was no contract and the jury's verdict that there was cannot stand. It is the kind of evidence in respect of which any jury is at a disadvantage in a complicated case involving many disputed allegations of fact and a correspondence extending over many months. It can hardly be said that the jury lose sight of the documents, for they barely see them. It is not surprising in the circumstances that even a competent special jury may have failed to notice the compelling significance of the written word.

On the other branch of the case I can find no facts uncontroverted or incontrovertible which justify an appellate court in interfering with the verdict. There was ample evidence to support the finding of contract and breach. I am inclined to think that too much importance was attached to the supposed intrinsic confidential nature of the information disclosed. It is quite sufficient to support the contract averred that the terms upon which the information was disclosed were that it was to be used for a particular purpose only. The giving of the information is ample consideration, and use for any other purpose would be a breach. The analogy of a contract of bailment I think supports this view. The confidential nature of the information, the fact that it was not known, and could not be known to members of the public, would in this view be relevant to damages rather than to formation of the contract. But in any case here there was ample evidence upon which the jury could find both the contract put to them and the breach, a breach instantaneous, surreptitious, and made for the advantage of the defendant who was specially qualified to form an opinion as to the value of the information which he was wrongfully using. I find it impossible to agree that the damages which flowed from the breach of the contract were only nominal. The members of the Court of Appeal, with respect, attached too much importance to the isolated expressions of Dr. Lehwess that he considered himself bound by the licence agreement and on that account refrained from exploiting his patent. It is unstable ground in view of the fact that the Court of Appeal also took the view, shared by your Lordships, that, in fact, Dr. Lehwess did not consider himself bound, and that for that reason the verdict on the licence agreement must be set aside. But, in fact, Dr. Lehwess could very properly treat himself as bound to the Austin company for commercial purposes by a very close negotiation intentionally long drawn out while all the time the defendant Austin was secretly busy availing himself of the plaintiff's information in obtaining patents for himself in England and all over the globe. The jury were entitled to find a substantial period of time after discovery of the breach in which Dr. Lehwess was entitled to hold his hand. There was also evidence that the Lehwess invention was of value, that the plaintiff lost a market which would have been available for him at the time and that the rewards of a successful invention of the type would be very great. It was pointed out that in one year the output of the Austin factories alone was about 60,000 saloon cars, out of which about 49,000 were fitted with what was then a competing sunshine roof. I have not to consider whether I myself would have found so large a sum. The amount of damages was a matter peculiarly fit for determination by a jury and I see no reason to set their decision aside. I also wish to express my agreement with the concluding remarks of the Lord Chancellor, and particularly with his statement that no censure was deserved in any respect by counsel who appeared at the trial on behalf of the plaintiffs. I agree with the motion proposed by the Lord Chancellor.

LORD MACMILLAN.—I concur.

LORD WRIGHT.—I have had an opportunity of considering in print the opinion which has just been delivered by my noble and learned friend on the Woolsack. I am in complete agreement with everything that is said in that opinion, and merely proceed to add a few observations because of the important questions raised in regard to the functions of an appellate court when dealing with the verdict of a jury.

I concur with the Court of Appeal in the conclusion that the jury's verdict in respect of what has just been described as "the licence agreement" should be set aside. I do so for the reasons set out by the Lord Chancellor which seem to me to bring the case within the language used by LORD ATKINSON in *Banbury* v. *Bank of Montreal* (4) in reference to *Allcock* v. *Hall* (5). What LORD ATKINSON said ([1918] A.C. at p. 678) was that in that case:

> "on an application for a new trial on the ground that the verdict was against the weight of evidence, the Court of Appeal, applying the principle laid down in *Metropolitan Rail. Co.* v. *Wright* (6), set aside the verdict, holding that it was utterly irreconcilable with the evidence in the case when reasonably considered."

He describes ([1918] A.C. at p. 679) another case in which the Court of Appeal set aside the verdict of a jury on the ground that the verdict was against the weight of evidence as being a case where the court acted on the basis that it was one where there was conflicting evidence, but an overwhelming balance of it on one side. That was *Millar* v. *Toulmin* (7), where, however, on appeal this House took a different view and restored the verdict of the jury (*Toulmin* v. *Millar* (7)). In the present case it is clear that the jury believed the evidence given by Dr. Lehwess to the effect that an agreement had been orally concluded; there was accordingly evidence on which they could so find. Indeed, as the Lord Chancellor has explained, it seems clear that Dr. Lehwess himself honestly believed that he had made the agreement, though no doubt at certain periods he thought the contrary. The Lord Chancellor has pointed out how easy it might be for even a careful jury to give undue weight to that evidence and forget that it was completely irreconcilable with the totality of the evidence in the case, in particular with the conduct and statements of Dr. Lehwess himself. His conduct was in truth quite inconsistent on a careful contemplation of the documents with there having been the agreement which he subsequently alleged and sought to establish at the trial; equally inconsistent were his letters, to some of which the Lord Chancellor has referred, and if I may take one further instance of inconsistency, I may refer to the statutory declaration which Dr. Lehwess made in the proceedings for the revocation of Sir Herbert Austin's patent. In that declaration he stated: "On Sept. 3, 1928 (the date on which the oral agreement was afterwards alleged to have been made), the draft agreement was discussed with Sir Herbert Austin and generally agreed upon." It is on the ground of this inherent inconsistency of Dr. Lehwess's own story when the totality of the material, oral and documentary, is considered that I think the verdict of the jury on this matter cannot stand. I do not so decide simply because I myself should have come to a different conclusion, or that the verdict of the jury is one which on a mere balance of evidence does not appear to me to be reasonable. The appellate court is never the judge of fact in a case where the constitutional judge of fact is the jury.

For the appellate court to set aside the verdict of a jury as being against the weight of evidence merely because the court does not agree with it, would, in my judgment, be to usurp the functions of the jury and to substitute their own opinion for that of the jury; that would be quite wrong. Much more is necessary in order to justify the setting aside of a jury's verdict where there is some evidence to support it. No doubt, the test can be roughly described as being whether the verdict of the jury was reasonable, but what is meant by reasonable in this connection, must be carefully defined. I shall not seek to make an anthology of the epithets applied in the authorities to the word "reasonable" in order to warn appellate courts that they must not act merely on what appears to them, on a reading of the shorthand notes, to be a conclusion more reasonable than that arrived at by the jury. The right and duty of the court to control the verdicts of juries was recognised in early days; thus in 1655 in *Wood* v. *Gunston* (8), Glyn, C.J., said (Sty. 466):

> "It is in the discretion of the court in some cases to grant a new trial, but this must be a judicial but not an arbitrary discretion and it is frequent in our books for the court to take notice of miscarriage of juries and to grant new trials upon them."

And in *Barker* v. *Dixie* (9) it was said:

> "New trials came in the room only of attaints as a more expeditious and easy remedy."

The objection in *Wood* v. *Gunston* (8) was that the damages were excessive, and a new trial was there ordered. The use of the phrase "miscarriage of juries" is significant. It indicates what there must be to justify the appellate court in interfering with or controlling the verdicts of juries. Since then many cases have been reported on these matters, but I think most useful guidance to help the appellate court is to be found in *Metropolitan Rail. Co.* v. *Wright* (6). Lord Fitzgerald (11 App. Cas. at p. 155) states the question to be:

> "whether the evidence so preponderates against the verdict as to show that it was unreasonable and unjust"

and he adds that the onus is on the appellants to establish that this condition is fulfilled. But the most illuminating statement is, I think, to be found in the observations of Lord Halsbury (11 App. Cas. at p. 156). He refers to *Solomon* v. *Bitton* (10), where the question, according to the report (the correctness of which was afterwards disputed in *Webster* v. *Friedeberg* (11)), was stated to be "whether the verdict was such as reasonable men ought not to have come to." Lord Halsbury said that was an erroneous statement of the principle. He proceeded:

> "If a court not a Court of Appeal in which the facts are open for original judgment, but a court which is not a court to review facts at all, can grant a new trial whenever it thinks that reasonable men ought to have found another verdict, it seems to me that they must form and act upon their own view of what the evidence in their judgment proves. That, I think, is not the law. . . . I think the test of reasonableness, in considering the verdict of a jury, is right enough, in order to understand whether the jury have really done their duty. If their finding is absolutely unreasonable, a court may consider that that shows that they have not really performed the judicial duty cast upon them; but the principle must be that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal. If the word 'might' were substituted for 'ought to' in *Solomon* v. *Bitton* (10), I think the principle would be accurately stated."

Lord Halsbury, in these valuable observations, is, I think, going back to the test applied in *Wood* v. *Gunston* (8), which was whether there was a miscarriage of the jury. Thus, the question in truth is not whether the verdict appears to the appellate court to be right, but whether it is such as to show that the jury have failed to perform their duty. An appellate court must always be on guard against the tendency to set aside a verdict because the court feels it would have come to a different conclusion.

A In this case, on these principles and for the reasons which I have indicated, but which are more fully set out in the speech of the Lord Chancellor, I think the appellants in the Court of Appeal (the respondents in this House) satisfied the onus which always rests on appellants who seek to set aside the verdict of a jury as being against the weight of evidence. The balance of the evidence was overwhelmingly in their favour and the totality of the evidence of Dr. Lehwess, oral and documentary, was irreconcilable with that part of his evidence which asserted B the oral agreement. The verdict was one which the jury, however comprehensible in all the circumstances their decision might be, were not competent to find, that is, "might" not find, on the evidence.

On the second and alternative issue in the case, what has conveniently been called "the confidence agreement," I, like the Lord Chancellor, concur with the conclusions of the Court of Appeal until I come to the question of damages. On C this question it is all-important to note carefully the exact terms of the answer of the jury to Question 7. By that answer the jury found that the information was used in breach of the confidence agreement by the defendants for the purpose of securing for the defendant Austin patent protection in respect of the plaintiff's construction or some substantial part thereof by taking out letters patent No. 320486. Apart from any question of damages, it is immaterial how or why the D respondents committed a breach of that agreement, but in relation to damages the essence of that finding is that the abuse of the confidential information which constituted the breach was not by inadvertence but was deliberate, and with the object of securing a patent covering substantially the plaintiff's construction; that finding involves an intention on the part of the respondents to do what must necessarily prejudice the appellants in their endeavour to exploit their own patent E for their profit. It seems on the evidence to be established that what the respondents did had that effect. The whole evidence on this issue has been examined before your Lordships, and is summarised by the Lord Chancellor. It is ample to support the finding of the jury that there was this disingenuous design on the part of the respondents thus to benefit themselves at the expense of the appellants and by an abuse of confidence; it is clear that all this was concealed from the F appellants, who were systematically induced to think that the respondents were contemplating the purchase from the appellants of a licence under the appellants' patent, at least up to December, 1929; when they discovered what had been going on the appellants were placed in a difficult position. Substantial damage to the appellants must, it seems, have been inevitable. The jury were, as the Lord Chancellor explains, properly directed and had all the facts fully before them. In G considering their award on damages, that view of the evidence most favourable to their finding must be taken, not the view most adverse to it if or where two views are competent. It is true that the damages awarded ran into big figures, but damages cannot be treated as excessive merely because they are large. Excess implies some standard which has been exceeded. It is true that the damages could not be arrived at otherwise than by estimate and conjecture; but that was H because the respondents' own conduct had made it impossible to put to practical test during the period of delay complained of, the money value of the appellants' invention. As to definite figures, the jury had before them, besides the other considerations adverted to by the Lord Chancellor, the fact that in a single year the respondents had paid (to another concern) £5,000 in royalties under a non-exclusive licence to use on their cars a type of "sunshine" roof competing with that patented I by the appellants.

I cannot agree with the Court of Appeal that the damages were nominal. Their reasoning is, in my opinion, on lines too narrow to accord with the realities of the situation. My only doubt has been whether the amount found by the jury was so large as to make it necessary after three prolonged hearings to order yet a further trial which would in that case be limited to the question of damages. I have had some difficulty on this matter. I do not in the least say that I should have awarded the same amount myself. But that is not the relevant consideration.

Most of the reported cases on the question of excessive damages are naturally cases of tort; in contract the damages are generally capable of more or less precise ascertainment, though it sometimes happens—as here—that they must be matter of conjecture. But in general in contract a new trial is ordered if at all, because of some error in law. But where there is no error in law the principles are well stated by LORD ESHER, M.R., in *Praed* v. *Graham* (12), where he said (24 Q.B.D. at p. 55):

> "The rule of conduct for the appellate court when considering whether a verdict should be set aside on the ground that the damages given by the jury are excessive, is as nearly as possible the same as where the court is asked to set aside a verdict on the ground that it is against the weight of evidence."

LORD ESHER adds that the court cannot set aside the verdict merely because it is larger than they themselves would have given, but only if

> "having regard to all the circumstances of the case the damages are so excessive that no twelve men could reasonably have given them."

He treats that statement as equivalent to the definition given by FITZGERALD, J., and approved by PALLES, C.B., in *M'Grath* v. *Bourne* (1) ([1876] I.R. 10 C.L. at p. 164), that to justify setting aside the verdict on the ground of excessive damages

> "the amount should be such that no reasonable proportion existed between it and the circumstances of the case."

LORD ESHER's statement of principle was approved by another master of the common law, VAUGHAN WILLIAMS, L.J., in *Johnston* v. *Great Western Rail. Co.* (3).

These tests seem to me to correspond to the tests which I have sought to apply in considering the verdict of the jury on the licence agreement. But whereas in the former matter I find that the verdict was one the jury could not "reasonably" find because it involved an irreconcilability or want of proportion between it and the whole circumstances of the case, I do not find in the verdict on damages any such irreconcilability or want of proportion between these damages and the whole circumstances of the case. On the question of damages the respondents have not satisfied me that the verdict was one which was "unreasonable" in the sense that the jury "might" not come to it, or one which was against the overwhelming balance of the evidence. Nor can I find that the jury were partial or perverse; and, again, I should desire to quote and apply here the observation which LORD HAILSHAM, L.C., made in *Tolley* v. *J. S. Fry & Sons, Ltd.* (2) ([1931] A.C. at p. 341) in reference to that case:

> "I cannot see in the facts of this case any ground for saying that the amount of the damages awarded is so excessive as to warrant the inference that the jury took a biased or mistaken view of the whole case."

Thus, applying mutatis mutandis the same principle to the verdict of the jury on the question of damages as I applied on the question of the licence agreement, I conclude that the verdict on damages should not be interfered with.

I may add that the order of the Court of Appeal on the issue of the licence agreement not merely setting aside the verdict of the jury, but ordering judgment to be entered upon it was, in my opinion, justified under Order LVIII, r. 4. That course was followed in *Banbury* v. *Bank of Montreal* (4), where the verdict of the jury for the plaintiff being set aside, judgment was entered by the appellate court for the defendants. That was a case where the verdict was set aside on the ground that there was no evidence at all to justify a verdict for the plaintiff, but I think it is clear that under rule 4 the same course is competent where the verdict is set aside as being against the weight of evidence; in this respect no distinction can be drawn between the two grounds for setting aside a verdict. That was the opinion of the Court of Appeal in *Allcock* v. *Hall* (5), where judgment was entered for the defendant not because there was no evidence at all to support the verdict but because the verdict was against the weight of the evidence. In *Millar* v. *Toulmin* (7) the Court of Appeal had gone further and entered judgment for the plaintiff after setting aside the verdict as being against the weight of the evidence. When this House reversed that judgment in *Toulmin* v. *Millar* (7), Lord Halsbury expressed a doubt whether rule 4 gives jurisdiction to the Court of Appeal to find a verdict for themselves. I should venture to think that for the court so to do would amount, not to controlling, but superseding the jury and exercising the function of affirmatively finding the facts. Apart from *Millar* v. *Toulmin* (7), I know of no case where this course has been taken. I agree with the observations on this point of my noble and learned friend Lord Atkin. But with him I think it is clear that the order of the Court of Appeal in the present case so far as it deals with the issue under the licence agreement is justified under Order LVIII, r. 4.

On the whole case I desire to concur with the motion proposed by the Lord Chancellor.

Appeal allowed in part.

Solicitors: *Roche, Son, & Neale*; *Sharpe, Pritchard, & Co.*, for *Ryland, Martineau, & Co.*, Birmingham.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

KNOTT *v.* KNOTT

[Probate, Divorce, and Admiralty Division (Sir Boyd Merriman, P., and Bucknill, J.), May 2, 3, 14, June 7, 1935]

[Reported [1935] P. 158; 104 L.J.P. 50; 153 L.T. 256; 99 J.P. 329; 51 T.L.R. 499; 79 Sol. Jo. 626; 33 L.G.R. 383; 30 Cox, C.C. 245]

Justices—Husband and wife—Maintenance order—Discharge—Adultery—Pendency of divorce suit—Issue of adultery—Ouster of justices' jurisdiction—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict.*, *c.* 39), *s.* 7.

Where a charge of adultery is made in a court of summary jurisdiction and at the same time the Divorce Court is seised, either directly or by necessary implication, of that issue, magistrates have no jurisdiction to decide the issue so long as the suit in which it is raised is pending in the Divorce Court.

In July, 1931, a wife was granted by magistrates a maintenance order on the ground of her husband's wilful neglect to provide her with reasonable maintenance. On Jan. 18, 1935, the husband issued a complaint under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, for the discharge of the order on the ground of the wife's alleged adultery. On Feb. 26 the wife filed a petition for the dissolution of the marriage on the ground of her husband's alleged adultery with a named woman. On March 5, 1935, the husband's summons came before the justices who found the adultery of the wife proved and discharged the maintenance order.

Held: the finding of the magistrates must be set aside on the ground that they should not have proceeded to a determination of the matter after their attention had been called to the conflict of jurisdiction. The case would be remitted to them for re-hearing, but that re-hearing should be stayed until the determination by the Divorce Court of the issue of the wife's adultery.

Per **Sir Boyd Merriman, P.**: The moment a decree nisi has been pronounced on a finding that a wife has been guilty of adultery it is at once open to magistrates to apply that finding on any application, whether already subsisting or newly made, for the discharge of a maintenance order previously made by them, and to do so without further evidence than is required to show that the adultery found is subsequent to their order. If that finding were finally reversed, a fresh order could be made by the magistrates in the wife's favour, while, if a new trial were ordered, she could get alimony pendente lite.

Semble.—S. 10 of the Summary Jurisdiction (Married Women) Act, 1895, which enables magistrates to refuse to make an order where the case would be more conveniently dealt with by the High Court does not apply to a plaint for the discharge of a maintenance order on the ground of a wife's adultery.

Notes. Considered: *Hickson* v. *Hickson*, [1953] 1 All E.R. 382. Referred to: *Whittle* v. *Whittle*, [1939] 1 All E.R. 708; *Markham* v. *Markham*, [1946] 2 All E.R. 737; *James* v. *James*, [1948] 1 All E.R. 214; *Hudson* v. *Hudson*, [1948] 1 All E.R. 773.

As to discharge of a maintenance order, see 12 HALSBURY'S LAWS (3rd Edn.) 491, and for cases on ouster of magistrates' jurisdiction by the pendency of a divorce suit, see 27 DIGEST (Repl.) 694, 695. For Summary Jurisdiction (Married Women) Act, 1895, see 11 HALSBURY'S STATUTES (2nd Edn.) 849.

Cases referred to:

(1) *R.* v. *Middlesex Justices, Ex parte Bond*, [1933] 1 K.B. 72; 102 L.J.K.B. 40; 148 L.T. 134; 96 J.P. 487; 49 T.L.R. 18; 30 L.G.R. 498; 29 Cox, C.C. 563, D.C.; *on appeal*, [1933] 2 K.B. 1; 102 L.J.K.B. 432; 148 L.T. 544; 97 J.P. 130; 49 T.L.R. 247; 31 L.G.R. 169; 29 Cox, C.C. 620; 27 Digest (Repl.) 554, *5050*.

(2) *Higgs* v. *Higgs*, [1935] P. 28; 104 L.J.P. 1; 152 L.T. 24; 98 J.P. 443; 51 T.L.R. 22; 78 Sol. Jo. 768; 32 L.G.R. 471; 30 Cox, C.C. 183, D.C.; 27 Digest (Repl.) 695, *6642*.

(3) *L.* v. *L.*, [1931] P.63; 100 L.J.P. 76; 144 L.T. 723; 47 T.L.R. 260; 75 Sol. Jo. 192; 27 Digest (Repl.) 377, *3105*.

(4) *R.* v. *Richardson, Ex parte Sherry*, [1909] 2 K.B. 851; 79 L.J.K.B. 13; 101 L.T. 541; 73 J.P. 434; 25 T.L.R. 711; 22 Cox, C.C. 183, D.C.; 27 Digest (Repl.) 720, *6890*.

(5) *Ruther* v. *Ruther*, [1903] 2 K.B. 270; 72 L.J.K.B. 826; 67 J.P. 359; 52 W.R. 154; 47 Sol. Jo. 640, D.C.; 27 Digest (Repl.) 724, *6922*.

(6) *Pratt* v. *Pratt* (1927), 96 L.J.P. 123; 137 L.T. 491; 43 T.L.R. 523; 71 Sol. Jo. 433; 28 Cox, C.C. 413; 27 Digest (Repl.) 726, *6938*.

(7) *Harriman* v. *Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 25 T.L.R. 291; 53 Sol. Jo. 265, C.A.; 27 Digest (Repl.) 363, *3005*.

(8) *Hyman* v. *Hyman*, [1929] P. 1; 139 L.T. 416; 44 T.L.R. 664; 72 Sol. Jo. 435; 26 L.G.R. 471; 66 L. Jo. 10; *affirmed*, [1929] A.C. 601; 98 L.J.P. 81; 141 L.T. 329; 93 J.P. 209; 45 T.L.R. 444; 73 Sol. Jo. 317; 27 L.G.R. 379; 27 Digest (Repl.) 235, *1888*.

(9) *Broadbent* v. *Broadbent* (1927), 43 T.L.R. 186, D.C.; 27 Digest (Repl.) 724, *6924*.

(10) *Lindsay* v. *Lindsay*, [1934] P. 162; 103 L.J.P. 100; 151 L.T. 283; *sub nom.* *L.* v. *L.*, 50 T.L.R. 441; 78 Sol. Jo. 472; 27 Digest (Repl.) 614, *5746*.

Appeal by the wife from the decision of the Wealdstone (Middlesex) magistrates discharging a maintenance order made in her favour on July 20, 1931.

The parties were married in 1928 and there were two children. In July, 1931, the wife was granted by the magistrates at Wealdstone a maintenance order on the ground of her husband's wilful neglect to provide her with reasonable maintenance, he being ordered to pay her 30s. a week and 10s. a week for each of the two children, the custody of whom was granted to her. On Jan. 18, 1935, the husband issued a complaint under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, for the discharge of the order on the ground of the wife's adultery. A week later the wife signed a petition for the dissolution of the marriage on the ground of her husband's alleged adultery with a named woman. There was no admission of adultery on her part by way of a plea for the exercise of the discretion, and that petition, which was filed on Feb. 26, remained pending. On March 5, 1935, the husband's plaint, which had been adjourned on Jan. 29, was heard. The wife denied adultery, and on her behalf the jurisdiction of the magistrates was challenged in view of the pending divorce suit. After hearing the evidence the magistrates found the adultery of the wife proved and discharged the maintenance order. On the next day the wife's petition was served on the husband. The wife appealed from the magistrates' decision and asked the Divisional Court either to set it aside or to remit the case to the justices for a re-hearing on the grounds: (i) that the justices had no jurisdiction and (ii) that they were wrong on the facts and in law in discharging the order.

S. 6 of the Summary Jurisdiction (Married Women) Act, 1895, provides that:

> "No orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery: Providing that there has been no condonation, connivance, or conduct conducing on the part of the husband."

S. 7 of the Summary Jurisdiction (Married Women) Act, 1895, empowers magistrates to alter, vary, or discharge a maintenance order on cause being shown on fresh evidence, and provides as follows:

> ". . . If any married woman upon whose application an order shall have been made under this Act . . . shall commit an act of adultery, such order shall upon proof thereof be discharged."

Under s. 2 (1) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, magistrates may refuse to discharge an order if such adultery was conduced to by the failure of the husband to make such payments as in the opinion of the court he was able to make under the order.

S. 10 of the same Act provides:

> "If in the opinion of a court of summary jurisdiction the matters in question between the parties or any of them would be more conveniently dealt with by the High Court, the court of summary jurisdiction may refuse to make an order under this Act, and in such case no appeal shall lie from the decision of the court of summary jurisdiction: Provided always, that the High Court or a judge thereof shall have power by order in any proceeding in the High Court relating to or comprising the same subject matter as the application so refused as aforesaid, or any part thereof, to direct the court of summary jurisdiction to rehear and determine the same."

I. H. Jacob (*C. W. Measor* with him) for the wife.
C. R. N. Winn (*P. B. Morle* with him) for the husband.

Cur. adv. vult.

June 7. **SIR BOYD MERRIMAN, P.**—At the hearing before the magistrates the solicitor for the wife took the point that the court had no jurisdiction to hear and determine the case, or to make the order asked for, and he cited in support of this proposition *R.* v. *Middlesex Justices, Ex parte Bond* (1) and *Higgs* v. *Higgs* (2). The court ruled that they had jurisdiction to hear the case, heard the evidence as to the wife's adultery at length, found that it was proved, and discharged the order of July, 1931, accordingly. The wife then appealed to this court to set aside the order of March, 1935, on the ground that the magistrates had no jurisdiction to make the order, or, alternatively, that the decision was wrong on the facts. As regards the latter ground, I propose to say no more than that, as at present advised, I am not prepared to accept this contention. Having regard to the view which I take on the question of jurisdiction, it would be most undesirable that this court should express any opinion on the evidence. At the same time the point with regard to the jurisdiction of the magistrates appears with full force if it is assumed as an hypothesis, but for the purposes of the argument only, that their decision would not be reversed on the evidence heard by them and submitted to this court.

The question, stated broadly, is whether magistrates have jurisdiction to decide the issue of a wife's alleged adultery at a time when there is pending in this court a suit between the spouses in which that very issue must necessarily be decided. It is true that in the divorce suit in this case the wife is the petitioner, and that she has not shown in her petition that she is invoking the discretion of the court on the ground of her own adultery. It is also the fact that the husband had not at the time of the hearing before the magistrates (and so far as I am aware has not yet) filed his answer. He is not obliged to recriminate with a counter-charge of adultery (*L.* v. *L.* (3)) and possibly may elect not to do so. It would, of course, have been possible for us to adjourn the hearing of the appeal until it was known whether the husband had counter-charged adultery in his answer. But counsel agree that it is inevitable that, in one form or another, having regard to the evidence tendered before the magistrates, the question of the wife's adultery will be put in issue, and that the fact that at the material date no counter-charge by the husband had actually been made is immaterial. The issue in the present case may be, therefore, stated as follows: Whether, where there is a charge of adultery made in a court of summary jurisdiction and at the same time this court is seised, either directly or by necessary implication, of that issue, magistrates have or have not jurisdiction to decide the issue so long as the suit in which that issue is raised is pending in this court. To put the matter beyond doubt we direct that, if the issue is raised in no other way, the record of the proceedings before the magistrates shall be submitted to the King's Proctor so that the facts may be investigated on his intervention. In these circumstances I am satisfied that this appeal really does raise in an acute, though not in the simplest, form the question as to the proper course to be followed where there is a conflict of jurisdiction in a matrimonial dispute between a court of summary jurisdiction and this court, and that it is unnecessary to adjourn the appeal to await the closing of the pleadings in the suit.

It might be sufficient to say that I consider that we are bound by *Higgs* v. *Higgs* (2), in which this court, following the decision of a Divisional Court of the King's Bench Division in *R.* v. *Middlesex Justices*, *Ex parte Bond* (1), held that during the pendency of a petition for divorce in the High Court no order for maintenance should be made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, by a court of summary jurisdiction. I think, however, that it would be better that we should consider the question anew, for two reasons. First, because, as a matter of history, the decision in *Higgs* v. *Higgs* (2) was given without this court being made aware that the decision of the King's Bench Divisional Court, which we followed, had been the subject of an appeal, and that the Court of Appeal, while upholding the decision of the Divisional Court on another ground, expressly declined ([1933] 2 K.B. 1) to decide the point which we were then considering. Secondly, counsel submits that the decisions in *Higgs* v. *Higgs* (2) and *R.* v. *Middlesex Justices*, *Ex parte Bond* (1), even if correct, are distinguishable. The ground on which he distinguishes these cases is that in both the subject-matter with which the magistrates had dealt was identical, in respect both of the facts involved and of the relief sought (in the one case custody and the other maintenance) with that of which this court was seised, whereas in this case, while he admits that the issue of adultery may be identical, though the periods covered by the allegation need not necessarily be coterminous, he submits that the relief resulting from the determination of that issue, here and before the magistrates, is entirely different. The Divorce Court, he argues (rightly, as I think), has no jurisdiction to set aside the order for maintenance: magistrates alone have that power under the Act of 1895. In the Divorce Court, on the other hand, the finding of adultery on the part of the wife may or may not lead to a decree for dissolution of the marriage, and with that the magistrates have no concern.

I appreciate the force of that argument, and I do not ignore the difficulties which may arise from holding that the hand of the magistrates must be stayed until this court has decided the issue of adultery. For example, as counsel for the respondent points out, even if it is assumed that, so far as amount is concerned, the magistrates' order is reasonable at the time when the petition in this court is filed, and although the wife would be entitled to alimony pendente lite, it may well be that in certain cases the amount of the alimony would be less than the amount awarded by the magistrates; and as the husband cannot, though the wife can, take steps to substitute an order for alimony for a subsisting order for maintenance, there would be no opportunity of seeking to reduce the amount of the magistrates' order if the husband's position changed for the worse during the pendency of the suit.

He argued further that different methods of enforcing the respective orders prevail, and that, whereas proof of means is necessary before an order for alimony can be enforced by committal, magistrates can commit without proof of means. It may be that as a matter of law—see *R.* v. *Richardson* (4)—formal proof of means is not a condition precedent to the making of a committal order; but I do not think that I ought to assume that magistrates would be prepared, in practice, to commit a man to prison for non-payment of a maintenance order if it were brought to their knowledge that he had not the means to pay. It is true also that the opportunities of appealing from a committal order differ in the two cases: (*Ruther* v. *Ruther* (5)).

A further complication might arise, though it could not very well arise in this case having regard to the evidence brought before the magistrates, if it were left in doubt, after the issue of adultery had been decided in the Divorce Court, whether the adultery found included adultery subsequent to the making of the magistrates' order. I do not think, however, that this affects the substance of the matter; for, if it is clear that adultery subsequent to the order is found by the Divorce Court, that would be conclusive evidence in support of the claim that the order should be discharged (*Pratt* v. *Pratt* (6)), whereas, if the only adultery found were antecedent to the order, it would be a ground for reversing the order itself under s. 6 of the Act of 1895, if necessary, by an extension of the time for appealing. It is right, however, to notice in passing that, by the terms of s. 6, adultery before the date of the order would not be a bar to the making of an order if the husband had condoned or connived at, or by his wilful neglect or misconduct conduced to such adultery. It would, however, by virtue of s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, be the duty of the judge trying the suit to consider these very matters, among others. By reason of the amendment to s. 7 of the Act of 1895 by s. 2 (i) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the right to refuse to discharge the order if adultery is proved is limited to one instance only of conduct conducing, namely, where the adultery was conduced to by the failure of the husband to make such payments as in the opinion of the court he was able to make under the order. Here again, however, if in any particular case the conduct of the husband were in question that limited issue would incidentally be decided by the judge trying the suit. I have mentioned these points, which may not be exhaustive, to show that I do not fail to recognise that there are undoubtedly practical difficulties in applying the rule laid down in *R.* v. *Middlesex Justices, Ex parte Bond* (1) and *Higgs* v. *Higgs* (2).

On the other hand, the issue of adultery is the most important issue which can be decided as between spouses. With certain exceptions to which it is unnecessary to refer, it is the essential basis of a petition for dissolution of marriage. If it is undesirable that a court of summary jurisdiction should decide ancillary matters such as questions of custody or maintenance when there is a suit pending in the Divorce Court in which such questions may be raised (see the cases last cited), it is manifest that it is still less desirable that the most important issue of all should be decided in a court of summary jurisdiction at a time when it is pending in this court. The undesirability is seen to be the greater if, while a suit is pending, a Divisional Court of this Division is obliged to decide on appeal from magistrates whether their decision is right without the advantage, which the judge trying the suit itself would have, of seeing the witnesses. It is quite true—see *Harriman* v. *Harriman* (7), per Cozens Hardy, M.R., and Fletcher Moulton, L.J.—that no estoppel binds this court, as distinct from the parties, on the issue of adultery.

In *Hyman* v. *Hyman* (8) the present Master of the Rolls adopted and emphasised this expression of the rule. It is not necessary to decide whether a judgment of the Divisional Court upholding a finding of adultery by the magistrates is conclusive against the world, as a decision of a judge of this Division would be, but a decision of the magistrates would not be (see *Pratt* v. *Pratt* (6); *Broadbent* v. *Broadbent* (9)), but it is at least clear from Order LIX, r. 7, of the Rules of the Supreme Court, which provides:

> "On any motion by way of appeal from an inferior court, the court to which any such appeal may be brought shall have power to draw all inferences of fact which might have been drawn in the court below, and to give any judgment and make any order which ought to have been made. . . ."

that a decision by way of appeal on the merits would be a decision of this court that adultery had been committed, and, although it might not bind the judge who tried the suit, the judgment of FLETCHER MOULTON, L.J., to which I have just referred, shows that at the very least it would have the highest evidential value, and would of itself entitle the court, if it were satisfied that no additional evidence was required, to find the fact proved. I confess that I was unable, in view of the decision in *Harriman* v. *Harriman* (7), to understand that part of the argument of counsel for the respondent in which he urged that it would not even be permissible to refer at the trial to the judgment of this court.

It seems to me to be in the highest degree undesirable that when a judge of this Division comes to try the cardinal issue of adultery he should be confronted with the judgment of a Divisional Court holding that the fact had already been established before a court of summary jurisdiction at the very time when the same issue was actually pending in this court. The inconveniences which may arise in any given case if the decision of the magistrates is postponed until the issue has been decided in this court seem to me, by comparison, to be quite inconsiderable. It must be conceded that if a decision of the magistrates were affirmed on appeal at a time when no suit was pending the situation to which I have referred might result. But in those circumstances the magistrates alone would have jurisdiction at the material time, and there would be no ground whatever for interfering with their jurisdiction under the statute. In a case like the present, however, the court already has seisin of the cardinal issue of adultery, and ought, unless the statute impels the opposite conclusion, to be able to try that issue on the evidence of the witnesses, unembarrassed by the fact that a Divisional Court has accepted, or rejected, on evidence necessarily viewed at second hand, a decision of the magistrates given at a time when the very issue was pending in this court. It might very well be that, on seeing the demeanour of the witnesses, the judge trying the suit would come to a conclusion different from that arrived at by the magistrates and affirmed by this court on the notes of the evidence recorded by the magistrates' clerk. Though such a result might be justifiable as a matter of logic, it would obviously be most unfortunate, and might very well be characterised in the robust words of AVORY, J., in *R.* v. *Middlesex Justices* (1), on which we based our decision in *Higgs* v. *Higgs* (2). On further consideration, therefore, I am not prepared to depart from the decision of this court in *Higgs* v. *Higgs*. Though I recognise the distinction to which counsel for the respondent has called attention, I think that, whatever may be the ultimate relief sought, the substance of the matter is that, when the issue of the adultery of the wife is pending in both courts, it should be decided exclusively by this court.

It was contended, however, in further illustration of the anomalies which might result from a decision to this effect, that the husband might still be liable between the decree nisi and decree absolute to pay under the magistrates' order, notwithstanding the finding of adultery. I do not think that this is so. It must be plainly understood that the jurisdiction of this court is regarded as exclusive only when substantially the same issue is raised in both courts. Similarly, when that issue, whatever it may be, has been decided by this court, there is no further ground for staying the hand of the magistrates, assuming that the decision of this court leaves any issue for decision by them. In *Lindsay* v. *Lindsay* (10) I have already decided incidentally, on a consideration of the forms of the decree nisi and the decree absolute respectively, that the decree nisi contains the substantive finding of fact. In that instance it was a finding as to the paternity of a child of the marriage. I think that the same applies to the finding of adultery, notwithstanding that cause may be shown against the granting of the relief prayed on the ground that the court was deceived as to the facts, or for some other reason. In my opinion, the moment the decree nisi has been pronounced on a finding that a wife has been guilty of adultery, it is at once open to the magistrates to apply that finding on any application, whether already subsisting, or newly made, for the discharge of their original order, and to do so without further evidence than is required to show that the adultery found is subsequent to their order: see *Pratt* v. *Pratt* (6). If that finding were finally reversed, a fresh order could be made by the magistrates in the wife's favour, while, if a new trial were ordered, she could get alimony pendente lite.

One other point must be noticed. It was argued that the Summary Jurisdiction (Married Women) Act, 1895, by s. 10, provided a means of escaping the undesirable consequences to which I have alluded. The same point arose under the Guardianship of Infants Act, 1925, and was considered by the Court of Appeal in *R.* v. *Middlesex Justices, Ex parte Bond* (1). SCRUTTON, L.J., without deciding the matter, does appear to have inclined to this view. SLESSER, L.J., however, again without deciding the matter, plainly indicates that he considers that the section supports the view that the jurisdiction of the Divorce Court is exclusive. In considering the application of s. 10 it is clear that, if the words "the matters in question between the parties" refer to the relief sought, namely, the discharge of the order, that matter could not possibly be referred to the High Court, since it is conceded that the magistrates alone have jurisdiction to make that order. In this view the section would have no application. If, on the other hand, the words quoted refer to the decision of the issue of fact, I respectfully agree with SLESSER, L.J., that it would be inapt for the legislature to give to a court of summary jurisdiction the right to decide whether or not it was more convenient that an issue of which the High Court was already seised should be decided by the High Court. I think that the existence of that section supports the view which I have expressed. If, on the other hand, the presence of that section in the Act tends the other way, it is unfortunate that in this case, as I think, it is not possible to deal with the matter under the section. If the jurisdiction of the magistrates and of this court is concurrent I am bound to say that I should feel that a decision of the magistrates that it was more convenient that they should try the issue of adultery than that this court should do so would be open to challenge on appeal. But I also think that it would be a condition precedent to any attempt to upset their decision that the justices themselves should have been invited to act under s. 10 and should have declined to do so. In this case it is admitted that they were not invited to do so, and I should not be prepared, therefore, to deal with the point in the absence of a decision by them.

In my opinion, the finding of the magistrates should be set aside on the ground that they should not have proceeded to a determination of the matter after their attention had been called to the conflict of jurisdiction and to the authorities, and that the matter should be remitted to them for re-hearing, but that such hearing should be stayed until the determination of the issue of the wife's adultery by this court. This will keep the complaint alive. I need scarcely add that if in this, or in any other case in which this question arises, this court were satisfied that the suit was not being duly prosecuted, but was merely being used for the purpose of prolonging the payments under the order, the court would have ample power to deal with the matter in such a way that the magistrates would regain jurisdiction.

BUCKNILL, J.—The question for decision is whether the magistrates had jurisdiction to hear the application of the husband that an order made against him under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, to pay his wife 30s. a week and 10s. a week for each of the two children of the marriage should be discharged on the ground that his wife had committed adultery since the making of the order. The objection to the jurisdiction is based on the fact that before the magistrates heard the application of the husband his wife filed a petition in the High Court for divorce on the ground of her husband's adultery.

In my opinion, the reasoning of the decision of this court in *Higgs* v. *Higgs* (2) applies to this case. In that case a husband left his wife, who then took out a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, for a weekly payment to her on the ground of the husband's neglect to maintain her. Before the hearing of the summons the husband filed a petition for divorce. Before the petition for divorce was heard and determined the magistrates made an order for a weekly payment to the wife. The husband then appealed to the High Court and succeeded on the ground that the magistrates had no jurisdiction to make the order because the petition for divorce was pending in the High Court. As I understand it, the decision of the Divisional Court was based on the principle that the legislature could not have intended to give concurrent jurisdiction to the magistrates over a matter which was already pending in a suit in the High Court, with the possible result that the magistrates might make one order and the High Court might make an exactly opposite order in the same matter.

It appears to me that s. 10 of the Summary Jurisdiction (Married Women) Act, 1895, has an important bearing on the question before the court in this case. I do not think that the words "matters in question" in s. 10 refer to the issue of adultery by a wife, which may be raised under the Act, if at the time when it falls to be determined by the magistrates the same issue has been raised in divorce proceedings in the High Court. The legal result of proof of the adultery of a wife is so different in divorce proceedings in the High Court to the legal result of her adultery under s. 6 or s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, that it seems to me to be impossible to suppose that the legislature would empower the magistrates to decide whether the question of the wife's adultery in such a case "would be more conveniently dealt with" by the High Court or by the magistrates.

I also doubt whether "the order" which the magistrates may refuse to make under s. 10 was intended to apply to an order for discharge of a previous order on the ground of the wife's adultery. The concluding words of s. 7 are peremptory. The "order shall upon proof thereof (*i.e.*, adultery of wife) be discharged." S. 10, on the other hand, enables the magistrates to refuse to make the order. Now, if s. 10 of the Act does not apply to a case where the issue of the wife's adultery is already pending in the High Court at the time when the husband seeks to obtain from the magistrates the discharge of an order for maintenance on the ground of her adultery, the position is that the magistrates have no power of exercising a discretion whether they shall decide that issue or leave the issue to be dealt with by the High Court, and are bound to hear and determine the issue as to the wife's adultery although the High Court may decide the exact opposite the next day. This seems to me to be such an unreasonable result that I think that the legislature cannot have intended it and therefore I think that the Summary Jurisdiction (Married Women) Act, 1895, must be so interpreted as to exclude the jurisdiction of the magistrates to hear and determine the issue of the wife's adultery when that issue is pending in divorce proceedings in the High Court.

I agree with the learned President's judgment that in this case the issue as to the wife's adultery must be raised during the course of the proceedings, either by the husband or at the instigation of the King's Proctor, and that the issue is therefore pending in divorce proceedings in the High Court. For these reasons this appeal, in my opinion, should be allowed.

Case remitted.

Solicitors: *Edgar H. Hiscocks*; *Pierron & Morley.*

[*Reported by* W. Latey, Esq., *Barrister-at-Law.*]

PENMAN *v.* FIFE COAL CO. LTD.

[House of Lords (Lord Tomlin, Lord Thankerton, Lord Macmillan, Lord Wright and Lord Alness), May 17, 20, June 21, 1935]

[Reported [1936] A.C. 45; 104 L.J.P.C. 74; 153 L.T. 261; 51 T.L.R. 494; 79 Sol. Jo. 478]

Master and Servant—Truck Acts—Deductions from wages—Discharge of debt due to employers by third person—Truck Act, 1831 (1 *&* 2 *Will.* 4, *c.* 37), *s.* 3, *s.* 4.

The appellant was a minor, and was employed as an oncost colliery worker by the respondents, who had deducted from his earnings the rent payable to them by his father, as occupier of a dwelling-house belonging to them, together with a proportional sum in name of rates. During the material time the father, who had been in the respondents' employ, was unemployed, but notwithstanding this fact he was allowed to remain in occupation of the house. The appellant, who lived in the house with his father, had assented to these deductions, and in consideration of this the respondents took no steps towards evicting the appellant and his father, and they, moreover, continued to supply them with coal at a special cheap rate. In an action brought by the appellant against the respondents for payment of the deductions, as being illegal, null, and void under s. 3 of the Truck Act, 1831,

Held: the retention by the respondents of part of the appellant's wages and its application in discharge of the liability to themselves of the appellant's father resulted in the payments which were made to the appellant not being "in the current coin of this realm" within s. 3, and, therefore, as being "illegal, null and void" under that section.

Per **Lord Macmillan:** There is all the difference in the world between the case where the workman directs his employers to pay part of his wages to a third party and that where the workman assents to his employers retaining part of his wages for their own behoof, whether in discharge of a debt due to them by the workman himself or in discharge of a debt due to them by some third party.

Per **Lord Alness:** Retention of wages due by employers to a workman cannot equiparate payment to him, although payment to a third party, with his consent, may be payment in the sense of the statute.

Hewlett v. *Allen & Sons* (1), [1892] 2 Q.B. 662, distinguished.

Held, further: the deductions being "illegal, null and void," the appellant, by acquiescing in them, could not give them validity, and, therefore, the respondents could not plead them in bar of the claim of the appellant who was entitled to recover under s. 4 of the Act.

Notes. Considered: *Kenyon* v. *Derwen*, [1936] 1 All E.R. 310.

As to payment of wages in full, see 17 Halsbury's Laws (3rd Edn.) 138 et seq., and for cases, see 24 Digest 937 et seq. For Truck Act, 1831, see 9 Halsbury's Statutes (2nd Edn.) 11.

Cases referred to:

(1) *Hewlett* v. *Allen & Sons*, [1892] 2 Q.B. 662; 66 L.J.Q.B. 9; 67 L.T. 457; 57 J.P. 260; 41 W.R. 197; 8 T.L.R. 793; 36 Sol. Jo. 730; 4 R. 77, C.A.; 21 Digest 342, *1311*.

(2) *Williams* v. *North's Navigation Collieries (1889), Ltd.*, [1906] A.C. 136; 75 L.J.K.B. 334; 94 L.T. 447; 70 J.P. 217; 54 W.R. 485; 22 T.L.R. 372; 50 Sol. Jo. 343, H.L.; 24 Digest 938, *263*.

Appeal from the Second Division of the Court of Session in Scotland, reported 1934 S.C. 254.

Between June, 1931, and January, 1933, the appellant, Alexander Penman, of 8 Beaumont-street, Low Valleyfield, Newmills, Fife, who was at all material times a minor, was in the employment of the respondents, Fife Coal Company, Ltd., as an oncost worker in their collieries. During the period in question the respondents deducted from the weekly wages earned by the appellant the rent payable to them by the appellant's father as occupier of a house belonging to the respondents, and a proportional sum in name of rates. The appellant's father had formerly been in the employment of the respondents, but had ceased to be so before the material period, during the whole of which he was unemployed. While he was in the respondent's employment he occupied one of the houses provided by them for their workmen, and after he ceased to be in their employment he was allowed to continue to occupy it. The sums deducted by the respondents from the appellant's wages for rent in respect of his father's occupancy of the house were retained by the respondents in payment of the father's rent. It was expressly found by the sheriff-substitute that the appellant assented to the deductions so made from the wages earned by him and to the "application of said deductions for said purpose." It was further found that in respect of the appellant's "assent to said deductions and application of wages," the respondents refrained from taking proceedings for the eviction of his father and himself from the respondents' house, and also supplied house coal to the appellant "at the special cheap rate granted by them to workmen in their employment who were paying rents under contracts of let." The appellant thereafter brought an action against the company for payment of the sums so deducted from his wages, and founded on the provisions of the Truck Act.

In the Second Division it was held (the Lord Justice Clerk dissenting) that while the company had not in terms of the Truck Act, 1831, paid to the appellant his whole wages in current coin of the realm, nevertheless the deductions in question were not illegal, in respect that they had been made under an arrangement between the parties of the nature of a gratuitous mandate, revocable at any time, whereby part of the appellant's wages was allocated in payment of rent due by his father.

R. Gibson, K.C., and *T. J. D. Connolly* (both of the Scottish Bar) and *Michael Marcus* (of the English Bar) appeared for the appellant.

T. Graham Robertson, K.C., and *John Cameron* (both of the Scottish Bar) and *A. M. Wallace* (of the English Bar) for the respondents.

The House took time for consideration.

June 21. **LORD THANKERTON.**—My Lords, I have had the privilege of reading the opinion which is about to be delivered by my noble and learned friend, LORD MACMILLAN, in which I entirely concur.

LORD MACMILLAN.—My Lords, I am authorised by my noble and learned friend, **Lord Tomlin**, who is unable to be present, to say that he concurs in the opinion which I am about to read.

The questions affecting the scope and effect of the Truck Act, 1831, which are raised in this appeal have given rise to considerable divergencies of opinion in the course of the progress of the case through three courts in Scotland to this House.

The facts are set out in the interlocutor of the Second Division of the Court of Session now under appeal. The cause having originated in the Sheriff Court, the judgment of the Court of Session, in so far as it relates to the facts, has "the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor." It is only in so far as the judgment "depends on or is affected by matter of law" that it is open to review in your Lordships' House (The Court of Sessions Act, 1825).

It appears that between June, 1931, and January, 1933, the appellant, who was then and is still in minority, was in the employment of the respondents as an oncost worker in their collieries. During the period in question the respondents deducted from the weekly wages earned by the appellant the rent payable to them by the appellant's father as occupier of a house belonging to the respondents and a proportional sum in name of rates. The appellant's father had formerly been in the employment of the respondents but had ceased to be so before the material period, during the whole of which he was unemployed. While he was in the respondents' employment he occupied one of the houses provided by them for their workmen and after he ceased to be in their employment he was allowed to continue to occupy it. The sums deducted by the respondents from the appellant's wages for rent in respect of his father's occupancy of the house were retained by the respondents in payment of the father's rent. It is expressly found that the appellant "assented to the deductions so made from the wages earned by him and to application of said deductions for said purpose." It is further found that in respect of the appellant's "assent to said deductions and application of wages" the respondents refrained from taking proceedings for the eviction of his father and himself from the respondents' house and also supplied house coal to the appellant "at the special cheap rate granted by them to workmen in their employment who were paying rents under contracts of let."

The action is a simple petitory action for a sum of money representing the deductions which were made from the appellant's wages and which are now agreed to amount to £37 2s. 11d. The sum is sued for as representing the "balance of his wages" on the plea that the deductions in question were "illegal under the Truck Act." The sheriff-substitute held that the deductions were illegal, null and void and that the appellant was entitled to recover the amount thereof as wages earned but unpaid. The sheriff on appeal, while agreeing with the sheriff-substitute that the deductions were illegal, nevertheless found in law that the appellant was "barred by acquiescence and mora from recovering the sum sued for." In the Court of Session the Second Division found in law that "the deductions made from the [appellant's] wages and the application thereof and any arrangement or contract relating to said deductions or their application were not illegal, null and void under the Truck Acts" and accordingly assoilzied the respondents. The Lord Justice Clerk (Aitchison) dissented, holding that the deductions were struck at by the statute and that the appellant was not barred from recovering the amount thereof.

There are two questions to be decided: First, whether the deductions made from the appellant's wages were in contravention of the statute; second, if so, whether the appellant is barred from recovering them.

(i) On the first question the words of s. 3 of the Truck Act, 1831, are clear. "The entire amount of the wages earned by or payable to any artificer" to whom the Act applies "in respect of any labour by him shall be actually paid to such artificer in current coin of this realm." I underline the emphatic words "entire amount" and "actually paid to such artificer." As Lord Bowen, when Lord Justice, said in *Hewlett* v. *Allen & Sons* (1) ([1892] 2 Q.B. at p. 666):

> "The statute insists (in all but the excepted cases) on actual payment in coin. Payment in account will not do. Payment in goods will not do. Nothing is to discharge the wages debt except actual payment in current coin."

In the present case the appellant is an artificer to whom the Act applies and the deductions challenged do not fall within any of the permissible exceptions set out in s. 33. On the facts as found nothing can be more certain than that the entire amount of the wages earned by the appellant was not actually paid to him in current coin. A part of the wages earned by him was not paid to him at all, in current coin or otherwise; it was deducted by the respondents from the sum actually paid to him and applied by them in discharge of the rent due to them by the appellant's father. So far as the deductions are concerned there was no payment in current coin or at all. No coin passed from one hand to another. On this part of the case it seems to me quite immaterial that the deductions were assented to by the appellant. The statute is none the less contravened by reason of the fact that the appellant has assented to the contravention. Were it otherwise what Lord Bowen described as the "tutelary shelter" of the statute would afford but a sorry protection.

From this apparently unanswerable reasoning the respondents seek to extricate themselves by invoking the interpretation which they represent as having been placed upon the language of the statute by this House in *Hewlett* v. *Allen* (1). In that case the workwoman on entering her employment signed an agreement undertaking to conform to the rules of her employers' works, one of which rules required all employees to become members of a sickness and accident club. The rules of this benefit club in turn required its members to contribute a weekly subscription to its funds. The employers when paying the workwoman her wages deducted every week her subscription to the club and paid it over to the club treasurer who banked it. The workwoman after leaving the employment of the firm sued them for the amount of the deductions so made from her wages. It was held in the Court of Appeal that the deductions were in contravention of the statute, but in this House it was held that there had been no contravention.

The following quotations will show the process of reasoning by which this result was reached. Lord Herschell, L.C., said ([1894] A.C. at p. 389):

> "I can myself entertain no doubt that a payment made by an employer at the instance of a person employed to discharge some obligation of the person employed, or to place the money in the hands of some person in whose hands the person employed desires it to be placed, is in the sense and meaning of those sections a payment to the person employed as much as if the current coin of the realm had been placed in his or her hands."

And again ([1894] A.C. at p. 392):

> "The question, then, is whether, in the present case, it is established that the total wages of the plaintiff have been paid, either by handing them to her in the current coin of the realm or by making on her behalf payments which she has authorised. I cannot doubt that, on the true view of the circumstances of this case, it has been established that the employer has thus discharged himself, and unless there are provisions in the Truck Act which prevent the inferences being drawn which otherwise would be drawn, the conclusion is absolutely irresistible."

His Lordship found no such provisions in the statute. Lord Watson thought ([1894] A.C. at p. 394) that the House should:

> "hold that the contributions advanced by the respondent firm, on behalf of the appellant, were substantially equivalent to payments made by them to the appellant herself, in current coin within the meaning of the Act."

Lord Shand said ([1894] A.C. at p. 398):

> "I think that a payment made presumably, as and when wages have become due, at the request or on the mandate of one of the persons employed, to meet an obligation or for a purpose which he or she desires to fulfil is a payment which is not invalid as being struck at by the requirements of the statute."

I have made these full quotations in order to exhibit quite clearly the principle upon which their Lordships proceeded, namely, that a debtor discharges his debt to his creditor when he pays the creditor's creditor on his creditor's instructions. I cannot refrain from observing that the statutory requirement that there shall be not only payment but payment in current coin seems to have been held satisfied without any evidence of current coin having actually passed between the employers and the club treasurer, but, be that as it may, the decision must of course be accepted as binding in all cases where the facts are the same.

The facts, however, in the case now under your Lordships' consideration are not the same and the difference goes to the root of the matter. Here there was no payment at all, whether in current coin or otherwise, by the respondents to anyone. The respondents simply retained part of what they were bound to pay, and applied what they retained in discharge of the liability of the appellant's father. No doubt it may be said in popular parlance that they paid themselves. But I cannot think

BIBL. LONDIN UNIV.

that this was payment in current coin to the workman within the meaning of the statute. I adopt the words of BOWEN, L.J., in *Hewlett's* case (1) where he said ([1892] 2 Q.B. at p. 666): A

> "The employer cannot for the purpose of compliance with the statute be both payer and payee. To hold otherwise would be to make the statute idle."

B Nothing that was said in this House detracted from the soundness of this view, which was subsequently referred to with approval by LORD DAVEY in *Williams* v. *North's Navigation Collieries, Ltd.* (2) ([1906] A.C. at p. 142). In *Hewlett's* case the payment which was upheld was payment by the employers to a third party. The employers themselves derived no personal benefit. In the present case the retention was for the employers' own benefit and it is a cardinal object of the Truck Act to prevent the employer from making deductions from his workmen's wages in C his own interest. LORD HUNTER in the Court of Session (1934 S.C. at p. 261) sought to surmount this difficulty by regarding the arrangement in the present case as:

> "amounting to a mandate by the pursuer to the defenders to allocate part of his wages in payment of the rent due by his father. . . . In reality what was D done was a voluntary employment by the pursuer of his wages, or part of his wages. If the pursuer had authorised his father to receive his wages or part thereof, and if his father, on receiving the wages, had paid the defenders, apparently the case would have come within the situation figured by LORD HERSCHELL. The mere fact that this procedure was not followed is, in my opinion, an insufficient reason for holding the arrangement illegal." E

I cannot approve this reasoning, which seems to me to afford an excellent illustration of the danger which attends the process, once it is started, of accepting equivalents for the plain requirements of the statute. There is, in my opinion, all the difference in the world between the case where the workman directs his employers to pay part of his wages to a third party and the case where the workman assents to his employers retaining part of his wages for their own behoof, whether F in discharge of a debt due to them by the workman himself or in discharge of a debt due to them by some third party. In *Williams* v. *North's Navigation Collieries, Ltd.* (2) it was held that employers, when paying their employee's wages, could not, without contravening the Act, set off a judgment debt due by their employee to them. No more, in my view, could they legally have set off a debt due to them by a third party. In *Williams's* case the employee objected to G the set off but the contravention would have been committed equally if he had assented.

I accordingly reach the conclusion that the deductions which, in the present case the respondents made from the appellant's wages, were in contravention of the statute and cannot be justified by anything that was decided in *Hewlett* v. *Allen* (1).

(ii) The question next arises whether the appellant can recover the amount of H the deductions. He invokes s. 4 of the Act of 1831, which, as amended, provides that:

> "every artificer shall be entitled to recover from his employer . . . the whole or so much of the wages earned by such artificer as shall not have been actually paid to him by such his employer in the current coin of this realm" I

Here again the statute seems sufficiently clear in its terms, but again it is said that authority provides the respondents with a means of escape.

In considering this question it must be borne in mind that under s. 3 the deductions which I have found to be in contravention of the Act are to be treated as "illegal, null and void," and that under s. 9 the respondents by making these deductions incurred the statutory penalties. Nevertheless, it is said that in a civil action for recovery of the amount of the deductions the respondents can successfully plead the appellant's assent to the deductions as operating to bar his claim. There are certainly unmistakable indications of judicial opinion that when the parties come into a civil court the employers may put forward, in answer to a claim for recovery of illegal deductions, defences which would afford no answer to a charge of contravention of the statute. In *Hewlett's* case (1) in the Court of Appeal this was clearly the opinion of BOWEN, L.J. That eminent judge took the view that because s. 5 expressly precluded the employer from pleading certain specific heads of set-off in answer to a suit for recovery of wages illegally deducted the inference was that other heads of set-off might legitimately be pleaded. He says ([1892] 2 Q.B. at p. 668):

> "Beyond these lines [*i.e.*, the specifically forbidden set-offs] . . . all legal and equitable defences other than payment, are still left open in any civil action to the employer,"

and he and his colleagues accordingly held it a good defence "in the nature of a set-off or counterclaim" that the sum deducted had been paid over professedly on the plaintiff's behalf

> "to the treasurer of the benefit club and that the plaintiff had subsequently ratified and assented to such payment and expenditure" (p. 672).

This, as I have already shown, was not adopted as the ground of judgment in your Lordships' House, where it was held that there had been no contravention of the Act. But in *Williams's* case (2) there are also indications of opinion by LORD DAVEY ([1906] A.C. at p. 142) and LORD ATKINSON ([1906] A.C. at p. 146), that deductions which the employer cannot legally make at his own hand when paying wages may nevertheless in some cases be admissible by way of set-off when the employee seeks to recover the deductions by civil process. I may point out that in *Williams's* case the action was one, not for recovery of the deductions, but for a declaration of their illegality and the observations of the noble and learned Lords to which I have referred were therefore obiter. I do not, however, presume, nor do I find it necessary, to express an opinion whether they were well founded. Assuming that they were, I do not find that they assist the respondents here. The respondents are not pleading set-off in answer to the appellant's claim. They are pleading personal bar founded on acquiescence or assent.

In my opinion, the respondents cannot avail themselves of this plea. Under the statute the deductions were illegal, null and void. I cannot see how a party, by acquiescing in a nullity, can give it validity for purposes of defence. A nullity cannot be ratified, for there is nothing to ratify. The appellant's assent to the deductions is, in my opinion, of no more avail to the respondents in these civil proceedings than it would have been in a prosecution for penalties. The respondents have committed an illegality in withholding part of the appellant's wages. I do not think that when the appellant now seeks to recover what has been illegally withheld from him the respondents can effectively plead his assent to the illegality.

I accordingly move your Lordships to allow this appeal, to recall the findings in law of the Second Division of the Court of Session and of the Sheriff and to restore the findings in law of the Sheriff-Substitute.

LORD WRIGHT.—I am so fully in agreement with the reasoning and conclusions expressed in the speech of my noble and learned friend LORD MACMILLAN, that I should not add anything were it not that we were taking a different view from that taken by the majority of their Lordships of the Second Division.

The crucial question in this case is whether the sums deducted and retained week by week by the respondents from the appellant's wages are deductions which are illegal and null and void, so that a suit lies for the recovery of these sums under s. 4 of the Truck Act, 1831. On the imperative words of the section the right of recovery would seem to be plainly secured in respect of so much of the wages earned as have not been paid to the appellant "in the current coin of this realm''; and the main ground on which the judgment appealed from proceeds, seems to be that as the sums retained were so retained on the mandate or with the assent of the appellant, these sums can be deemed to be substantially equivalent to payments made to the appellant himself in current coin within the meaning of the Act on the principle laid down by Lord Watson in *Hewlett* v. *Allen* (1) ([1894] A.C. at p. 394), whose words appear to sum up the effect of the decision of this House on the facts of that case. But that decision is based on the fact that the sums in question were paid on the worker's mandate to a third party in order to discharge a debt of the worker due to that third party. The worker's request to pay the third party on her behalf, made, so it was held, the third party the worker's agent or hand to receive the current coin. In the present case the respondents retained the sums now in suit in order to pay a debt due, not to a third party, but to themselves, and not due from the appellant, but due from another party, namely, his father; and furthermore, the father's debt was for rent in respect of premises belonging to the respondents of which the father was tenant. If express provision was required in s. 23 of the Act to validate a deduction for the rent of premises demised or let to the workman, it would seem impossible to justify a deduction of the rent of premises not demised or let to the appellant, but to another person. The fact that the appellant lived with his father in the premises, is, I think, immaterial.

That *Hewlett's* case (1) went to the limit of what is permissible in the way of liberal construction of the Act is, in my opinion, clear from a consideration of *Williams* v. *North's Navigation Collieries, Ltd.* (2). It is not true to say that *Williams's* case was distinguished from *Hewlett's* case on the ground that in the former case, the workman did not assent, whereas in the latter he did assent, to the deduction. Lord Davey ([1906] A.C. at p. 142) thus sums up the statutory position:

> ''By s. 23 and s. 24 certain deductions are permitted to be made, or, to use the language of the marginal note, 'particular exceptions to the generality of the law,' are made under strictly defined conditions, and no other deductions or particular exceptions are in my opinion authorised.''

Subsequent statutes have enlarged the list of permissible deductions but have not affected the principle. Lord Davey further emphasised that the employer was not entitled to retain a part of the workman's admitted wages in payment of a debt to himself: ''Payment on account will not do''; ''the employer cannot for purposes of the Statute be both payer and payee.'' These phrases, quoted by Lord Davey from Bowen, L.J.'s judgment in *Hewlett* v. *Allen* (1) apply with even greater force where, as here, the money was retained for a debt not due from the workman, but from another party.

Some reliance was placed in support of the respondents' contention on s. 5 of the Act. That section was applied by Bowen, L.J., in *Hewlett's* case (1) as justifying in the action a set-off or reduction of the plaintiff's demand on the ground that the sums in debate had been actually paid away to a third party in satisfaction of the plaintiff's debt and under his mandate: that was held to constitute a ground of cross-claim or set-off subsequent to and independent of the contract of employment on the footing that the actual deduction was illegal, as Bowen, L.J., held it was, under s. 4. In the present case there was no actual disbursement of money by the respondents, who simply kept for themselves the part of the wages retained. The ruling of Bowen, L.J., accordingly does not cover the present case. S. 5, whatever may be its precise scope, which is far from clear, may here, in my opinion, be disregarded: indeed, I do not gather that any specific set-off is sought to be established, if the deductions which the respondents made are held to be illegal, as I think they must be, and if the plea of personal bar, which is something quite different from set-off or cross-claim, is rejected, as I think it must be for the reasons stated by Lord Macmillan.

Such is my opinion on the actual words of the Truck Act, 1831. But if I also consider what I conceive to be the policy of the Act, a case such as the present seems entirely to fall within it.

LORD ALNESS.—Were it not for the importance of the questions at issue in this case, and for the fact that your Lordships, as has been pointed out, are reversing the decision of the Second Division of the Court of Session, I should be well content to express my formal concurrence in the opinions delivered by my noble and learned friends, LORD MACMILLAN and LORD WRIGHT, and in the reasons upon which those opinions proceed. In the circumstances, I beg leave to add a few words of my own to what has been already said.

In the first place, I am clearly of opinion that the respondents, in what they did, contravened the injunction contained in s. 3 of the Truck Act, 1831. In order to reach a sound conclusion on that matter, one must steadily bear in mind (i) what the respondents are by statute enjoined to do, and (ii) what they in point of fact did. (i) The respondents, as employers of the appellant, are enjoined, by Act of Parliament, to pay to him the whole amount of the wages earned by him in the current coin of the realm, and not otherwise. The words of the statute, authority apart, would appear to be plain, and indeed intractable. (ii) The respondents, in point of fact, instead of paying to the appellant, in the current coin of the realm, the wages earned by him, deducted from these wages the rent payable to them by the appellant's father as occupier of a house belonging to them.

Primâ facie this would seem to be an illegal deduction; and indeed the respondents in argument appeared to recognise the cogency of this view. They sought, however, to take shelter under the ægis of *Hewlett's* case (1), and they contended that it avoided the result for which the appellant contended. Indeed, it is not too much to say that the opinions of the majority in the court below were based largely, if not solely, upon the authority of *Hewlett*. Now, while the resemblances between this case and the case of *Hewlett* are considerable, the differences are even more striking. *Hewlett* decided, as LORD MURRAY pointed out, that the entire wages of the employee in that case had actually been paid to him within the meaning of the statute. I am quite unable to affirm that in this case, where a portion of the appellant's wages remained in the hands of the respondents, that that was so. Retention of wages due by employers to a workman cannot equiparate payment to him, although payment to a third party, with his consent, may be payment in the sense of the statute. In this case the respondents were both payers and payees, and that fact, in my opinion, is fatal to their contention. In *Hewlett* the employers were not enriched by the arrangement which was made: in this case they definitely are. In *Hewlett* the employers made a payment on behalf of their employee: here they retained a certain deduction, not for the appellant's benefit, but for their own. *Hewlett* was a case of set-off: this is not a case of that character. The circumstances of the two cases appear to me to differ toto cælo, as indeed LORD HUNTER pointed out. I, therefore, reach the conclusion that the respondents acted in plain breach of their statutory duty, and that the case of *Hewlett* affords them no protection from that inference.

In the second place, I am of opinion that the appellant is not, as the respondents contended, personally barred from enforcing his claim. Personal bar in this connection is a Scottish doctrine, and the validity of the respondents' contention falls, I apprehend, to be decided by the law of Scotland. Now, ex hypothesi of the argument, the deduction made by the respondents from the appellant's wages is, by statute, declared to be "illegal, null and void." In these circumstances the respondents' argument that the appellant is barred by mora and acquiescence from vindicating his claim appears to me to be a startling, if not indeed an audacious contention. To my mind it is a novel doctrine in the law of Scotland that a plea of personal bar can avail against that which is declared by statute to be illegal, null and void. The proposition appears to me really to be a contradiction in terms. The doctrine of mora and acquiescence is, in my opinion, foreign to a case of this kind. Acquiescence, in my judgment, can present no bar to an action founded on the illegality and nullity of the thing acquiesced in. No decision was cited by the respondents in which the judgment of the court proceeded on the view for which they contended.

I will only add that I find myself in agreement with the dissenting opinion of the learned Lord Justice Clerk, and with the reasoning upon which it is based. I therefore concur in the motion which has been moved that this appeal should be allowed.

Appeal allowed.

Solicitors: *W. A. G. Davidson & Co.*, for *I. H. Irvine-Jones*, Edinburgh, and *William Philp*, Kirkcaldy; *Simmons & Simmons*, for *Wallace, Begg, & Co.*, W.S., Edinburgh, and *Ross & Connel*, W.S., Dunfermline.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

LILLEY AND SKINNER, LTD. *v.* ESSEX COUNTY VALUATION COMMITTEE

[KING'S BENCH DIVISION (Lord Hewart, C.J., Lord Avory, and Lord Humphreys, JJ.), April 10, 11, 1935]

[Reported 153 L.T. 64; 99 J.P. 254; 51 T.L.R. 432; 79 Sol. Jo. 321; 33 L.G.R. 272, D.C.]

Rating—Valuation list—Amendment—Increase of assessments of shop properties within borough—No corresponding increase in assessments of dwelling-houses—Objection by owners of shop property.

The occupiers of a shop, the assessment of which had been increased together with the assessments of most of the shop properties in the borough, contended that their assessment ought to be reduced, on the ground that there had been no corresponding increase in the assessments of dwelling-house properties within the borough. The gross and rateable values of the shop arrived at as the result of the increase were admittedly not higher than the gross and rateable values as defined by the Rating and Valuation Act, 1925.

Held: the Act did not require that re-valuations of shops and dwelling-houses must be made at one and the same time, and, as the hereditament in question was admittedly not over-assessed, the court could not, merely for the sake of uniformity, substitute a lower figure which admittedly would be inaccurate.

Per curiam: To secure uniformity in valuation a ratepayer the valuation of whose hereditament is correct must take steps to correct the assessments of other ratepayers who have been assessed at too low a figure and not seek to get his own correct assessment re-valued downwards to a figure on a level with theirs.

Ladies' Hosiery and Underwear, Limited v. *West Middlesex Assessment Committee* (1), [1932] 2 K.B. 679, applied.

Notes. Considerable alterations in the procedure relating to valuation for rating have been made in the Local Government Act, 1948, Parts III and IV, and in the Rating and Valuation (Miscellaneous) Provisions Act, 1955, for which see 20 HALSBURY'S STATUTES (2nd Edn.) 220, 35 HALSBURY'S STATUTES (2nd Edn.) 377, respectively.

Considered: *R.* v. *Cornwall County Valuation Committee, Ex parte Falmouth Rating Authority*, [1937] 2 All E.R. 266. Referred to: *R.* v. *Heston and Isleworth Rating Authority, Ex parte Conti*, [1941] 2 All E.R. 116.

For cases on the basis of assessment of rateable value, see 38 DIGEST 518 et seq.

Cases referred to:

(1) *Ladies' Hosiery and Underwear, Ltd.* v. *West Middlesex Assessment Committee*, [1932] 2 K.B. 679; 101 L.J.K.B. 632; 147 L.T. 390; 96 J.P. 336; 30 L.G.R. 369, C.A.; Digest Supp.

Case Stated by Essex Quarter Sessions.

A proposal was made by the Essex County Valuation Committee to amend the current valuation list for the borough of Ilford by increasing (inter alia) the assessment of a hereditament, Nos. 101–105 High-road, Ilford, occupied by Lilley & Skinner, Ltd. The assessment committee accepted the proposal, and increased the gross value of the hereditament from £862 to £884, and the rateable value from £682 to £734. From that decision the company appealed to quarter sessions.

The building in question was occupied by the company as a shop. The current valuation list for the borough was the first quinquennial list made under the Rating and Valuation Act, 1925, and was finally approved by the Southern Essex Assessment Committee in 1929. For the purposes of that list all shop properties in the borough (about 1,500 in all) were valued by a professional surveyor, but the dwelling-houses, of which there were many thousands, were valued by an employee of the borough council, who had no professional qualifications.

The standards of values applied both to shops as a class and dwelling-houses as a class were below the standards prescribed by the Act of 1925, by the definitions of gross and rateable value therein contained, and were less than they ought to have been if the Act had been correctly applied, but the court was not satisfied that the standard applied to dwelling-houses was substantially lower than that applied to shops.

On March 29, 1933, the valuation committee made proposals (about 1,100 in all) to amend the valuation list by increasing the assessments of most of the shop properties in the borough. One such proposal related to the company's shop, and, after amendment, that proposal called for a gross value of £884 and net value of £734. The company admitted that those amounts were not higher than the true gross and rateable values of the property.

The assessment committee allowed the proposal and subsequently allowed the majority of the proposals relating to other shops in the borough. No alterations were made in the assessable values of dwelling-houses in the borough as a class.

The company contended that it was illegal to re-value and increase the assessments of shop properties generally in the borough without re-valuing and increasing the assessments of the dwelling-houses, and that a valuation list which discriminated unfairly between one class of property and another was bad in law.

The valuation committee contended that the assessments were not unlawful, and that, even if they were, the appellants' proper remedy was to apply to quash either the valuation list or the rate, for neither of which were the respondents responsible. They also said that there was no obligation on them to correct all the errors in the valuation list at the same time.

Quarter sessions dismissed the appeal. From that decision the company appealed to the Divisional Court.

M. Rowe for the appellants.

Comyns Carr, K.C., and *F. D. Levy* for the respondents.

LORD HEWART, C.J.—In my opinion this appeal ought to be dismissed. The discussion of the matter has involved many words, but the real point is tolerably simple. The appellants belong to the class of occupiers of shops in the borough of Ilford. A proposal was made some time ago by the county valuation committee of the Essex County Council to amend the current valuation list for that borough, and to amend it in the sense of increasing the gross value of certain shop property from £862 to £884 and the rateable value from £682 to £734. The only point which was made was that, while what are called shop properties in the borough, to the number of some 1,500, were to have their assessments increased unless this appeal succeeded, the dwelling-houses on the other hand, of which there are said to be many thousands, were valued below the prescribed standard. The contention made by the appellants was, not that those properties which were valued below the proper standard should have their assessments increased, but that their own and others like it which were valued at the proper standard should have their assessments reduced, so that all might be equally wrong. It is to be observed that it was expressly admitted at the Bar by counsel for the appellants, that this hereditament was not over-assessed. That being so, it seems to me that the case is singularly like *Ladies' Hosiery and Underwear, Ltd.* v. *West Middlesex Assessment Committee* (1). I refer in particular to the judgment of EVE, J., who, on that occasion, was sitting in the Court of Appeal. He said ([1932] 2 K.B. at p. 696):

> "The one concrete fact which emerges is the correctness of the assessment of the appellants' premises, and when that is once recognised as established, there is really nothing more to be said. It is quite impossible for the court, in these proceedings, to substitute for the correct figure another figure which, by their own evidence, they have proved to be inaccurate. It may be that want of uniformity, and consequent unfairness, can be established, and that it is due to under-assessment of comparable premises and not to other considerations affecting these particular premises; but, if so, this must be established by proper proceedings directed to the raising of the assessments of those other premises, and so framed as to afford the occupiers thereof an opportunity of showing that no such unfairness in fact exists. Upon the materials now before the court it is impossible to arrive at any conclusion beyond this, that the appellants have failed altogether to prove that their assessment is otherwise than correct."

From the course which the argument has taken it seems to me that the present case is a fortiori, for here it was expressly admitted at the outset that the assessment of this hereditament was correct. The argument made below, and made unsuccessfully, by the appellants was that it was unlawful to re-value and increase the assessments of shop properties generally in the borough without re-valuing and increasing the assessments of dwelling-houses in the borough. The contention is that if re-valuation is to be made it must be made uno flatu with regard to all the hereditaments in the area. The law does not compel any such impossibility. It has been strongly argued that, if the appellants are not to enjoy getting rid of a grievance, not by seeking to make everybody right, but by making everybody equally wrong, there is no remedy at all. I do not so read the Rating and Valuation Act, 1925. Statutes are not always easy to understand, but it seems to me to be pretty clear that there is a remedy open to these appellants—a remedy which is perhaps cumbrous, but does not at all involve the difficulty of inviting the court to do that which is admittedly wrong.

I think this appeal must be dismissed and that the appellants must be left to find a better method, which is not hard to find.

AVORY, J.—I am of the same opinion, and in view of the findings of fact in this case I doubt whether the long argument that we have listened to is other than purely academic. [His Lordship stated the findings as set out above, and continued:] Upon those findings of fact it appears to me that the observations made by SCRUTTON, L.J., in *Ladies' Hosiery and Underwear, Ltd.* v. *West Middlesex Assessment Committee* (1) are directly in point. He there said ([1932] 2 K.B. at p. 686):

> "One would have thought that this evidence destroyed the ratepayer's objection, but he said: 'No, I will show you that seven other hereditaments in the borough are assessed at sums lower than the rents which their hypothetical tenants would pay, and I require that I also should be assessed at a sum lower than the hypothetical tenant would pay. I do this because the essence of rating is

> fairness and uniformity, and I prefer my assessment to be inaccurate, but uniform, rather than it should be accurate, but out of harmony with my neighbours. It is true that I can, if my facts are right, secure uniformity by correcting the inaccuracy of my neighbours' assessments, on objection to those assessments, and can get those assessments made uniform with my correct assessment. But I do not want this; I want to indulge my passion for uniformity by securing uniform inaccuracy, though that uniformity makes my correct assessment incorrect, but the inaccuracy is to my pecuniary advantage.' "

During the argument the learned Lord Justice had pointed out that that looked all wrong, and he says: "I think it is a wrong view." Corresponding with that expression of opinion is the passage which my Lord has read in the judgment of EVE, J., which is to the same effect. It appears to me that much time has been occupied in discussing whether the appellants have any appropriate remedy other than the remedy which has been declared to be wrong of asking that their correct assessment should be made incorrect. In my opinion, s. 37 of the Act of 1925 provides all the necessary remedy in this case, and particularly I wish to say that I do not agree with counsel's contention that under s. 37 (2) a person who is making a proposal for the amendment of the list would be bound in the present case to specify the figures upon which he contends that each of the residential properties is under-assessed. In my opinion, it would be sufficient, to satisfy par. (*b*) of that sub-section, for him to state generally that the grounds on which his proposed amendment is supported are that the residential properties as a whole or as a class are under-assessed, and thereupon, as counsel for the valuation committee has pointed out, by sub-s. (3) the rating authority have to give the necessary notice to the occupiers of those hereditaments in order that they may have the opportunity of coming in and being heard upon the objection. So far as any difficulty about the rate is concerned, to which question also counsel for the appellants has devoted considerable time, it appears to me that sub-s. (10) of that same section provides all the necessary remedy with regard to the current rate or any subsequent rate in case there is any alteration made in the assessment of the residential properties.

For those reasons I agree that quarter sessions were right in dismissing the appeal, and that this appeal accordingly should be dismissed.

HUMPHREYS, J.—I agree that the appeal should be dismissed. I think the appellants have established a grievance by reason of the fact that the requirements of the statute produce the result that a rated occupier is entitled to require that all other occupiers of the same or comparable class should be assessed upon a similar basis. That has not been done in this case, and the remaining question is: What is the remedy open to the rated occupier for the purpose of amending that grievance? I agree with what has been said by the other members of the court as to the remedy which he undoubtedly has, if he chooses to pursue it, of objecting by way of making proposals to the improper rating of other persons, and I accept with the greatest possible pleasure every word which was said by SCRUTTON, L.J., in his judgment in the *Ladies' Hosiery and Underwear* case (1), where he pointed out the absurd result which would follow from permitting a person whose rateable value is admittedly correctly stated in the valuation list to ask the court to make that lower and, therefore, incorrect because some other persons' valuations are also admittedly incorrect as being themselves too low. I think that the grievance which the appellants have established is to be met, not by the course which they have taken, but by another course which was open to them. That is sufficient to dispose of this appeal.

Appeal dismissed.

Solicitors: *Foster, Grave, & Jay*, Ilford; *E. S. Holcroft*, Chelmsford.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

A

POWELL *v.* STREATHAM MANOR NURSING HOME

[HOUSE OF LORDS (Lord Sankey, L.C., Lord Blanesburgh, Lord Atkin, Lord Macmillan and Lord Wright), Jan. 17, 18, 21, 22, 24, Feb. 28, 1935]

[Reported [1935] A.C. 243; 104 L.J.K.B. 304; 152 L.T. 563; 51 T.L.R. 289; 79 Sol. Jo. 179] B

Court of Appeal—Jurisdiction—Review of finding of fact—Case tried by judge without jury—Need to prove clearly that judge in error.

On an appeal from the decision of a judge sitting without a jury the jurisdiction of the Court of Appeal is free and unrestricted. The court has the same right as the trial judge to come to decisions on issues of fact as well as of law. But the C court is still a court of appeal, and in exercising its functions it is subject to the inevitable qualifications of that position. Where the question is one of credibility, where either story told in the witness-box may be true, where the probabilities and possibilities are evenly balanced, and where the personal motives and interests of the parties cannot but affect their testimony, an appellate court should be reluctant to differ from the judge who has seen and heard the witnesses and has had the D opportunity of watching their demeanour, unless it is clearly shown that he has fallen into error.

Notes. As to the jurisdiction of the House of Lords, the Judicial Committee of the Privy Council, and the Court of Appeal, see 9 HALSBURY'S LAWS (3rd Edn.) 363, 393, and 417 respectively, and for cases, see 16 DIGEST 160 et seq., and DIGEST (PRACTICE) E 782 et seq.

Cases referred to:

(1) *The Sir Robert Peel* (1880), 43 L.T. 364; 4 Asp. M.L.C. 321, C.A.; 1 Digest 201, *1201*.

(2) *Clarke* v. *Edinburgh and District Tramways Co.*, 1914 S.C. 775; 51 S.L.R. 681; 1914 S.L.T. 39.

(3) *Solomon* v. *Bitton* (1881), 8 Q.B.D. 176, C.A.; Digest (Practice) 598, *2386*. F

(4) *Metropolitan Rail. Co.* v. *Wright* (1886), 11 App. Cas. 152; 55 L.J.Q.B. 401; 54 L.T. 658; 34 W.R. 746; 2 T.L.R. 553, H.L.; Digest (Practice) 599, *2391*.

(5) *Kinloch's Trustees* v. *Young* 1909, 47 S.L.R. 356; 1910, 1 S.L.T. 2, H.L.

(6) *Folkestone Corpn.* v. *Brockman*, [1914] A.C. 338; 83 L.J.K.B. 745; 110 L.T. 834 78 J.P. 273; 30 T.L.R. 297; 12 L.G.R. 334, H.L.; Digest (Practice) 609, *2486*.

(7) *S.S. Hontestroom* v. *S.S. Sagaporack, S.S. Hontestroom* v. *S.S. Durham Castle*, G [1927] A.C. 37; 95 L.J.P. 153; 136 L.T. 33; 17 Asp. M.L.C. 123; *sub nom. The Sagaporack, The Hontestroom*, 42 T.L.R. 741; Digest Supp.

(8) *Bland* v. *Ross, The Julia* (1860), 14 Moo. P.C.C. 210; Lush 224; 15 E.R. 284, P.C.; 41 Digest 682, *5114*.

Appeal by plaintiffs from an order of the Court of Appeal (LORD HANWORTH, M.R., SLESSER and ROMER, L.JJ.), ordering that a judgment of HORRIDGE, J., in favour of H the appellants be set aside and that judgment in the action be entered for the respondents. The action was brought by the appellants to recover damages for negligence by the respondents.

The question raised by the appeal related to the function of the Court of Appeal on an appeal on a question of fact from a judge before whom at the trial conflicting evidence had been given by a number of witnesses. I

H. G. Robertson, and *S. K. de Ferrars* for the appellants.

Henry C. Dickens and *C. Gordon Thompson* for the respondents.

The House took time for consideration.

Feb. 28. **LORD SANKEY, L.C.**—This is an appeal from an order of His Majesty's Court of Appeal (England) dated Nov. 22, 1933, ordering that the judgment of HORRIDGE, J., dated July 11, 1933, in favour of the appellants, be set aside, and that the judgment in the action be entered for the respondents with costs.

The action was brought by the appellants, who are husband and wife, for damages caused to them by reason of the personal injury done to the female appellant by negligence, as the appellants alleged, of the respondents' servants or agents.

The appellant, Helena Powell, entered the respondents' nursing home on Jan. 9, 1930, as a paying patient, and on Jan. 20, 1930, Dr. James Kirkland performed the operation of hysterectomy upon her in the home. This is an operation for the removal of the uterus.

The appellants' complaint is and was that on the following day, namely, Jan. 21, 1930, the respondents' servant, Sister Hyndham, punctured the female appellant's bladder in negligently using and attempting to pass a catheter into her. There is no dispute that the bladder was not punctured before the operation. There is no dispute that it has been punctured. The respondents at the trial set up the case that it must have been punctured by Dr. Kirkland in performing the operation. This case is completely contradicted by and at variance with the evidence of the female appellant, and the learned judge accepted her evidence and based his judgment upon it.

No question of law was raised at the trial or is involved in the appeal except in so far as it may be material to consider the functions of the Court of Appeal on appeal on a pure question of fact from a judge before whom at the trial conflicting evidence has been given by a number of witnesses whom he has not only heard but seen.

A number of witnesses were called before the learned judge, and the course of the trial resolves itself into three questions.

In order that the plaintiffs should succeed, it was necessary for them to establish the fact, to the satisfaction of the judge, that the puncture to her bladder sustained by the female plaintiff was due to the negligence of the nurses in attendance. If the proper deduction from the evidence was that the puncture had been made by the doctor who performed the operation or if it was impossible upon the evidence to say in which way it was caused, the defendants were entitled to succeed, for then the plaintiffs would not have discharged the onus placed upon them. Several questions therefore become of vital importance. For example:

(i) Was the puncture caused by the doctor who performed the operation? Upon this the learned judge had the direct evidence of the two doctors who were at the operation, both of whom said that the puncture was not caused on that occasion. There was also evidence, called by the defendants, of an expert character as to the possibility or probability of a puncture being made by the operating doctor without his knowing it.

(ii) Another question of vital importance was when the urine showed signs of escaping. Here again the matter was in controversy, first of all as to the time at which the escape was noticed, secondly as to the exact time it was likely to have happened after the operation, if the puncture to the bladder had been made then. Upon these questions there was the direct evidence of the doctor and the nurses and also reports by the nurses.

(iii) There was the vital question as to what took place when the nurses tried to insert a catheter and the doctor was sent for. Upon this there was the evidence of the female plaintiff herself as to what happened and what she felt during the insertion of the instrument. On the other hand, there was the evidence of the nurses as to what they did, as to the kind of catheter they used and as to the improbability or rather impossibility of a catheter of such a sort making a puncture. Over and above that, there was the delay in bringing the action and the letters written by the plaintiffs which seem to show that they did not at first attribute any negligence to the nursing home.

It is true that a court naturally attaches great importance to letters written by a witness which appear to contradict evidence which he subsequently gives, but the court must always take into consideration the witness's explanation of such letters and weigh it carefully. Further than that, an omission to state something in a letter may not be so weighty as a statement which contradicts something to which the witness subsequently deposes.

Upon these several matters the evidence was of a very contradictory character and no one could have been in as good a position as the learned judge, who both saw and heard the witnesses, to say where the truth lay. He expressly said that he accepted the evidence of the doctors, which, if true, proved that the puncture did not take place

at the operation; that he accepted the evidence of Mrs. Powell which, if true, made it A
almost conclusive that the puncture took place when the nurses tried to insert the catheter.

When the matter came before the Court of Appeal, the learned MASTER OF THE ROLLS, founding himself upon *The Sir Robert Peel* (1) dwelt with considerable force upon another fact altogether. In *The Sir Robert Peel* JAMES, L.J., said (4 Asp. M.L.C. at p. 322): B

> "The court will not depart from the rule it has laid down that it will not overrule the decision of the court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression."

Originally in the present case there had been a claim for damages for a hernia which the female plaintiff alleged had been produced by one of the nurses allowing her to fall C
during her illness and so causing the hernia. The learned MASTER OF THE ROLLS was evidently very much impressed by the fact that HORRIDGE, J., did not accept the female plaintiff's account of this, and he thought that the fact that the judge did not accept her evidence on this point was a governing fact, or at any rate one of the governing facts, to which great importance should be attached in considering the remaining part of her story. D

It is important carefully to consider what really happened with regard to this matter. The short-hand note clearly shows that the learned counsel for the plaintiff gave up this point because he thought it had not been proved that the fall caused the hernia, but he expressly said that he only did so without admitting that it made any difference to the rest of the female plaintiff's evidence. Upon this the learned judge agreed with him and indeed the counsel for the respondents regarded it of minor importance. The E
following is a transcript of what happened when the matter was given up. The learned counsel for the defendants said:

> "A word again about the other branch of the case which had almost escaped me, the hernia."
>
> HORRIDGE, J.—"I am not satisfied on that branch of the case, Mr. Hilbery, that F
> the hernia resulted from this."
>
> *Malcolm Hilbery.*—"I do not say anything more about it provided it is satisfactorily understood that I must deal with it if it is said that it has any bearing upon the reliance which should be placed on Mrs. Powell's evidence or not."
>
> HORRIDGE, J.—"I did not say that. I said I was not satisfied that if her evidence was true the hernia resulted from it." G
>
> *Malcolm Hilbery.*—"It is really so much a minor matter in this case that I do not desire to say any more about it. I was intending only to say to your Lordship upon it that I was going to abandon it in the state of the evidence because I do not think the chain of causation is satisfactorily carried out . . . provided it is understood that I am not casting any reflection upon or departing from the credibility of Mrs. Powell's evidence in any way." H
>
> HORRIDGE, J.—"Then you need not bother your head about that, Mr. Joy."

What, then, should be the attitude of the Court of Appeal towards the judgment arrived at in the court below under such circumstances as the present? It is perfectly true that an appeal is by way of re-hearing, but it must not be forgotten that the Court of Appeal does not re-hear the witnesses. It only reads the evidence and re-hears the counsel. Neither is it a re-seeing court. There are different meanings to be attached I
to the word "re-hearing." For example, the re-hearing at quarter sessions is a perfect re-hearing because, although it may be the defendant who is appealing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after a trial before a judge alone and a verdict after a trial before a

judge and jury. On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside such judgment unless the appellant satisfies them that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses: see *Clarke* v. *Edinburgh and District Tramways Co.* per LORD SHAW (2) (1919 S.C. (H.L.) at p. 36), where he says:

> " When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to credibility or not. I can, of course, quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."

On an appeal against a verdict, if the evidence was such that no jury properly directed could reasonably have found the verdict in question, the verdict so found will be set aside. A verdict, however, will not necessarily be set aside merely because it is, in the opinion of the Court of Appeal, against the weight of evidence, but there is jurisdiction to grant a new trial in such a case: see *Solomon* v. *Bitton* (3), and *Metropolitan Rail. Co.* v. *Wright* (4), per LORD HALSBURY (11 App. Cas. at p. 155). There is certainly jurisdiction in the Court of Appeal to reconsider the facts in the way they do reconsider them and to come to an opposite conclusion to that arrived at in the court below. The judge of first instance is not the possessor of infallibility, and, like other tribunals, there may be occasions when he goes wrong on a question of fact, but first and last and all the time, he has the great advantage, which is denied to the Court of Appeal, of seeing the witnesses and watching their demeanour. It is hardly possible to conceive a case where a judge of first instance was in a better position than the Court of Appeal to judge where the truth lay than the present case. There were contradictions on questions of fact between professional witnesses of high experience and standing, there were contradictions of expert evidence between similar witnesses who were not called as to fact, but as to their opinion. In circumstances like the present the Court of Appeal would be slow to upset the judgment arrived at by the judge who both saw and heard the persons who gave evidence.

Having regard to the facts, it is, in my view, quite impossible to say that the learned judge was wrong in coming to the conclusion he arrived at in favour of the plaintiffs, and I am for allowing this appeal and for restoring the judgment of HORRIDGE, J.

The appellants should have their costs in the Court of Appeal and the costs of the appeal to this House, the costs in this House to be taxed in the manner usual when the appellant sues in forma pauperis.

LORD BLANESBURGH (read by LORD MACMILLAN).—I, too, have reached the conclusion that the judgment of HORRIDGE, J., in this most anxious case must be restored. I phrase in this way my concurrence in the motion just proposed, because I am thereby enabled to indicate, as is the fact, that my adhesion is not based upon any conviction of mine that the judgment to be restored was right, but is given solely on the ground that, sitting as I am in an appellate tribunal, and there deprived of the privilege of seeing, as the learned judge did, the witnesses on both sides, I have no sufficient justification for asserting with due regard to judicial prudence that the judgment was wrong.

It has, however, been with great difficulty that I have reached that conclusion: it is not without hesitation that I now express it. I have been gravely concerned by the long delay in the institution of proceedings and by the failure on the part of the appellants or of Dr. Kirkland, their principal witness at the trial after Mrs. Powell herself, throughout a period of over two years during which Dr. Kirkland at least was in constant association with the home to make any kind of complaint to Mr. Hogg, or to either sister of any improper treatment of Mrs. Powell while she was resident there in 1930.

I was, and I remain, gravely concerned by the consequential embarrassment to the defence. The production at the trial either of Mrs. Powell's temperature charts or of the catheters actually used by the sisters upon her became thereby impossible—productions which, although they possibly could not have strengthened the appellants' case, as then presented, might well have ended it. I was impressed by the fact that rupture of the bladder by an india-rubber catheter was admittedly impossible, and that no such rupture by a gum elastic catheter has ever been known; I was impressed by the payment during this period by the appellants of part of the remaining nursing home fees with an apology for non-payment of the balance and a promise to discharge it after the doctor's charges had been met, and all without a word of complaint; by the fact that when, on March 8, 1932, that balance was asked for by a debt collector, the only complaint even then suggested was with reference to the hernia—a complaint in effect abandoned at the trial; I was troubled, too, by the terms of Messrs. Bircham's letter of April 1, 1932, in which it is stated that it has now been "discovered beyond doubt that the bladder is perforated," suggesting, contrary to Dr. Kirkland's evidence, that the rupture, while it might previously have been suspected, had only then been definitely ascertained; above all, was I struck by what remains for me the entirely incomprehensible conduct of Dr. Kirkland during the whole period, and by the disturbing fact that not only did the learned judge accept his evidence apparently at its face value, but he made it the buttress, if not the pillar, of his judgment.

These were, and some of them remain, for me very disturbing facts, the more especially as no one of them is either discussed or even referred to by the learned judge in his judgment. So serious indeed did they collectively appear to me that at one time since the hearing I feared in the course of my study of the case that judicial prudence, without at least some further support from the appellants' counsel by way of reply, would not be equal to the strain involved. In the end, however, difficult as I have found the journey to be, it has led me to the conclusion I have stated, in agreement in its result, with that of all your Lordships.

With that agreement reached I feel that no useful purpose would be served by detaining the House with a recital of the judgment on the whole case which I had prepared.

One thing only must I say. I regard it as being necessarily involved in the restoration of HORRIDGE, J.'s judgment that the burden thereby laid upon the respondents results from some act of proved negligence on the part of the two sisters, or, of one of them in the presence of the other, on Jan. 21, 1930. But, in my view, at any rate, it does not necessarily involve any reflection upon what I may term the honour and humanity of Sister Hyndman and Sister Cooper, or of either of these ladies. I accept from the learned judge the sincerity in every particular of Mrs. Powell as a witness; but her reliability or accuracy in this and in some other matters is a different question altogether, and in its consideration her strong, if natural, prepossessions after many years of suffering must not be left out of account.

Now, nothing has impressed me more on this record than the tributes of continued confidence and respect paid to the sisters by every medical witness who knew them, and even by Mrs. Powell herself. In my eyes, and I feel it to be my duty to declare it, nothing proved in this action leaves the slightest stain on the honour or humanity of either of them.

LORD ATKIN.—I have had the opportunity of reading the opinions of the Lord Chancellor and LORD WRIGHT, and as I agree both with their statement of the law and their review of the facts I should add nothing were we not differing from the Court of Appeal. I have not had the opportunity of seeing in advance the opinion of LORD BLANESBURGH which has just been read. If I had had the opportunity of reading it in advance I should probably have felt bound to say that I differ in a good many respects from the view which he has formed of the facts of this case.

The case involves only an issue of fact very closely defined. The plaintiff was injured in the nursing home, either by the surgeon at the operation between 11 and 12 noon on Jan. 20 or by the nurse about 7 p.m. on Jan. 21. She would feel the effects of the injury within a few hours of the operation if the surgeon was at fault: at once if the nurse was at fault. It is in the ordinary course unusual that the injury should be caused in either way either without the knowledge of the doctor in the first instance or in the process of catheterising by a competent nursing sister, such as the sister in this case was proved to be. But as the injury certainly did happen in one or other of the two ways common inherent improbability is of little weight. The case resolved itself into an issue between the credibility of the patient and the doctor on the one hand, and nurses on the other. The judge who saw the witnesses believed the former. I venture to think that such a finding in such a case precluded any successful appeal. I wish to express my concurrence in the view that on appeals from the decision of a judge sitting without a jury the jurisdiction of the Court of Appeal is free and unrestricted. The court has to re-hear; in other words, has the same right to come to decisions on the issues of fact as well as law as the trial judge. But the court is still a court of appeal, and in exercising its functions is subject to the inevitable qualifications of that position. It must recognise the onus upon the appellant to satisfy it that the decision below is wrong: it must recognise the essential advantage of the trial judge in seeing the witnesses and watching their demeanour. In cases which turn on the conflicting testimony of witnesses and the belief to be reposed in them an appellate court can never recapture the initial advantage of the judge who saw and believed. And in no cases should this advantage be more readily recognised than in cases which involve character and reputation.

I agree with all your Lordships in thinking that in the present case the Court of Appeal were not justified in differing from the findings of the trial judge, based as they expressly were upon his opinions of the credibility of the plaintiff and the surgeon. In particular, I think that there was no sufficient ground for expressing the strong views about the untruthfulness of Dr. Kirkland, whom no member of the Court of Appeal had seen giving evidence, while he was believed by the judge who saw him. I have already said that the Court of Appeal are unrestricted in their jurisdiction in appeals, and it seems to me unfortunate that they should be entangled by any formula as to their powers. But if any formula were adopted I cannot imagine any more unsatisfactory or of so limited a scope as that adopted from JAMES, L.J., in *The Sir Robert Peel* (1). In fact, however, it seems plain that the governing fact relied on by the MASTER OF THE ROLLS is based upon a misunderstanding of the judgment of the trial judge, who expressed no opinion upon the credibility of the plaintiff as to the facts which it was suggested caused the hernia. I have not tried to form any opinion as to what judgment I should have given if I had seen the witnesses myself. I find no reason for rejecting the findings of the very experienced judge who had that advantage, and I agree that this appeal should be allowed.

LORD MACMILLAN.—I have shared to the full the anxiety which your Lordships have felt in disposing of this appeal, involving as it does questions of grave moment to the parties. The evidence presents a direct conflict of oral testimony on a pure issue of fact. If the judgment given in the plaintiffs' favour in the court of first instance had been based on the verdict of a jury, your Lordships' task would have been relatively easy, for there was plainly ample evidence on which a reasonable jury could have found for the plaintiffs and the verdict must have stood.

But the case was tried by a judge sitting alone, and on appeal from the decision of a judge the Court of Appeal and this House have a duty to exercise their jurisdiction as tribunals of appeal on fact as well as on law, a jurisdiction which your Lordships have never hesitated to exercise when satisfied that the courts below have erred on a question of fact. Where, however, as in the present instance, the question is one of credibility, whether either story told in the witness-box may be true, where the probabilities and possibilities are evenly balanced, and where the personal motives and interests of the parties cannot but affect their testimony, this House has always been reluctant to differ from the judge who has seen and heard the witnesses, unless it can be clearly shown that he has fallen into error. The reasons for that reluctance have been expounded by your Lordships who have preceded me. They are founded on common sense and they are nowhere better stated than by Lord Loreburn, L.C., in *Kinloch* v. *Young* (5), from whose speech I take leave to quote the following passage (1911 S.C. (H.L.) at p. 4):

> "Now, your Lordships have very frequently drawn attention to the exceptional value of the opinion of the judge of first instance, where the decision rests upon oral evidence. It is absolutely necessary no doubt not to admit finality for any decision of a judge of first instance, and it is impossible to define or even to outline the circumstances in which his opinion on such matters ought to be overruled, but there is such infinite variety of circumstances for consideration which must or may arise, and it may be that there has been misapprehension, or that there has been miscarriage at the trial. But this House and other courts of appeal have always to remember that the judge of first instance has had the opportunity of watching the demeanour of witnesses—that he observes, as we cannot observe, the drift and conduct of the case; and also that he has impressed upon him by hearing every word the scope and nature of the evidence in a way that is denied to any court of appeal. Even the most minute study by a court of appeal fails to produce the same vivid appreciation of what the witnesses say or what they omit to say."

I have had an uneasy feeling, as I listened to the able arguments of counsel in this appeal that I was remote from the poignant realities of the case and that I was being asked, as it were, to dispose of the fate of the parties in their absence. It is only the written evidence which reaches this House; the other evidence which the judge of first instance tells us that he has relied upon cannot be reproduced or subjected to review here, and I have never felt more conscious of the disability imposed by the absence of this aid to judgment.

I should nevertheless be ready to differ from the decision of Horridge, J., if the criticisms to which it has been subjected in the Court of Appeal and at your Lordships' bar had carried conviction to my mind that he had gone wrong. But these criticisms have not convinced me, as they have not convinced your Lordships, and I am of opinion that no sufficient reason has been shown for departing from the decision of the experienced trial judge who enjoyed the advantages denied to your Lordships and who manifestly devoted the utmost care to the consideration of the case. I accordingly concur in the motion that his judgment be restored.

LORD WRIGHT.—This appeal is from a judgment of the Court of Appeal, reversing a judgment of Horridge, J., who had awarded the female appellant, Mrs. Powell (whom I shall hereafter refer to as the appellant) £2500 with costs and the male appellant Mr. Powell (whom I shall refer to as the husband) £977 with costs. The case was tried by the judge alone, a special jury who had been empanelled having been discharged at the joint request of both parties after the end of the first day.

The respondents are the proprietors of a nursing home and were sued, without any formal objection, as the Streatham Manor Nursing Home. The appellant became a patient of the home; on Jan. 20, 1930, the operation of hysterectomy was there performed upon her by Dr. Kirkland, an experienced medical practitioner of thirty-eight years standing who had performed this operation almost 200 times. Subsequently she suffered from a leakage of urine which in fact was due to her bladder having been punctured.

It is not contested that this puncture must have been caused in one or other of two ways, that is either in the course of the operation or on the next day when attempts were unsuccessfully made by the sisters of the home to catheterise her. On the material issues there was a direct and serious conflict of oral testimony; the judge, after hearing the case for nine days, decided in favour of the appellants; he expressly says: "I believe the plaintiff Mrs. Powell, and it is on her evidence I decide this case." The Court of Appeal were of opinion that he was wrong in so deciding and in believing the appellant, mainly it seems on their views of the probabilities of the case and, in a less degree, on some inconsistencies, which they observe, in her evidence and in that of Dr. Kirkland, who gave evidence on her behalf. They set aside the judgment of Horridge, J., and entered judgment for the respondents with costs.

The case is both difficult and unusual; it is important in respect of the particular interests of the parties and is also of general importance because of the discussion which has taken place before this House on the proper functions of the Court of Appeal on hearing an appeal from the decision of a judge sitting without a jury, where the case is purely one of fact, and the trial judge has based his judgment on the conclusion he has formed as to which of the witnesses, whom he has seen and heard, are trustworthy and which are not.

[His Lordship reviewed the facts and continued:] There are further matters of controversy in this difficult case, and further probabilities or contentions on the one side or the other, to some of which I shall advert later, but it is sufficient here to repeat that, if the story told by the female appellant as to her actual experiences is true, it would indicate damage to the bladder caused (though in a manner apparently unprecedented) by the use of the catheter: and that her evidence, if accepted, as it was by the judge, that she suffered from distension of the bladder earlier in the day negatives the possibility of her bladder having been punctured during the operation. On the other hand, if there was in fact a leakage or escape of urine, as the nurses say, starting on the evening before and continuing, and that leakage was per vaginam, the puncture of the bladder which caused the leakage must have been caused during the operation. As the judge fully appreciated, he could not escape from the responsibility of coming to a decision on the direct conflict of evidence.

Before I turn to consider the reasoning which led the Court of Appeal to reverse the conclusions of fact arrived at by the judge, it is necessary to examine what are the principles which have been established to regulate the duty of the Court of Appeal in cases such as the present. The essence of the matter is now contained in the initial words of Order LVIII, r. 1 (which has statutory effect) which are as follows: "All appeals to the Court of Appeal shall be by way of re-hearing." These words apply to an appeal from the decision of a judge sitting without a jury. The position is different when the trial has been with a jury. Where the trial has been before a judge alone the re-hearing is had on the evidence given before the judge, except in the rare cases where further evidence has been permitted to be called before the Court of Appeal; that may be done under r. 4, which enables this course to be taken on "special grounds only and not without special leave of the Court." In effect, there, the re-hearing is very different from the original hearing: it is a re-hearing on documents, including the judge's notes and sometimes, as in this case, also the shorthand notes, whereas the judge who originally heard the case, both saw and heard the witnesses, and during an examination and cross-examination, often prolonged and searching, had abundant opportunity of forming an opinion as to their relative trustworthiness or the reverse. A re-hearing of this character is essentially different from the re-hearing which takes place on an appeal to quarter sessions: on that latter appeal, the witnesses are called and give their evidence afresh, as if there had been no previous trial: there is also this further difference that at quarter sessions the appellant does not open the appeal, but the complainant, even though respondent on the appeal, begins: the hearing on the appeal proceeds on the same course as the original hearing; whereas on a re-hearing by way of appeal under Order LVIII, r. 1, the order of opening the case may be transposed: the appellant even if defendant below opens the appeal and develops his case, putting together such select passages from the judge's notes or documents or shorthand notes as appear helpful to him and adopting what arrangement he chooses: he naturally seeks to create at the outset a sentiment in favour of the appellant.

But the appeal under Order LVIII is still a re-hearing and as such differs from appeals from judgments of judges of county courts or upon cases stated by justices under certain statutes; as to these latter, reference may be made to what was said by LORD ATKINSON in *Folkestone Corporation* v. *Brockman* (6) ([1914] A.C. at p. 362). In these latter cases the Court of Appeal is not a judge of fact in any sense: its powers of review are limited to cases where judgment has been given without evidence, and, therefore, without jurisdiction or under error in law. The case of an application for a new trial or to set aside a verdict after trial with a jury, again involves different considerations and need not be considered here. In all these latter cases the Court of Appeal is not the judge of fact.

But under Order LVIII the Court of Appeal is the judge of fact. Here, however, arises the crucial circumstance that the court is the judge of fact with what may be a vital difference as compared with the trial judge, since the re-hearing which it conducts is under the different conditions which have been explained. What consequences properly follow from that have been stated in several cases. The latest and fullest statement of the relevant principles is now to be found in the opinion of LORD SUMNER (which was the opinion of the House) in *Owners of Steamship Hontestroom* v. *Owners of Steamship Sagaporack, Owners of Steamship Hontestroom* v. *Owners of Steamship Durham Castle* (7). That was an Admiralty case, and the authorities cited by LORD SUMNER were decisions in Admiralty appeals; indeed these questions could not have arisen before the Judicature Act in common law cases, in which the jury alone was the competent judge of fact. LORD SUMNER states the antinomy which arises when the court which is judge of fact has neither seen nor heard the witnesses and discusses how it is to be reconciled. He says ([1927] A.C. at p. 47):

> "Of course, there is jurisdiction to re-try the case on the shorthand note, including in such re-trial the appreciation of the relative values of the witnesses, for the appeal is made a re-hearing by rules which have the force of statute: Order LXVIII, r. 1. It is not, however, a mere matter of discretion to remember and take account of this fact: it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case."

He adds a little later:

> "If his [the trial judge's] estimate of the man [the witness] forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone."

LORD SUMNER quotes to the same effect earlier Admiralty authorities, both before and since the Judicature Act.

But in my opinion the same principles apply in ordinary common law cases: indeed in a personal injury case which came on appeal from Scotland to this House the rule was enunciated in analogous terms. That was *Clarke* v. *Edinburgh and District Tramways Co.* (2). LORD BUCKMASTER said that Courts of Appeal should not seek anxiously to discover reasons adverse to the conclusions of the learned judge who has seen and heard the witnesses and determined the case on the comparison of their evidence. LORD WRENBURY said that the trial judge was in a position of advantage, which he as an appellate judge did not possess. LORD SHAW dwelt on the important effect of indications to be drawn from witnesses' manner and deportment.

Two principles are, I think, beyond controversy. First it is, I think, clear that in an appeal of this character—that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen—the Court of Appeal

> "in order to reverse must not merely entertain doubts whether the decision below is right, but be convinced that it is wrong."

The Julia, Bland v. *Ross* (8) (14 Moo. P.C.C. at p. 235), per Lord Kingsdown, cited with approval by Lord Sumner ([1927] A.C. at p. 47). And secondly the Court of Appeal has no right to ignore what facts the judge has found on his impression of the credibility of the witnesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing. Lord Sumner protested against such a course being taken: he thus stated ([1927] A.C. at p. 50) what were to his mind the proper questions which the Appellate Court should propound to itself in considering the conclusions of fact of the trial judge:

> " (i) Does it appear from the President's judgment that he made full judicial use of the opportunity given him by hearing the viva voce evidence? (ii) Was there evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation? (iii) Is there any glaring improbability about the story accepted, sufficient in itself to constitute 'a governing fact which in relation to others has created a wrong impression' or any specific misunderstanding or disregard of a material fact or any 'extreme or overwhelming pressure,' that has had the same effect?"

Lord Sumner in his reference to "a governing fact" is quoting what was said by James, L.J., in *The Sir Robert Peel* (1). I have found it difficult to appreciate the precise application in that case of this observation. The Court of Appeal there affirmed the decision of the trial judge on a question of the admissibility of evidence, and I can see nothing in the argument or in the facts as reported which raised this question. Furthermore, the dictum of James, L.J., does not appear by itself to constitute any full or even useful enunciation of the principles which should guide the Court of Appeal, unless, indeed, qualified and supplemented as it is by Lord Sumner. I do not understand that Lord Sumner is laying down any precise rules of universal application. I think that it is difficult, if not impossible, to seek to lay down any precise rule to solve the problem which faces the Court of Appeal when it has to act as a judge of fact on the rehearing, but finds itself "in a permanent position of disadvantage as against the trial judge." In truth, it is not desirable, as I think, to do more than state, as I think Lord Sumner was stating, principles which will guide the appellate court in the majority of such cases. The problem in truth only arises in cases where the judge has found crucial facts on his impression of the witnesses; many, perhaps most cases, turn on inferences from facts which are not in doubt, or on documents; in all such cases the appellate court is in as good a position to decide as the trial judge. But where the evidence is conflicting and the issue is one of fact depending on evidence, any judge who has had experience of trying cases with witnesses cannot fail to realise the truth of what Lord Sumner says; as the evidence proceeds through examination, cross-examination and re-examination the judge is gradually imbibing almost instinctively, but in fact as a result of close attention and of long experience, an impression of the personality of the witness and of his trustworthiness and of the accuracy of his observation and memory or the reverse. He will not necessarily distrust a witness simply because he finds him inaccurate in some details; he can give such inaccuracy its proper place, particularly if he sees that the witness is tired, or antagonised, or confused, or perhaps impatient, and especially if the matter or the inaccuracy is of minor or collateral importance. But such inaccuracies may appear in a very different light when pointed to as isolated passages in the shorthand notes and abstracted from the human atmosphere of the trial and from the totality of the evidence. The judge will form his impression from the whole personality of the witness; he can allow for the nervous witness, standing up in a crowded court or worried by the strain of cross-examination. The judge may be deceived by an adroit and plausible knave or by apparent innocence, for no man is infallible; but in the main a careful and conscientious judge with his experience of courts is as likely to be correct in his impressions as any tribunal, unless, perhaps, as some would say, a jury of twelve members is preferable. Yet even where the judge decided on conflicting evidence, it must not be forgotten that there may be cases in which his findings may be falsified, as for instance by some objective fact; thus in a collision case by land or sea the precise nature of the damage sustained by the colliding objects or their relative or final positions A may be determinant and indisputable facts, and the same may be true of some conclusive document or documents which constitute positive evidence refuting the oral evidence of the witness; such cases have occurred in the experience of most judges and are covered by the third question propounded by LORD SUMNER.

When I seek to apply these principles to the present case I find myself unable to accept as sufficient the reasoning which has led the lords justices to reverse the decision B of the trial judge. I trust that in the brief summary which alone is possible here, I shall do no injustice to their elaborate and careful judgments. I have only extracted from these judgments enough to explain why I find it impossible to agree with their reasoning. I shall also have to advert briefly to some parts of the evidence which up to now I have felt able to ignore. As the judgments of the Court of Appeal agree in the main, I do not think it necessary to discuss each individually. C

Their general tenor is that the appellant's story is not credible, but they lay stress on certain more general aspects. Thus I may refer in the first place to their view of the improbability that the puncture should have been caused in the attempt to catheterise made by Sister Hyndman with the help of Sister Cooper; it is more probable in the view of the Court of Appeal that the injury was done by Dr. Kirkland while operating; and it is said that the appellant's evidence of her subjective feelings or her experiences D so soon after a major operation cannot be regarded as accurate, especially in view of the evidence as to her nervous condition before the operation and the fact that she was receiving injections of morphia from time to time. But all the evidence is that she was quite sensible at the material times, as Sister Hyndman herself says. I cannot find evidence of any kind to the contrary and I do not see how I can speculate. The judge has found that her story is true in fact: that finding must be upset. The Court of Appeal E cannot proceed as if no such finding exists. On the other side of the picture they do not seem to have given any heed to the undoubted fact that the attempt by the sisters to catheterise met with some obstruction calls for explanation. That in itself is an arresting fact; the very careful evidence of the eminent surgeon, Mr. Hedley, evidently accepted by the judge, disposes of the only explanation tendered of this unusual occurrence. F

In the next place, great stress is laid in the Court of Appeal on the fact, at first sight, and, perhaps, on any view, calling for explanation, that no claim was made against the respondents for more than two years after the appellant left the home: and further that even then the letter of claim first sent did not complain at all of the puncture of the bladder, but only mentioned the minor claim that the appellant had been negligently dropped by the night nurse and had, thereby, sustained a hernia. These facts are to be G treated, in the opinion of the Court of Appeal, as constituting a "glaring improbability" such as LORD SUMNER envisages, and as being fatal to the judge's conclusion. I cannot accept this argument. The judge deals with the difficulty shortly, but as I think sufficiently, in these terms:

> "Considerable comment was made on the delay which occurred before any claim was made but it is amply explained by the circumstances of the terrible condition H in which the plaintiff Mrs. Powell was and by the doctor's desire not to encourage her in any way to make a claim against this home with which he was himself associated and of which Mr. Hogg, who was a great personal friend of his and with whom he had been away for two holidays, was the secretary. I have seen the witnesses and accept their evidence as to the delay."

I

When this delay is spoken of as a glaring improbability, it must be inquired what is the standard of probability to be taken. Is it that of the normal man in normal circumstances, if such an abstraction is conceivable? Any such standard would obviously be fallacious, since the true question can only be what was probable if you take, as you must, these particular individuals situated in the particular circumstances in which they were. I can see no reason to reject the judge's conclusion, even if it were competent for me to speculate on probabilities of this kind. I observe that the first letter of complaint was followed in a few days by a letter setting out the full complaint, and in a few days more by a letter from the appellants' solicitors. On the other hand, it may be noted that the reply from the respondents' solicitors to that letter stated that it had been impossible for the nurses to approach the appellant and insert a catheter at all as the appellant was so tender. This was in April, 1932. It was not till the following July that the respondents' solicitors wrote correcting that statement: the respondents were no doubt in a position of some difficulty owing to the lapse of time; sometimes in such cases reconstruction takes the place of recollection.

Another matter emphasised by the Court of Appeal is that the claim for the hernia is rejected by the judge, and that is described by the Court of Appeal as "a touchstone of the validity and credibility of the plaintiff's story." The matter is dealt with very shortly by the judge in his judgment, but your Lordships, like the Court of Appeal, have been provided, not only with the judge's very full and careful notes, but with the shorthand notes of the evidence and of counsel's speeches. It is clear from these that the judge believed the appellant's story both as to the fact that she had the hernia and that she was negligently dropped on the bed by the night nurse in the way she describes: these, indeed, are all the facts to which she speaks in her examination in chief. In cross-examination she states that the hernia resulted from the fall. This is a matter of inference which on the medical testimony the judge refuses to draw. But I fail to see how all this can afford a ground for treating the appellant's evidence as incredible.

To turn to the consideration of the general probabilities of the case by the Court of Appeal, they appear to be of opinion that it is much more likely that Dr. Kirkland would cause the puncture in the operation (which indeed on the evidence he might do without negligence, though he ought to notice it) than that the sisters should be guilty of what is described as "brutality" almost amounting to a criminal assault, or that being experienced nurses they should be guilty of such negligence and that their story should consequently be believed. If the inquiry is to be which story is the more probable, then I may confess, as LORD SUMNER did, that "I am a poor hand at answering that kind of question" ([1927] A. C. at p. 49). What is undoubtedly suggested is that Dr. Kirkland, knowing he had caused the injury, was inventing a story and prompting the appellant to tell it and was putting the blame on the sisters, when he found that he could no longer keep the appellants quiet or keep them from making a claim. It is said in the Court of Appeal that his evidence is "a mass of inconsistency and improbability." I can only observe that, apart from the fact of his professional standing, he is, after being cross-examined at great length, believed by the judge. To my mind it would be unjust after this, to seek to convict him on paper. As to the sisters, especially Sister Hyndman, their conduct, if the view of the judge is accepted, is capable of a much more charitable construction than could on the other theory be applied to Dr. Kirkland, if the view adverse to him were adopted. The appellant herself speaks throughout of Sister Hyndman as having been kind to her: the appellant's belief that she had been damaged is not inconsistent with absence of animosity. Sister Hyndman is spoken of as fully competent. In any case, the judge heard them fully before he decided. I do not advert to features of the evidence which on any view are curious, such as the sister's statement that until the claim was made in March, 1932, she had no idea that the constant leakage of urine experienced by the appellant was due to anything other than nervous incontinence, or the evidence of Dr. Kirkland that before he catheterised the appellant, he examined the parts and saw that the urine was leaking per vaginam and diagnosed that the bladder had been punctured by the attempts to catheterise, but did not mention it at the home till next morning and then not to Sister Hyndham, and did not for some time discuss it with the appellants. No doubt the case presents many difficulties, but that is no ground to justify reversing the decision of the trial judge.

It is not, in my opinion, necessary to examine more minutely the evidence. I think I have done so sufficiently to show why, in my judgment, nothing has been established either in the judgments of the Court of Appeal or in the able and strenuous arguments enforcing those judgments which counsel for the respondents have advanced before your Lordships of such a character as to constitute either any specific misunderstanding or disregard of a material fact or any extreme and overwhelming pressure, or any governing fact, or in any way to justify reversing the decision of the very learned and experienced judge who heard the case for nine days. I do not say that it was not a difficult case. I am not seeking to re-try the case de novo and as if there had been no trial before the judge. I do not know, nor is it material that I should know (if indeed I could) how I should have decided the case if I had tried it myself. It is enough to say that I am not convinced that the judge was wrong.

Appeal allowed.

Solicitors: *Bircham & Co.*; *Hempsons*.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

THE URANIENBORG

[Probate, Divorce and Admiralty Division (Sir Boyd Merriman, P.), Nov. 15, 1935]

[Reported [1936] P. 21; 105 L.J.P. 10; 154 L.T. 664; 52 T.L.R. 114; 18 Asp. M.L.C. 591]

Shipping—Towage—Damage to hirer's vessel—Liability of tug—Exemption "whilst towing"—"Tug in position to receive orders direct from hirer's vessel to pick up ropes or lines"—United Kingdom Standard Towage Conditions, cl. 1.

By cl. 1 of the United Kingdom Standard Towage Conditions: "For the purpose of these conditions, the phrase 'whilst towing' shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines or when the tow rope has been passed to or by the tug, whichever is the sooner. . . ." By cl. 3: "the tug-owner shall not, whilst towing, bear or be liable for damage done by . . . the tug or done . . . to the hirer's vessel arising from any cause including negligence at any time of the tug-owners' servants or agents."

The defendants, owners of the steamship *U.*, had, through their agents, entered into a contract with the plaintiffs whereby it was agreed that the plaintiffs should supply two tugs to tow the *U.*, which was discharging at Bellamy's Wharf, River Thames, down river to Swanscombe Buoys. No exact time had been stipulated for the commencement of the towage, but it had been intimated to the plaintiffs that the towage would commence on the afternoon tide of March 4, 1934, after the *U.* had discharged, and that the tugs had better be in attendance at about 11 a.m. on that day. On March 4, the plaintiffs' tug *K.* went to Bellamy's Wharf, but she approached the *U.* at such high speed that, before she could take her way off, she collided with the *U.*, doing her considerable damage. The plaintiffs alleged that the tugs had been engaged on the terms of the United Kingdom Standard Towage Conditions, and that those conditions afforded them a complete defence to the action brought against them by the *U.* in respect of the collision damage. The plaintiffs contended that the collision happened "whilst towing." The defendants denied that they had engaged the tugs prior to the collision, and contended that in any event the terms of the towage conditions were irrelevant, and that the plaintiffs were not entitled to any relief because at the time of the collision the towage conditions had not begun to apply since the *U.* had not finished discharging, her pilot had not yet come on board, her boatmen were not in attendance, and the *U.* was consequently not in a position to give orders to the tug.

Held: (i) that the word "position" in cl. 1 involved not only the physical situation of the tug, but the conception of the tug being in a condition to receive and act upon orders from the ship to pick up ropes or lines, and that that must have some reference, not only to the readiness of those on board the tug to receive those orders, but to the intention of those on board the ship to give them; (ii) that, although at the time of the collision the *K.* was within hailing distance of the *U.*, as the evidence showed that nobody on board the *U.* was preparing to give orders with regard to ropes and lines and that the *K.*, when she arrived, was mainly engaged in trying to avoid the collision, the tug was not at the critical moment in a position to receive such orders, and that, accordingly, the period covered by the words "whilst towing," as defined by cl. 1, had not commenced to run, and the plaintiffs were not protected.

Notes. Considered: *The Baltyk*, [1947] 2 All E.R. 560; *Guy* (*W. J.*) *& Son* v. *Glen Line, Ltd.*, [1948] 1 All E.R. 245.

As to towage, see 30 HALSBURY'S LAWS (2nd Edn.) 658 et seq., and for cases, see 41 DIGEST 793 et seq.

Action for a declaration and consequent order.

The plaintiffs, William Watkins, Limited, of London, owners of the steam tug *Kenia*, claimed as against the defendants, A/S D/S Danebrog, of Copenhagen, owners of the steamship *Uranienborg*: (i) a declaration that they were not liable to the defendants for damage resulting from a collision between the two vessels on March 4, 1936, because the United Kingdom Standard Towage Conditions, upon the terms of which the tug was engaged, afforded a complete defence to the plaintiffs in another action brought against them by the defendants; and (ii) an order setting aside an admission of liability which the plaintiffs had filed in that other action under a mistake of fact.

Owen L. Bateson for the plaintiffs.
Cyril Miller for the defendants.

SIR BOYD MERRIMAN, P.—This is an action by the owners of the steam tug *Kenia*, the substance of which, without setting out all the heads of claim, is a claim to be allowed to recall an admission of liability, the filing of which has the effect of a judgment, on the ground that the admission was made by mutual mistake of fact and that there is, once that mutual mistake is cleared away, a defence to the action. Owing to the commonsense and candour with which these proceedings have been conducted, all the irrelevant points have been got out of the way, and it is conceded that there was a mutual mistake of fact, the mutual mistake being that both parties, at the time when the admission of liability was called for and given, were under the misapprehension that there had not been a contract of towage.

The claim was for damage by collision to a ship, the *Uranienborg*, lying alongside a wharf, by a tug, the *Kenia*, which was going in the ordinary course of events to assist her, with another tug, in going down river. Of course, if there had been no contract of towage at the moment of collision no sort of exemption would apply, and it was under that misapprehension that the original admission was made. That is conceded, and I have allowed the pleadings to be amended so as to give full effect to that allegation and to the admission. On the assumption that the amendment has been made, the point of substance emerges. If there was a contract of towage, it is conceded that the conditions, which are known as the United Kingdom Standard Towage Conditions, apply, and the question then is whether this collision occurred in circumstances which were covered by those conditions. If so, I do not think it is disputed that the *Kenia* would be exempt from liability. If, on the other hand, the towage conditions do not apply, I have not heard any argument to the effect that liability would not attach to the *Kenia*.

The circumstances are these. The steamship *Uranienborg* was lying alongside Bellamy's Wharf, starboard side to the wharf, and was discharging. She was expected, not to put to sea, but to leave the wharf and proceed to enter that part of the river which is at Swanscombe Buoys on Monday, March 4. On the Saturday, negotiations were entered into by telephone between the owners of the tug *Kenia* and another tug, and the agents of the ship, for the towing arrangements, and the matter was left that they were to provide two tugs and that the time would probably be 11 o'clock, and that the time should be verified on Monday morning by a telephone conversation direct from the office of the tug owners to Bellamy's Wharf, so that the tugs should have time to get A to the ship in ample time to perform a towage operation when required.

It is not now disputed that there was a completed contract. I do not think that it is necessary to follow out all the details, but I do not think that there ever was an actually defined time at which the towage was to begin. On the other hand, I think it was made quite clear that the towage would start some time after the ship had finished discharging and on the afternoon tide of March 4, with, no doubt, an intimation that the tugs had B better be in attendance at about 11 a.m. I think that is what it comes to, but no point is made that it was not a completed contract; all that is said is that there was no exact time, and I think that is right. In fact, the ship did not finish discharging until about 11.30, and at the material time—that is the time when the collision occurred, which was two minutes, probably about five minutes, before 11 or thereabouts—the pilot had C not come on board.

I find that the companion tug, the name of which was the *Tanga*, arrived at Bellamy's Wharf earlier than the *Kenia*. The *Tanga* arrived there at about 10.30 a.m. and she came up to the ship, asked for orders, was told that they were waiting for the pilot and boatmen connected with the unmooring of the ship and getting her away. The master of the *Tanga* hung on to one of the buoys just over by the wharf, and he was already hanging on to that buoy when he saw the *Kenia* come up about a quarter of a mile off. D

The *Kenia* came up in accordance with orders given by his owners as the result of a telephone conversation which was initiated at about 10.5 a.m., and as the result of his asking for orders, but strictly in accordance with the arrangement which had been made on the Saturday on the telephone. After he had telephoned about his orders, the man in the office telephoned to Bellamy's Wharf to find out whether the *Uranienborg* was shifting on Monday afternoon's tide, and her agents said she was shifting at 11 o'clock E and that they had better hurry as there was not much time. That is what is said to have been said over the telephone. I have not had evidence about the other end of the conversation and I do not think that the exact wording matters much. At any rate, the *Kenia* was undoubtedly going up as one of the two tugs which were going to perform this service.

She came up at what is admitted to be about six knots, or something between seven F and eight knots over the ground, the tide being flood. There was outside the *Uranienborg* a line of buoys—a barge tier—and the *Kenia* had to make her way through those. I am quite satisfied that she came through much too fast, and as the result of her excessive speed, combined with the failure to give orders to reverse her engines in time (a failure which the master himself admits), she ran into the *Uranienborg* at approximately a four-point angle and did very severe damage. She broke her own anchor, knocked her G own hawsepipe so severely that it was cracked all round and had to be taken out and replaced; she set in the side of the *Uranienborg* at a point over one of the most substantial frames no less than 4½ in. and, without going into detail, did damage which showed that the blow was a very severe blow. I am satisfied that this was the direct result, without any interruption of any sort, of her turning out of the river through the barge tiers, as I say, at an entirely excessive speed and out of proper control. It is said H that, in these circumstances, she is entirely exempt from all liability because she is covered by the towage conditions.

Before I leave that question of her speed, I should like to say that, among the other reasons for believing that she was going much too fast, is her master's report, written on the very day, in which he says that he could not understand why he did not stop his way. He said in the box now that he was practically stopped, but in his report he said: "If I I had been doubtful I would have rung my engines the second time astern, but I had no cause to, I thought, because every other time she has always done it but this time she did not." It is unimportant what was the particular fault or negligence or breakdown in the machinery, or whatever it may have been which caused her to fail to pull up and to be out of control. I am satisfied that she was going too fast and that it was her speed which caused the severity of the damage.

It is said she is covered by these conditions, and the whole point is (and both sides agree) whether, within the meaning of the phrasing of cl. 1 of the United Kingdom

Standard Towage Conditions, she was in collision "whilst towing." The meaning of the phrase "whilst towing" is given in cl. 1 in the following words:

> "For the purpose of these conditions the phrase "whilst towing" shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines or when the tow rope has been passed to or by the tug, whichever is the sooner, and ending when the final orders from the hirer's vessel to cast off ropes or lines have been carried out, or the tow rope has been finally slipped and the tug is safely clear of the vessel, whichever is the later. Towing is any operation in connection with holding, pushing, pulling, or moving of the ship."

I need not pay any attention to that last sentence for the purpose of the present case, because nobody disputes that the operation, if it had begun, was one connected with the moving of the ship at any rate. The point is whether this period had commenced.

It is admitted (I do not want to put it on any admission, but I am clearly of opinion) that "the tug" means a tug under contract. It may be that the contract only begins by the acceptance of the offer of one among many tugs which are hovering round a ship, but the tug is assumed to be, I think, a tug which is there in pursuance of a contract of towage. The contract may, of course, be made at the moment when the towage is about to start, or it may be made days or weeks beforehand. The crucial words are:

> "is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines or when the tow rope has been passed to or by the tug, whichever is the sooner."

Take the last words first and there ought to be no difficulty in ascertaining when that moment occurred. The rope either has or has not been passed to or by the tug. Once the rope has been passed there is to be no further room for argument whether the rope is taut so that the actual process of moving the ship has begun and the towing has begun.

I think those words which are the alternative to the crucial words are important in construing the crucial words, because in effect what counsel for the plaintiffs argues is this:

> "Show that the tug was there because of a contract of towage; show that she is within reasonable hailing distance of the ship at a reasonable time in reference to the contract of towage, and the words are satisfied. Her physical position is within hail, and that is enough. She is there waiting the moment when somebody gives her the orders which she is prepared to receive. She will receive them direct because she is within hailing distance and there is no more to be said about it."

I do not think that that is a reasonable interpretation. I do not think that is what the words mean. Of course, if that is the only possible meaning of the words, then, even if they may appear to lead to an absurd conclusion, that cannot be helped; one has to give effect to them. But I do not think that that is what is meant here. Whether you look at the alternative which I have just referred to, or whether you look at the corresponding point of time at which the towage ends, I think one is driven to the conclusion that something narrower than that is meant. I doubt myself whether the word "position" is only used in the sense of local situation. I think it involves also the conception of the tug being herself in a condition to receive and act upon the orders. But, however that may be, the orders which she is to be in a position to receive are orders to pick up ropes or lines—not orders generally, but those specific orders—and I think that that must have some reference to the intention of those on board the ship to give those orders, and to the readiness of those on board the tug to receive such orders.

On the facts of this case I should be prepared to hold that, even if one were bound to hold that all that matters is the physical position of the tug, I do not think that the moment had arrived. I have already said that there was nobody on board the *Uranienborg* who, at the moment of the *Kenia's* arrival, was even thinking or preparing to give orders to take or receive, as between the ship and the tug, the ropes or lines. They had not got to that stage; they were not thinking of it. I have seen the officer whose duty it would be to superintend those operations. He had not got anybody standing by;

they had not finished discharging; he had already told the other tug that neither the pilot nor the boatmen had come; and the other tug, as I have already said, was lying off some 300 ft. away, at a buoy. Mr. Bateson says that she plainly, quite plainly, was in a position to receive orders to pick up ropes or lines—she was, in the sense that she was within 300 ft. and within hailing distance, but in no other sense. She knew that the time was not ripe and was acting accordingly, and there is not a tittle of evidence from the *Kenia* that anybody, from the master downwards, on board the *Kenia* was even thinking in terms of ropes and lines at the material time. Certainly, they had come there in order to be available for the towing whenever the towing began. At the moment that this collision occurred they were not thinking of—they had not begun to expect—an order to pick up ropes or lines at all. On the contrary, all that the master was thinking of at that moment was correcting his own errors in going through those barge tiers much too fast and trying to avoid this collision. I find it, whether as a matter of construction of the conditions or on the facts of this case, impossible to hold that at the critical moment this tug was in a position to receive orders with regard to ropes or lines.

But counsel for the plaintiffs says that on his argument that does not matter. That may be so at that moment, but I have got to look at the very latest to the moment when she turned out of the river (and possibly earlier because she was within hailing distance before); but at any rate at the moment when she turned out of the river between these buoys in the barge roads, and at that moment she was in a position to receive orders. Therefore, the towage had begun, and, therefore, the fact that at some later moment she is not thinking about ropes or lines at all, she is only thinking of correcting her own carelessness, is irrelevant. The towing has begun, and the moment has not come when the tow ropes have been finally slipped and the tug is safely clear—therefore, she is subject to all the exemptions.

I think that is simply making nonsense of these conditions. I think that the least that is involved in arriving at the moment when the period commences is that the tug herself, at any rate, should be able to show that she was in a position to receive and, having received, to comply with these orders in connection with ropes or lines at the material time. I am satisfied that that period had not come in the case of this tug *Kenia*, but I think also that this phrase has got to be read as if there were two parties involved in the matter and that until the reasonable moment has come at which orders may be expected to be given from the ship the tug cannot be said to be in a position to receive orders from the ship; but whichever way you look at it—even if you look at it, as I say from the point of view of the tug alone—I am satisfied that on the facts of this case she was not in a position to receive orders and that the towing had not begun. That being so, I dismiss the claim with costs. That leaves the original admission, having the effect of a judgment of the court, where it is.

Action dismissed.

Solicitors: *Godfrey Warr & Co.*; *Thomas Cooper & Co.*

[*Reported by* J. A. Petrie, Esq., *Barrister-at-Law.*]

WESSEX DAIRIES LTD. *v.* SMITH

[COURT OF APPEAL (Greer and Maugham, L.JJ. and Talbot, J.), April 5, 8, 1935]

[Reported [1935] 2 K.B. 80; 104 L.J.K.B. 484; 153 L.T. 185; 51 T.L.R. 439]

Master and Servant—Duty of servant—During service—Soliciting customers to transfer custom to him at future date.

The defendant, who was in the service of the plaintiffs as a milk roundsman, solicited, on the day before he left their service, the plaintiffs' customers to become his customers in the business which he was about to start.

Held: that the defendant had committed a breach of his implied contract to serve the plaintiffs with good faith and fidelity by acting as he did before the termination of his employment, and was, therefore, liable in damages.

Per **Maugham, L.J.:** In the absence of a valid restrictive clause in the contract of service preventing him doing so, a servant may, while in the employment of the master, be as agreeable, attentive, and skilful as it is in his power to be to the master's customers with the ultimate view of obtaining the benefit of their friendly feelings when he calls on them if and when he sets up business for himself.

Nichol v. *Martyn* (2) (1799), 2 Esp. 732, N.P., disapproved.

Notes. Considered: *Hivac, Ltd.* v. *Park Royal Scientific Instruments, Ltd.*, [1946] 2 All E.R. 350.

As to the duty of a servant to his master, see 22 HALSBURY'S LAWS (2nd Edn.) 183–5, and for cases, see 34 DIGEST 117, 118, *881–903*.

Cases referred to:

(1) *Attwood* v. *Lamont*, [1920] 3 K.B. 571; 90 L.J.K.B. 121; 124 L.T. 108; 36 T.L.R. 895; 65 Sol. Jo. 25, C.A.; 43 Digest 20, *131*.

(2) *Nichol* v. *Martyn* (1799), 2 Esp. 732, N.P.; 34 Digest 168, *1306*.

(3) *Robb* v. *Green*, [1895] 2 Q.B. 1; 72 L.T. 686; on appeal, [1895] 2 Q.B. 315; 64 L.J.Q.B. 593; 73 L.T. 15; 59 J.P. 695, C.A.; 34 Digest 121, *928*.

(4) *Lamb* v. *Evans*, [1893] Ch. 218; 62 L.J.Ch. 404; 68 L.T. 131; 41 W.R. 405; 9 T.L.R. 87; 2 R. 189.

Appeal from an order of HUMPHREYS, J., at Winchester Assizes.

The plaintiffs, Wessex Dairies, Ltd., were the proprietors of a dairy, and the defendant had been in their employment as a roundsman. He had previously been in the service of A. J. Garland, the plaintiffs' predecessor in the business, under an agreement whereby, in consideration of a weekly wage, he agreed that he would well and faithfully serve Garland and his assigns or successors in the same business and would not during the continuance of such service, nor after quitting such service, in any way interfere with the trade of the customers served by A. J. Garland or his assigns or successors, and, if he failed to observe these covenants, he would pay 20s. for each day's breach as liquidated damages. In 1933 Garland's business was acquired by the plaintiffs, and the defendant continued in the plaintiff's business until June 2, 1934, when he terminated his service by giving to the plaintiffs one week's salary in lieu of notice.

The plaintiffs alleged that on the day before he left their service the defendant had asked some of the customers on the round on which he worked to transfer their custom to him in connection with the business which he was starting on his own account, and that a number of them had done so. The plaintiffs claimed that this was a breach of his contract with them, or, in the alternative, they said that it was a breach of his implied obligation to "well and faithfully serve" them, and they asked for damages. HUMPHREYS, J., held that the defendant, during his service with the plaintiffs, had acted in a way contrary to their interests and was not a faithful servant to them, and that, therefore, the plaintiffs were entitled to damages, which he assessed at £20.

The defendant appealed, and there was a cross-appeal by the plaintiffs as to the amount of damages.

Scott Henderson for the defendant.
W. E. P. Done for the plaintiffs.

GREER, L.J.—The plaintiffs were the proprietors of a dairy in whose service the defendant had been for some time as a roundsman, as he had been with their predecessor in the business. By an agreement between that predecessor and the defendant the latter undertook that, in consideration of his weekly wage, he would

> "well and faithfully serve" [him] "or his future . . . assigns or successors in the same business and will not during the continuance of such service nor after quitting such service in any way interfere with the trade or the customers served by and from the dairy aforesaid, or endeavour in any way whatever to supply any of the said customers either as servant or master for his own benefit or that of any other person or persons whatsoever."

If that was a valid contract, the defendant would not only have been prevented from trading on his own account with customers on the round while in the plaintiffs' employment, but he would have been prevented from doing so after he had left their service, apparently, for the term of his life. It was conceded that the effect of the decision in *Attwood* v. *Lamont* (1) is to make such a contract invalid in so far as it restrained the defendant, after he left the plaintiffs' employment, from canvassing the plaintiffs' customers. The case before the judge was conducted on that view, and I do not propose to consider whether the decision in *Attwood* v. *Lamont* (1) goes as far as that. I proceed on the assumption that the clause which I have read, in so far as it restricts the defendant after he left the plaintiffs' service, is invalid, but I treat the obligation that during the employment he will well and faithfully serve the plaintiffs as binding on him. Even, however, if the latter obligation is not severable and the whole of the clause is bad, the defendant would, nevertheless, be under the ordinary implied obligations existing between master and servant, namely, that during the continuance of his employment he will act in his employers' interests and not use the time for which he is paid by the employers in furthering his own interests.

Counsel for the defendant has asked us to say that that is not so, and he cited in support of his contention *Nichol* v. *Martyn* (2), which is to be found in that collection of imperfect and misleading reports bearing the name of ESPINASSE, and of which the sidenote reads thus:

> "A servant, while in his master's service, may solicit business from his customers for himself, when his service is at an end, and he sets up on his own account."

If that is to be taken as laying down a general principle applicable to all contracts of service it is in my opinion bad law and cannot be accepted at the present day. It is obvious that during the continuance of the contract of service and during his master's time the servant has to look after, not his own interests, but those of his master. The report of *Nichol* v. *Martyn* (2) is very short, but, if the words of LORD KENYON, C.J., are correctly reported they lay it down that the servant may, while in the master's service, canvass or solicit business from the master's customers for himself to take effect after he has left the service. In that case the defendant was a traveller in the service of the plaintiffs, but it does not appear from the report whether he was in whole time service, and it may be that, if we knew the precise facts, the actual decision might be justified without accepting the general principle stated by LORD KENYON, C.J., as applicable to all master and servant contracts.

The point involved came up for consideration in *Robb* v. *Green* (3), where HAWKINS, J., in the course of a very elaborate and illuminating judgment, said this with regard to *Nichol* v. *Martyn* (2):

> "It seems presumptuous to criticise or doubt so high an authority, but I cannot help asking myself whether at the present day LORD KENYON, after considering the matter, would have considered it no breach of the duty of a servant deliberately to utilise his hours of service by being false to his master's interests and endeavouring to induce his master's customers to transfer their custom to him on a near

> approaching day. It was certainly against his master's interests that he should do so. It may be under particular circumstances that the injury done to his master would hardly be greater than if he had waited till he had left the service before he made his canvass. But that is not the question. The obligation to protect his master's interests lasts until the last hour of his service. The dividing line between owing his master a duty and owing him none is that imperceptible period of time between the termination of his service and the moment he acquires freedom of action after his service has terminated."

HAWKINS, J., then dealt with the facts in the case before him, which were that, during the service, the servant copied a list of the master's customers. That was clearly a flagrant breach of trust. The passage I have read correctly states the duty owed by a servant to his master as the law regards it at the present day.

In the present case the defendant acted contrary to his duty. During the last week of his service with the plaintiffs, while pursuing his duty to his master by calling on customers and delivering milk to them, he tried to induce them to become his customers after his employment with the plaintiffs had terminated, and for the direct result of that wrongful act he is liable to pay damages. As to the damages, I cannot see my way to interfere with the amount fixed by the learned judge. The appeal and the cross-appeal must therefore be dismissed.

MAUGHAM, L.J.—The claim in this case, which raises a question of some little interest in relation to the duty of a servant to his master during the period of his employment, is based upon an alleged breach of an implied term in the contract by which the defendant was to serve the plaintiffs as a milk roundsman. The point of law involved is one on which judges have not always expressed the same opinion. The question is whether a servant in such an employment as that in which the defendant was engaged, is entitled, while in that employment, to solicit orders from his employers' customers as from a future time, namely, the time when the servant ceased to be in the employment of the plaintiffs. HUMPHREYS, J., found that the defendant was guilty of a breach of contract and awarded the plaintiffs £20 as damages. In this court the defendant's counsel has quite rightly relied on some passages in *Nichol* v. *Martyn* (2) as justifying the defendant's conduct—passages which to some extent seem to have been approved by HAWKINS, J., in *Robb* v. *Green* (3). This court has now to decide whether the language of LORD KENYON, C.J., as reported, can be accepted at the present day as accurately stating the law, and whether the words used by HAWKINS, J., which seem to agree with it are correct. *Nichol* v. *Martyn* (2) was a decision of nisi prius.

The plaintiffs were wholesale ironmongers, by whom the defendant was employed as their traveller to get orders. During his employment with the plaintiffs the defendant solicited their customers to give their orders to him after he had left their employment. In his judgment LORD KENYON, C.J., said:

> "A servant, while engaged in the service of his master, has no right to do any act which may injure his trade, or undermine his business; but every one has a right, if he can, to better his situation in the world; and if he does it by means not contrary to law, though the master may be eventually injured, it is damnum absque injuria."

Then comes this passage:

> "There is nothing morally bad, or very improper, in a servant, who has it in contemplation at a future period to set up for himself, to endeavour to conciliate the regard of his master's customers, and to recommend himself to them, so as to procure some business from them as well as others. In the present case, the defendant did not solicit the present orders of the customers; on the contrary, he took for the plaintiffs all those he could obtain; his request of business for himself was prospective, and for a time when the relation of master and servant between him and the plaintiffs would be at an end."

LORD KENYON, accordingly, non-suited the plaintiffs. The case, it may be noted, was argued by very eminent counsel, who, no doubt, put forward every point adequately, but, having regard to the fact that the skill and accuracy of ESPINASSE as a reporter have been often adversely criticised, I think there is considerable reason to suppose that the report is inaccurate. Indeed, at one time counsel were recommended by judges not to cite him, inasmuch as he afforded no sure guidance, and I cannot think that the report in this particular can be accurate. I doubt whether we can accept the view that Lord Kenyon used the words I have cited, beginning: "There is nothing morally bad." They do not sound like a judgment of his. If what the servant was doing was morally bad, it was improper, and, if improper, it was morally bad. I doubt also whether we can accept the view attributed to the Chief Justice that a person while still in the employment of wholesale ironmongers is entitled to solicit customers for himself as from the time when he ceases to be employed by them.

If that stood alone, one would probably say that the report was defective, but in *Robb* v. *Green* (3), however, Hawkins, J., said this:

> "In what I have said I do not intend to convey that while the contract of service exists a person intending to enter into business for himself may not do anything by way of preparation, provided only that he does not, when serving his master, fraudulently undermine him by breaking the confidence reposed in him. For instance, he may legitimately canvass, issue his circulars, have his place of business in readiness, hire his servants, &c. Each case must depend on its own circumstances."

I do not know what the judge meant by "legitimately canvassing," but if he meant that the servant, while going his rounds or while he was employed in some way on behalf of the master, is entitled to use the opportunity to canvass his master's customers for himself as from the day when he ceases to be in the master's service, I doubt whether that view is correct, and I observe that when that case went to the Court of Appeal nothing to that effect is to be found in the judgments. There is, however, another passage in *Robb* v. *Green* (3) when Hawkins, J., in referring to the judgment of Lord Kenyon, C.J., in *Nichol* v. *Martyn* (2), said this:

> "It seems presumptuous to criticise or doubt so high an authority, but I cannot help asking myself whether at the present day Lord Kenyon, after considering the matter, would have considered it no breach of the duty of a servant deliberately to utilise his hours of service by being false to his master's interests and endeavouring to induce his master's customers to transfer their custom to him on a near approaching day."

That appears to show that Hawkins, J., did not take the view, which the other passage I read seems to indicate, that a servant can properly canvass his master's customers for himself as from a near approaching day.

The question to be determined essentially depends on the term to be implied in the ordinary case of a contract of employment in the absence of express agreement. In the present case an express agreement has been mentioned which states the duty of fidelity, but I would like to decide the case on a wider ground. Hawkins, J., said in *Robb* v. *Green* (3) that in a contract of service, and in the absence of any stipulation to the contrary, there is an implied obligation that the servant will honestly and faithfully serve his master; that he will not abuse his confidence in matters appertaining to his service; and that he will, "by all reasonable means in his power, protect his master's interests in respect to matters confided to him in the course of his service." This is somewhat vague. I do not quite know what is meant by the words "matters confided to him." For myself I do not hesitate to say that I prefer the more general implication stated thus by A. L. Smith, L.J. ([1895] 2 Q.B. at p. 320):

> "I think that it is a necessary implication which must be engrafted on such a contract that the servant undertakes to serve his master with good faith and fidelity. That is what was said in *Lamb* v. *Evans* (4), and I entirely agree with it."

The Lord Justice then asked himself whether the defendant in *Robb* v. *Green* (3) acted with good faith and fidelity. The same question has to be answered in the present case. In considering it certain considerations should not be left out of sight. First, after the employment terminates, the servant may, in the absence of special stipulation, canvass the customers of the late employer, and further he may send a circular to every customer.

On the other hand, it has been held that while the servant is in the employment of the master he is not justified in making a list of the master's customers, and he can be restrained, as he was in *Robb* v. *Green* (3), from making such a list, or, if he has made one, he will be ordered to give it up. But it is to be noted that in *Robb* v. *Green* (3), the defendant was not restrained from sending out circulars to customers whose names he could remember. Another thing to be borne in mind is that, although the servant is not entitled to make use of information which he has obtained in confidence in his master's service, he is entitled to make use of the knowledge and skill which he acquired while in that service, including knowledge and skill directly obtained from the master in teaching him his business. It follows, in my opinion, that the servant may, while in the employment of the master, be as agreeable, attentive, and skilful as it is in his power to be to the master's customers with the ultimate view of obtaining the benefit of their friendly feelings when he calls on them if and when he sets up business for himself. That is, of course, where there is no valid restrictive clause preventing him doing so.

In the present case the question is whether the defendant acted with good faith and fidelity when, on the Saturday afternoon in question and perhaps on the previous days of the week, in going his round he informed the customers that he would cease on Saturday to be in the employment of the plaintiffs, that he was going to set up business for himself, and that he would be in a position to supply them with milk, obviously soliciting their custom as from Saturday evening. In my opinion, that was a deliberate, as it was a successful, canvassing at a time when the defendant was under an obligation to serve the plaintiffs with fidelity. I am of opinion, therefore, that he committed a breach of his implied contract by acting as he did before the termination of his employment. Not to leave the matter in doubt the passage in LORD KENYON's judgment relied on by counsel for the appellant cannot, in my opinion, be regarded as good law. The amount of damages cannot, I think, be put at any high figure, because I think the learned judge saw the witnesses and considered the matter very properly. In these circumstances I cannot see my way to differ from the conclusion at which he arrived. The appeal and cross-appeal must, therefore, be dismissed.

TALBOT, J.—I am of the same opinion, and I desire to add nothing except that I agree that *Nichol* v. *Martyn* (2) as reported cannot be relied on as a correct statement of the law.

Appeal and cross-appeal dismissed.

Solicitors: *J. F. Chadwick*, for *Edmonds & Bullin*, Portsmouth; *Reynolds, Sons & Gorst.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re BROMAGE. PUBLIC TRUSTEE *v.* CUTHBERT

[CHANCERY DIVISION (Luxmoore, J.), April 11, 12, 15, 1935]

[Reported [1935] Ch. 605; 104 L.J.Ch. 299; 153 L.T. 313; 51 T.L.R. 408; 79 Sol. Jo. 418]

Legitimacy—Presumption of legitimacy—Rebuttal—Spouses living apart under separation deed—Evidence of non-access.

Every child born of a married woman during the subsistence of the marriage is primâ facie legitimate and the fact that at the material dates the spouses were living separate and apart under a separation deed does not render the presumption inapplicable. But where, on June 6, 1921, a deed of separation was signed by a husband and wife and they ceased to live together, and two children were subsequently born to the wife, one in March, 1922 and one in May, 1929, and in each case she registered the birth as the child of a man other than the husband with whom she had been living.

Held: that, there being no evidence to prove that there had been access by the husband since the date of the deed, the children must be deemed illegitimate and not capable of sharing in a bequest to children of the marriage.

Mart v. *Mart* (3), [1926] P. 24, doubted.

Notes. Not followed: *Stafford* v. *Kidd*, [1936] 3 All E.R. 1023. Approved: *Ettenfield* v. *Ettenfield*, [1939] 2 All E.R. 743. Considered: *Cotton* v. *Cotton*, [1954] 2 All E.R. 105. Referred to: *Re Adams, Sursham* v. *Farquharson*, [1951] 1 All E.R. 1037; *Re Jenion, Jenion* v. *Wynne*, [1952] 1 All E.R. 1228.

As to the presumption of legitimacy, see 3 HALSBURY'S LAWS (3rd Edn.) 87–92, and for cases on the subject, see 3 DIGEST 358–368, *1–97*.

Cases referred to:

(1) *Aylesford Peerage Case* (1885), 11 App. Cas. 1; 3 Digest 367, *80*.

(2) *Banbury Peerage Case* (1811), 1 Sm. & St. 153; 57 E.R. 62; 3 Digest 358, *2*.

(3) *Mart* v. *Mart*, [1926] P. 24; 95 L.J.P. 29; 134 L.T. 446; 42 T.L.R. 253; Digest Supp.

(4) *Morris* v. *Davies* (1837), 5 Cl. & Fin. 163; 1 Jur. 911; 7 E.R. 365, H.L.; 3 Digest 359, *12*.

(5) *Russell* v. *Russell*, [1924] A.C. 687; 93 L.J.P. 97; 131 L.T. 482; 40 T.L.R. 713; 68 Sol. Jo. 682, H.L.; Digest Supp.

(6) *Hetherington* v. *Hetherington* (1887), 12 P.D. 112; 56 L.J.P. 78; 57 L.T. 533; 51 J.P. 294; 36 W.R. 12; 3 Digest 360, *22*.

(7) *Bury* v. *Philpot* (1834), 2 My. & K. 349; 3 L.J.Ch. 119; 39 E.R. 977; 3 Digest 360, *16*.

(8) *Gordon* v. *Gordon and Granville Gordon*, [1903] P. 141; 72 L.J.P. 33; 89 L.T. 73; 3 Digest 360, *17*.

(9) *Andrews* v. *Andrews and Chalmers*, [1924] P. 255; 93 L.J.P. 137; 132 L.T. 400; 40 T.L.R. 873; Digest Supp.

(10) *R.* v. *Mansfield (Inhabitants)* (1841), 1 Q.B. 444; 1 Gal. & Dav. 7; 10 L.J.M.C. 97; 5 J.P. 420; 5 Jur. 505; 113 E.R. 1203; 3 Digest 366, *74*.

Originating Summons.

These proceedings were commenced by the Public Trustee for the purpose of determining (inter alia) the question whether two of the defendants, namely, Dene Horton and Clive Arthur Aubrey (both infants), were entitled contingently on their respectively attaining twenty-one to share with the two first-named defendants, namely, Heather Gordon Cuthbert and Ian Reid Cuthbert (also both infants), in certain trust funds bequeathed by the will of Sarah Ann Bromage, deceased, to the plaintiff in trust after the death of Margaret Nora Cuthbert, and also after the death of Archibald Cuthbert for all children of the said Margaret Nora Cuthbert and all the children of the said Archibald Cuthbert who, being sons, should attain twenty-one or, being daughters, should attain that age or marry.

Margaret Nora Cuthbert was married on Oct. 29, 1910, to Archibald Cuthbert. Four children of the marriage were born before June 6, 1921, namely, the defendants Heather Gordon Cuthbert and Ian Reid Cuthbert, and two others who died in early infancy. On June 6, 1921, a deed of separation was executed by the husband and wife by which it was agreed that the wife should live separate and apart from her husband and free from his marital control and authority, and that she should be at liberty to reside at such place as she might think proper. No proceedings for divorce had been instituted at this date, nor were any proceedings of that nature subsequently launched. The deed of separation did not contain any clause limiting the provision thereby made for the wife to such period as she remained chaste.

Two children were born to the wife after the date of the separation deed. The first was born on March 2, 1922. This child was, as appeared from the birth certificate, registered as Dene Horton. His father's name was there stated to be Ernest Albert Gladman Horton, while the mother's name was given as Margaret Nora Cuthbert, formerly Bromage. The informants in respect of the birth were stated to be E. A. G. Horton, father, and M. N. Cuthbert, mother. This child was the defendant Dene Horton. The other child was born on May 25, 1929. The birth certificate stated the child's name as Clive Arthur, that the father's name was Henry Arthur Aubrey, and the mother's name was Margaret Nora Cuthbert, formerly Bromage. The informants were stated to be H. A. Aubrey, father, and M. N. Cuthbert, mother. This child was the defendant Clive Arthur Aubrey.

Margaret Nora Cuthbert died on Oct. 26, 1933. By the will of her mother, the said Sarah Ann Bromage, who died on May 3, 1919, certain provisions were made, as above stated, for the children of the said Margaret Nora Cuthbert and also for the children of the said Archibald Cuthbert. Evidence adduced in the case and further facts are stated in the judgment of the learned judge.

H. Johnston, for the plaintiff.

J. V. Nesbitt, for the defendants Heather G. Cuthbert and Ian Reid Cuthbert, referred to *Aylesford Peerage Case* (1) and *Banbury Peerage Case* (2).

Hon. B. L. Bathurst, for the defendant D. Horton.

J. L. Stone, for the defendant C. A. Aubrey, referred to *Mart* v. *Mart* (3), *Morris* v. *Davies* (4), *Russell* v. *Russell* (5), *Hetherington* v. *Hetherington* (6), *Bury* v. *Phillpot* (7) and *Gordon* v. *Gordon and Granville Gordon* (8).

LUXMOORE, J., stated the facts and continued: It is well settled that every child born of a married woman during the subsistence of the marriage is primâ facie legitimate. This presumption, however, is not one juris et de jure, and, therefore, can be rebutted by evidence of circumstances proving the contrary: see the first answer of the judges in the *Banbury Peerage Case* (2). The presumption does not arise where the child is born after a decree of divorce, because in such case the marriage is no longer subsisting when the birth takes place. Nor does it arise where the parties are living apart under a decree for judicial separation: see *Hetherington* v. *Hetherington* (6) or under an order of a court of summary jurisdiction: see *Andrews* v. *Andrews and Chalmers* (9). The ground for the exception where there is a decree for judicial separation appears to be statutory, for it was provided by s. 16 of the Matrimonial Causes Act, 1857, now replaced by s. 185 of the Supreme Court of Judicature Consolidation Act, 1925, that a sentence of judicial separation should have the effect of a divorce a mensa et thoro under the existing law. A similar basis also appears to exist in the case of a separation under an order of a court of summary jurisdiction: see the Summary Jurisdiction (Married Women) Act, 1895, s. 5.

It is said that the execution of a separation deed where the parties are living apart under its provisions has the same effect as a decree for judicial separation or an order of a court of summary jurisdiction, and that in such a case the presumption has no application. In support of this contention reliance is placed on the decision of BATESON, J., in *Mart* v. *Mart* (3). With all respect to that learned judge, and notwithstanding my personal inclination to accept and follow that decision, it seems to me to be at variance with that of the House of Lords in *Morris* v. *Davies* (4), where the husband and wife were in fact living apart under a separation deed executed by them, and also with the decision in the *Aylesford Peerage Case* (1), where also the husband and wife had executed a separation deed and were at the material dates living apart under its provisions.

In my judgment, I am bound by those decisions to decide the present case on the footing that the fact that the parties were at the material dates living separate and apart under a separation deed does not render the presumption inapplicable. This being so, it is necessary to consider in what circumstances the presumption may be rebutted. A careful consideration of the authorities leads to the conclusion that if the parties have opportunities of access it is necessary, in order to rebut the presumption, to prove that such access did not take place between the husband and wife as is necessary in order for the husband to be the father of the child in question. I use the word "access" in the sense in which it is defined in the fifth answer in the *Banbury Peerage Case* (2) in the following passage:

> "The non-existence of sexual intercourse is generally expressed by the words 'non-access of the husband to the wife'; and we understand those expressions as applied to the present question, as meaning the same thing, because in one sense of the word 'access,' the husband may be said to have access to his wife as being in the same place or the same house, and yet, under such circumstances as, instead of proving, tend to disprove, that any sexual intercourse took place between them."

In their fifth answer in the *Banbury Peerage Case* (2) the judges stated that the presumption of legitimacy could

> "only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife, at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child, in such a case, is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father of such child, and the evidence to prove that he was not the father must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any time, when, by such intercourse, the husband could, by the laws of nature, be the father of such child."

The evidence must, as the Lord Chancellor said in *Morris* v. *Davies* (4),

> "be such as to exclude all doubt, that is, of course, all reasonable doubt in the minds of the court or jury, to whom that question is submitted."

The question cannot be decided upon a mere balance of probabilities. To quote LORD LYNDHURST'S words:

> "that presumption of law is not lightly to be repelled. It is not to be broken in upon, or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive."

In considering these statements it is, I think, necessary to bear in mind that the fact to be proved is in a sense a negative, and, consequently, in some of its aspects is incapable of positive proof.

Counsel on behalf of the defendant Clive Arthur Aubrey, urged that in a case where there was evidence of meetings between the husband and wife, and using the word "access" in its wider sense and not in the sense in which, in the *Banbury Peerage Case* (2), the judges stated they were using it in their answers, there was a presumption of sexual intercourse which could only be rebutted by direct evidence that no such intercourse in fact took place, and for this argument he relied on certain statements to be found in the judgments in *R.* v. *Mansfield* (*Inhabitants*) (10). The story unfolded in the report of that case appears at first sight strongly to suggest a finding in the opposite sense to that arrived at by the court, but I think the actual finding is explained by the fact that the only witness called at the trial was the wife, most of whose evidence was not admissible, and the case was, therefore, treated as being one in which no contrary evidence was available. The argument of counsel for the defendant is, in effect, the same as was advanced in favour of the appellant in *Morris* v. *Davies* (4). The Lord Chancellor dealt with it in these words:

> "I consider the *Banbury Peerage Case* (2) as establishing a principle, not only from the opinions of the judges, but from the points actually decided, distinctly negativing the presumption argued for at the Bar, namely, that where the evidence proves that the husband and wife had opportunities of access, from being shown to have been in the same house or place, no evidence from the conduct of the parties, that is, no circumstantial evidence, can be received to repel the presumption of sexual intercourse, and therefore of the legitimacy of the child, because,"—and this is the ground on which the argument was rejected—"first, in that case, there was no evidence of any separation or quarrel between Lord and Lady Banbury, and the presumption of their living toegether as man and wife, and of a sexual intercourse, therefore arose, but yet was capable of being repelled by circumstantial evidence."

It is plain that in the *Banbury Case* (2) the presumption of sexual intercourse arising from the fact that the husband and wife were living together was rebutted by the conduct of the parties and other circumstantial evidence.

What are the material facts in the present case? It is clear from the correspondence exhibited that the husband and wife were not living together at the beginning of 1921. They appear to have parted in June of the preceding year. In October of that year the wife was suing the husband in the King's Bench Division of this court for money lent and the return of certain chattels. Negotiations were in hand for the execution of a deed of separation. On Feb. 3, 1921, the wife's solicitors wrote to those of the husband a letter in which is this statement: "Our Client" [the wife] "sees no reason for exchanging addresses, as she has no desire to communicate further with your client [the husband]," while in April of the same year the wife is writing to her solicitor telling him not to mention that "we are out of town as he"—the husband—"might try to find us." There is nothing in the correspondence to suggest that the wife and husband ever met during this period before the deed of separation was executed.

Mr. Horton's evidence is that he first met the wife in April, 1921; that they began to live together as man and wife some four or five weeks after that date, and that from May until September they lived together at week-ends. There is a statement to the effect that the wife told Mr. Horton at some time during the period between May and September, 1921, that she had been to London with regard to the sale of her house at Hornsey, and that she had seen her husband with regard to certain furniture he had belonging to her. The wife and Mr. Horton moved in September, 1921, to 16, Denbigh-street, where they lived as man and wife for some months. They left that address and moved to Brixton, where the defendant Dene Horton was born. They returned to 16, Denbigh-street after that event. They continued to live together for some years, and finally separated in 1927. I have already referred to the facts relating to the registration of the birth of the defendant Dene Horton. From early infancy he has been brought up under the care of Mr. Horton's parents. So far as the evidence goes, there is no suggestion that the husband knew of his existence. Certainly he was never asked to provide for him and never acknowledged him as his child. A consideration of the evidence leaves no shadow of doubt in my mind that the husband was not the father of Dene Horton, and that there was no sexual intercourse between the husband and wife at the material time when he was conceived. I have no hesitation in holding that Dene Horton is not a legitimate child of Margaret Nora Cuthbert.

It remains to consider the evidence with regard to the defendant Clive Arthur Aubrey. Some time before August, 1928, Mr. Arthur Henry Aubrey, being then nineteen years of age, went to lodge with the wife. At this time the latter was about forty years of age. Very soon after his arrival intimacy took place between him and the wife, and this continued during a period which ended in November, 1928, when there was a quarrel. Mr. Aubrey left the house and returned to his parents. On March 25, 1929, the defendant Clive Arthur Aubrey was born. The nurse in attendance on Mrs. Cuthbert telephoned to Mr. Aubrey and told him that Mrs. Cuthbert wanted to see him. He went to London, and was told by Mrs. Cuthbert that it was his duty to register the child as his. He, accordingly, went with her to the registrar, and the result appears on the birth certificate of the defendant Clive Arthur Aubrey. There is no evidence to suggest that the husband knew of the birth of this child. He certainly has never been acknowledged by the husband as his child. Since Mrs. Cuthbert's death the child has been residing under the care of Mr. Aubrey's parents. If the evidence stopped there, there could, I think, be no reasonable doubt but that the child was illegitimate. It is said, however, that the weight of this evidence is displaced because Mr. Aubrey has stated that while he was living with Mrs. Cuthbert her husband used to visit her, not only for the purpose of seeing her children, Heather and Ian, but also on other occasions, and that on these occasions he (Aubrey) used to go out, but he does not state at what time he was in the habit of returning or whether he ever found the husband still there. Having regard to his pecuniary interest and the vague nature of the suggestion, I do not think much weight can be attributed to this statement or to the statement that Aubrey was told by Mrs. Cuthbert that she and her husband were considering making a home together again. Obviously, if intercourse had taken place between the husband and wife, there was cogent reason for registering the husband as the father of the child.

In my judgment, there is no reasonable doubt in this case also, and I hold that the defendant Clive Arthur Aubrey is not the legitimate child of the wife. I, therefore, answer the questions raised by the summons in the negative.

Solicitors: *Warren & Warren*; *Pattinson & Brewer*; *Piper, Smith & Piper*; *Doyle, Devonshire & Co.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

In the Estate of SIMPSON. *In the Estate of* GUNNING

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), November 11, 1935]

[Reported [1936] P. 40; 105 L.J.P. 7; 154 L.T. 136; 52 T.L.R. 117; 79 Sol. Jo. 861]

Intestacy—Grant of administration—Grant to nominee of applicant—Desire of applicant to institute proceedings against intestate's estate—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 162 (1), *as amended by Administration of Justice Act*, 1928 (18 *&* 19 *Geo.* 5, *c.* 26), *s.* 9*—Law Reform (Miscellaneous Provisions) Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1 (1).

On these motions a grant of letters of administration was made in each case to a nominee of the applicant under s. 162 (1) of the Supreme Court of Judicature Act, 1925, as amended by s. 9 of the Administration of Justice Act, 1928, to enable the applicant to sue for damages under the Law Reform (Miscellaneous Provisions) Act, 1934, against the administrators as defendants under third-party motor insurance policies held by the deceased. In both cases those primarily entitled to take representation had declined to do so.

Notes. As to discretionary grants, see 16 HALSBURY'S LAWS (3rd Edn.) 224 et seq., and for cases, see 23 DIGEST 164 et seq. For the relevant statutes, see 9 HALSBURY'S STATUTES (2nd Edn.) 639 et seq.

Application by G. W. Miskin for a grant of letters of administration to the estate of Alistair Begg Simpson, a minor, and an undergraduate of Cambridge University, who, when motor-cycling, was killed in a motor collision on Oct. 28, 1934. It was stated that the applicant and another member of his family, who were travelling by motor car, were injured in the accident. The deceased's only asset was his motor car insurance policy, and his parents, who were the persons entitled to administration, refused to take a grant. The insurance company repudiated liability. The applicant and the owner of the car (which was damaged), wished to sue for damages against the estate of the deceased, and it was necessary that an administrator should be appointed who would be made defendant in the action. The applicant prayed that a certain accountant be appointed administrator for that purpose.

H. B. D. Grazebrook, for the applicant.—The Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1), provides that on the death of any person since July 25, 1934, all causes of action subsisting against or vested in him (subject to certain immaterial exceptions) shall survive against or for the benefit of his estate, as the case may be. Section 1 (3) (*b*), provides that no proceedings shall be maintainable in respect of a cause of action in tort which, by virtue of s. 1, has survived against the estate of a deceased person unless the cause of action arises not earlier than six months before the death, and proceedings are taken in respect thereof not later than six months after his personal representative takes out representation. Here no claim can be made in respect of the insurance policy until there is a legal representative. Unless and until the applicant obtains judgment he cannot claim representation as a creditor, but the court may grant letters of administration to his nominee, under the special powers provided by s. 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 9 of the Administration of Justice Act, 1928. There would then be a representative of the estate who could be sued.

LANGTON, J., granted the order as prayed.

Solicitors: *Waterhouse & Co.*, for *Few & Co.*, Cambridge.

In the case of J. G. Gunning, deceased, it was stated that Mr. John Gillespie Gunning died on Nov. 7, 1934, as the result of a motor cycle accident, intestate, and with no estate except a third-party indemnity motor insurance policy. His widow and father declined to take out letters of administration.

Mr. F. A. Pidwell, a motor cyclist who had been injured in the accident, wished to sue for damages, and applied for the appointment of a nominee as administrator who might be made defendant in an action the cause of which subsisted against the estate.

C. G. Talbot-Ponsonby for the applicant.

LANGTON, J., made the order as prayed, and dispensed with citation of the deceased's widow and father.

Solicitors: *Savage Cooper & Wright*, for *W. A. L. Houlder & Co.*, Southall.

[*Reported by* WILLIAM LATEY, ESQ., *Barrister-at-Law.*]

A

MARITIME NATIONAL FISH, LTD. *v.* OCEAN TRAWLERS, LTD.

[PRIVY COUNCIL (Lord Atkin, Lord Tomlin, Lord Macmillan, and Lord Wright), March 25, April 12, 1935]

[Reported [1935] A.C. 524; 104 L.J.P.C. 88; 153 L.T. 425; 79 Sol. Jo. 320; 18 Asp. M.L.C. 551] B

Contract—Frustration—Event causing impossibility of performance act of party setting up frustration—Possibility of event known to parties at date of contract—No express condition relating thereto.

Per CURIAM: Where the possibility of an event which is relied on as constituting the frustration of an adventure is known to both parties when the contract is made, C but the contract contains no express condition relating to that event and is absolute in terms so far as concerns it, the contract is not resolved on the happening of the event.

By s. 69a of the Canadian Fisheries Act it was a punishable offence to leave any port in Canada with intent to fish with a vessel that used an otter trawl, except under licence from the Minister. The appellants were charterers of the *St. C.*, a D steam trawler belonging to the respondents, which was fitted with, and could only operate as a trawler with, an otter trawl. It was expressly agreed that the trawler should be employed in the fishing industry only. The charter-party was dated Oct. 23, 1928, and was to continue from year to year. It was renewed on Oct. 25, 1932, for one year. On March 11, 1933, the appellants applied to the Minister of Fisheries for licences for the five trawlers they were operating. The Minister in E his reply stated that only three licences would be granted, and he requested the appellants to state for which of the five trawlers they desired to have licences. The appellants gave the names of three trawlers other than the *St. C.* and licences were issued for those three trawlers. The appellants thereupon claimed that the charter-party had thereby been frustrated and that they were no longer bound by it. In an action brought by the respondents for hire due under the charter, the appel- F lants pleaded that the contract had become impossible of performance, and that they were wholly discharged from it.

Held: the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side; what was claimed in the present case to be a frustration by reason of the withholding of the licence was a matter for which the appellants were responsible, it having happened in consequence of their G election regarding which trawlers should be licensed; and, therefore, they remained liable under the contract.

Krell v. *Henry* (1), [1903] 2 K.B. 740, criticised.

Notes. Considered: *Joseph Constantine S.S. Line, Ltd.* v. *Imperial Smelting Corpn., Ltd.*, [1941] 2 All E.R. 165. Referred to: *Southern Foundries* (1926), *Ltd.* v. *Shirlaw*, H [1940] 2 All E.R. 445; *Monarch S.S. Co.* v. *A/B Karbshamns Oljefabriker*, [1949] 1 All E. R. 1; *Davis Contractors, Ltd.* v. *Fareham U.D.C.*, [1955] 1 All E.R. 275.

As to the frustration of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 185 et seq., and for cases, see 12 DIGEST (Repl.) 436 et seq.

Cases referred to:

(1) *Krell* v. *Henry*, [1903] 2 K.B. 740; 72 L.J.K.B. 794; 89 L.T. 328; 52 W.R. 246; I 19 T.L.R. 711, C.A.; 12 Digest (Repl.) 435, *3327*.

(2) *Bank Line, Ltd.* v. *Arthur Capel & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 35 T.L.R. 150; 63 Sol. Jo. 177; 14 Asp. M.L.C. 370, H.L.; 12 Digest (Repl.) 443, *3365*.

(3) *Larrinaga & Co., Ltd.* v. *Société Franco-Americaine des Phosphates de Médulla, Paris* (1923), 92 L.J.K.B. 455; 129 L.T. 65; 39 T.L.R. 316; 16 Asp. M.L.C. 133; 29 Com. Cas. 1, H.L.; 12 Digest (Repl.) 441, *3356*.

(4) *Hirji Mulji* v. *Cheong Yue S.S. Co., Ltd.*, [1929] A.C. 497; 95 L.J.P.C. 121; 134

L.T. 737; 42 T.L.R. 359; 17 Asp. M.L.C. 8; 31 Com. Cas. 199, P.C.; 12 Digest (Repl.) 436, *3332.*

(5) *Dahl & Co.* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38; 44 L.T 381; 50 L.J.Ch. 411; 29 W.R. 543; 4 Asp. M.L.C. 392, H.L.; 17 Digest (Repl.) 66, *719.*

Appeal from a judgment of the Supreme Court of Nova Scotia reversing a judgment of the Supreme Court of Nova Scotia.

C. B. Smith, K.C. and *Frank Gahan,* for the appellants.
Willink, K.C. and *Mocatta,* for the respondents.

April 12. **LORD WRIGHT.**—The appellants were charterers of a steam trawler, the *St. Cuthbert,* which was the property of the respondents. The charter-party, dated Oct. 25, 1928, had originally been entered into between the respondents and the National Fish Co., Ltd., but was later by agreement taken over by the appellants. It was for twelve calendar months, but was to continue from year to year unless terminated by three months' notice from either party, the notice to take effect at the end of one of the years. It was expressly agreed that the trawler should be employed in the fishing industry only; the amount of monthly hire was to be fixed on a basis to include a percentage of the purchase price, and also operating expenses. There was an option given to the charterers to purchase the trawler.

By letters dated July 6 and 8, 1932, exchanged between the appellants and respondents, it was agreed that the charter-party as then existing should be renewed for one year from Oct. 25, 1932, but at a rate of monthly hire which was 25 per cent lower than that previously paid: the amount so agreed came to $590.97 per month. It was also then agreed that, in the event of the appellants giving notice on or before July 25 in any year that they did not intend to renew, they should further give notice whether or not they intended to exercise the option to purchase. In fact, the appellants gave notice on Jan. 27, 1933, that they did not intend to renew the charter or to purchase the vessel.

When the parties entered into the new agreement in July, 1932, they were well aware of certain legislation consisting of an amendment of the Fisheries Act (c. 73, R. S. Can. 1927) by the addition of sect. 69A, which in substance made it a punishable offence to leave or depart from any port in Canada with intent to fish with a vessel that used an otter or other similar trawl for catching fish, except under licence from the Minister. It was left to the Minister to determine the number of such vessels eligible to be licensed, and regulations were to be made defining the conditions in respect of licences. The date of this amending sect. 69A was June 14, 1929. Regulations were published on Aug. 14, 1931, former regulations having been declared invalid in an action in which the appellants had challenged their validity.

The *St. Cuthbert* was a vessel which was fitted with, and could only operate as a trawler with, an otter trawl. The appellants, in addition to the *St. Cuthbert,* also operated four other trawlers, all fitted with otter trawling gear.

On March 11, 1933, the appellants applied to the Minister of Fisheries for licences for the trawlers they were operating, and in so doing complied with all the requirements of the regulations, but on April 5, 1933, the Acting Minister replied that it had been decided (as had shortly before been announced in the House of Commons) that licences were only to be granted to three of the five trawlers operated by the appellants. He accordingly requested the appellants to advise the Department for which three of the five trawlers they desired to have licences. The appellants thereupon gave the names of three trawlers other than the *St. Cuthbert,* and for these three trawlers' licences were issued, but no licence was granted for the *St. Cuthbert.* In consequence, as from April 30, 1933, it was no longer lawful for the appellants to employ the *St. Cuthbert* as a trawler in their business. On May 1, 1933, the appellants gave notice that the *St. Cuthbert* was available for redelivery to the respondents; they claimed that they were no longer bound by the charter.

On June 19, 1933, the respondents commenced their action claiming $590.97 as being hire due under the charter for the month ending May 25, 1933; it is agreed that if that claim is justified, hire at the same rate is also recoverable for June, July, August, September and October, 1933.

The main defence was that through no fault, act or omission on the part of the appellants, the charter-party contract became impossible of performance on and after April 30, 1933, and thereupon the appellants were wholly relieved and discharged from the contract, including all obligations to pay the monthly hire which was stipulated.

The defence succeeded before the trial judge, Doull, J. His opinion was that there had been a change in the law, including the regulations, which completely changed the basis on which the parties were contracting. He thought it

> "not unreasonable to imply a condition to the effect that if the law prohibits the operation of this boat as a trawler the obligation to pay hire will cease."

He also thought the appellants were not bound to lay up another boat instead of the *St. Cuthbert*. It seems that the learned judge proceeded on the footing that the change of law was subsequent to the making of the contract, whereas it was in fact anterior to the agreement of 1932 under which the trawler was being employed at the time the licence was refused.

This judgment was unanimously reversed by the judges in the Supreme Court En Banco. The judges of that court rightly pointed out that the discharge of a contract by reason of the frustration of the contemplated adventure follows automatically when the relevant event happens and does not depend on the volition or election of either party. They held that there was in this case no discharge of the contract for one or both of two reasons. In the first place, they thought that the appellants, when they renewed the charter in 1932, were well informed of the legislation, and when they renewed the charter at a reduced rate and inserted no protecting clause in this regard, must be deemed to have taken the risk that a licence would not be granted. They also thought that, if there was frustration of the adventure, it resulted from the deliberate act of the appellants in selecting the three trawlers for which they desired licences to be issued.

Their Lordships are of opinion that the latter ground is sufficient to determine this appeal. Great reliance was placed in the able argument of counsel for the appellants on *Bank Line, Ltd.* v. *Arthur Capel & Co.* (2), and, in particular, on the judgment of Lord Sumner in that case. That case was in principle very different from this, because the vessel which was chartered in that case was actually taken from the control of the shipowners for a period such as to defeat the contemplated adventure; it was in consequence impossible during that time for the shipowners to place the vessel at the charterers' disposal at all. In the present case the *St. Cuthbert* was not requisitioned: it remained in the respondents' control, who were able and willing to place it at the appellants' disposal; what happened was that the appellants could not employ the *St Cuthbert* for trawling with an otter trawl. No doubt it was expressed in the charter-party that the *St. Cuthbert* should be employed under the charter in the fishing industry only, but the respondents did not warrant the continued availability of the vessel for that employment nor was payment of hire made dependent on that condition. The *St Cuthbert* was available for the appellants to make such use of her as they desired and were able to make. This case is more analogous to such a case as *Krell* v. *Henry* (1), where the contract was for the hire of a window for a particular day: it was not expressed but it was mutually understood that the hirers wanted the window in order to view the Coronation procession; when the procession was postponed by reason of the unexpected illness of King Edward, it was held that the contract was avoided by that event: the person who was letting the window was ready and willing to place it at the hirer's disposal on the agreed date; the hirer, however, could not use it for the purpose which he desired. It was held that the contract was dissolved, because the basis of the contract was that the procession should take place as contemplated. The correctness of that decision has been questioned, for instance, by Lord Finlay, L.C., in *Larrinaga & Co., Ltd.* v. *Société Franco-Americaine des Phosphates de Médulla, Paris* (3). Lord Finlay observes (29 Com. Cas. at p. 7):

> "It may be that the parties contracted in the expectation that a particular event would happen, each taking his chance, but that the actual happening of the event was not made the basis of the contract."

The authority is certainly not one to be extended: it is particularly difficult to apply where, as in the present case, the possibility of the event relied on as constituting a frustration of the adventure (here the failure to obtain a licence) was known to both parties when the contract was made, but the contract entered into was absolute in terms so far as concerned that known possibility. It may be asked whether in such cases there is any reason to throw the loss on those who have undertaken to place the thing or service for which the contract provides at the other parties' disposal and are able and willing to do so. In *Hirji Mulji and others* v. *Cheong Yue Steamship Co., Ltd.* (4), LORD SUMNER ([1926] A.C. at p. 510), speaks of frustration as

> "a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands."

In a case such as the present it may be questioned whether the court should imply a condition resolutive of the contract (which is what is involved in frustration) when the parties might have inserted an express condition to that effect but did not do so, though the possibility that things might happen as they did, was present in their minds when they made the contract.

This was one of the grounds on which the judges of the Supreme Court were prepared to decide this case. Their Lordships do not indicate any dissent from the reasoning of the Supreme Court on this point, but they did not consider it necessary to hear a full argument, or to express any final opinion about it, because in their judgment the case could be properly decided on the simple conclusion that it was the act and election of the appellants which prevented the *St. Cuthbert* from being licensed for fishing with an otter trawl. It is clear that the appellants were free to select any three of the five trawlers they were operating and could, had they willed, have selected the *St. Cuthbert* as one, in which even a licence would have been granted to her. It is immaterial to speculate why they preferred to put forward for licences the three trawlers which they actually selected. Nor is it material, as between the appellants and the respondents that the appellants were operating other trawlers to three of which they gave the preference. What matters is that they could have got a licence for the *St. Cuthbert* if they had so minded. If the case be figured as one in which the *St. Cuthbert* was removed from the category of privileged trawlers, it was by the appellants' hand that she was so removed, because it was their hand that guided the hand of the Minister in placing the licences where he did and thereby excluding the *St. Cuthbert*. The essence of "frustration" is that it should not be due to the act or election of the party. There does not appear to be any authority which has been decided directly on this point. There is, however, a reference to the question in the speech of LORD SUMNER in the *Bank Line, Ltd.* v. *Arthur Capel & Co.* (2) ([1919] A.C. at p. 452):

> "One matter I mention only to get rid of it. When the shipowners were first applied to by the Admiralty for a ship they named three, of which the *Quito* was one, and intimated that she was the one they preferred to give up. I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration; indeed, such conduct might give the other party the option to treat the contract as repudiated. Nothing, however, was made of this in the courts below, and I will not now pursue it."

A reference to the record in the House of Lords confirms LORD SUMNER'S view that the court below had not considered the point, nor had they evidence or material for its consideration. Indeed in the war time the Admiralty, when minded to requisition a vessel, were not likely to give effect to the preference of an owner, but rather to the suitability of the vessel for their needs or her immediate readiness and availability. However, the point does directly arise in the facts now before the Board, and their Lordships are of opinion that the loss of the *St Cuthbert*'s licence can correctly be described, quoad the appellants, as "a self-induced frustration." LORD SUMNER in *Hirji Mulji* v. *Cheong Yue Steamship Co., Ltd.* (4) ([1926] A.C. at p. 507) quotes from LORD BLACKBURN in *Dahl & Co.* v. *Nelson, Donkin & Co.* (5) (6 App. Cas. at p. 53) who refers to a "frustration" as being a matter "caused by something for which neither party was responsible": and again ([1926] A.C. at p. 508) he quotes BRETT, J.'s words which postulate as one of the conditions of frustration that "it should be without any default of either party." It would be easy, but is not necessary, to multiply quotations to the same effect. If either of these tests is applied to this case, it cannot in their Lordships' judgment be predicted that what is here claimed to be a frustration, that is, by reason of the withholding of the licence, was a matter for which the appellants were not responsible or which happened without any default on their part. In truth, it happened in consequence of their election. If it be assumed that the performance of the contract was dependent on a licence being granted, it was that election which prevented performance, and on that assumption it was the appellants' own default which frustrated the adventure. The appellants cannot rely on their own default to excuse them from liability under the contract.

On this ground, without determining any other question, their Lordships are of opinion that the appeal should be dismissed with costs. They will humbly so advise His Majesty.

Appeal dismissed.

Solicitors: *Charles Russell & Co.*; *William A. Crump & Son.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

OWEN *v.* SYKES

[COURT OF APPEAL (Greer, Slesser, and Scott, L.JJ.), November 14, 15, 1935]

[Reported [1936] 1 K.B. 192; 105 L.J.K.B. 32; 154 L.T. 82; 80 Sol. Jo. 15]

Damages—Assessment by judge—Test for review by Court of Appeal.

In the case of an appeal against an award of damages by a judge sitting without a jury the Court of Appeal has power to consider the matter, the appeal being by way of re-hearing, but the mere fact that the amount awarded is one which the Court of Appeal might feel disinclined to give does not justify that court in amending the judge's award. Before the court will review the judge's assessment they must be satisfied that it is based on an entirely erroneous estimate of the damage.

Observations of GREER, L.J., in *Flint* v. *Lovell* (1), [1935] 1 K.B. 360, explained and applied.

Notes. Referred to: *Gambling* v. *Benham*, [1940] 1 All E.R. 275; *Davies* v. *Powell Duffryn Associated Collieries, Ltd.*, [1942] 1 All E.R. 657.

As to the review by the Court of Appeal of an award of damage, see 11 HALSBURY'S LAWS (3rd Edn.) 310 et seq., and for cases, see 17 DIGEST (Repl.) 193, 194.

Cases referred to:

(1) *Flint* v. *Lovell*, [1935] 1 K.B. 354; 104 L.J.K.B. 199; 152 L.T. 231; 51 T.L.R. 127; 78 Sol. Jo. 860, C.A.; 36 Digest (Repl.) 200, *1055*.

(2) *Rose* v. *Ford*, [1937] 3 All E.R. 359; [1937] A.C. 826; 106 L.J.K.B. 576; 157 L.T. 174; 53 T.L.R. 873; 81 Sol. Jo. 683, H.L.; 36 Digest (Repl.) 229, *1210*.

(3) *Armsworth* v. *South Eastern Rail. Co.* (1847), 11 Jur. 758; 36 Digest (Repl.) 222, *1188*.

(4) *Rowley* v. *London and North-Western Rail. Co.* (1873), L.R. 8 Exch. 221; 42 L.J. Ex. 153; 29 L.T. 180; 21 W.R. 869, Ex. Ch.; 36 Digest (Repl.) 223, *1189*.

(5) *Watt* v. *Watt* (1905), 92 L.T. 483, H.L.; 4 Digest 95, *863*.

(6) *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K.B. 250; 73 L.J.K.B. 568; 91 L.T. 157; 52 W.R. 612; 20 T.L.R. 455; 48 Sol. Jo. 435, C.A.; 17 Digest (Repl.) 186, *825*.

Appeal by defendant from a judgment of GREAVES-LORD, J., sitting without a jury, at Liverpool Assizes.

The plaintiff, C. H. Owen, was a physician and surgeon with a considerable general practice at Liverpool. The defendant F. Sykes, was the owner of a motor coach. On Feb. 10, 1935, the plaintiff, when in a covered way between Bridge-street, Warrington, and the yard and garages of the Lion Hotel, Warrington, was crushed against the wall of the covered way by the defendant's motor coach, which had entered the way from Bridge-street. The plaintiff brought an action for damages for personal injuries, alleging negligence on the part of the defendant or his servant. The defendant pleaded that the injuries were due solely to the negligence of the plaintiff, or, in the alternative, that the plaintiff was guilty of contributory negligence. On the issue of damage, the plaintiff, whose age was thirty-nine years, proved that from the injury there resulted a permanent limitation of expansion of the left lung with a consequent impairment of his breathing powers, and that, therefore, he would be subject to an increased susceptibility to pulmonary ailments. The special damages claimed amounted only to £268. Evidence was given that the plaintiff, who had been an athlete, now on slight effort was subject to fatigue, exhaustion and faintness, and that to continue his practice on its former scale he would have to employ an assistant at a salary of £300 or £400 a year.

GREAVES-LORD, J., held that the plaintiff's injuries were caused solely by the negligence of the driver of the motor coach, and there was no contributory negligence. On the issue as to damages he said:

> "But now comes the most difficult part of the whole case, to arrive at the proper sum for damages. It is a terrible injury in this case. One has to bear in mind that an assistant for the doctor's practice would probably cost £300 or £400 a year, but as against that the probabilities are that, if the plaintiff gets a good assistant it would increase the practice, and that would to a great extent help him towards paying the £300 or £400 a year, even allowing for the fact that the plaintiff himself will do less than he has done. That has to be borne in mind. At the same time, the two items are substantial—first, the cost of an assistant, and, secondly, the amount which has to be given in the case not merely for pain and suffering but for the terrible and permanent injury which has been inflicted, because this is not an injury which just causes pain and suffering for a time; it affects the amenities of the man's life for the rest of its duration. An athlete, a strong man, is reduced to a man who will have to live very largely a sheltered life, and have no opportunity of taking part in those sports which have appealed to him, and which probably have made him capable of resisting the effects of this accident as he has done. The special damages claimed are, as counsel has said, negligible—£268. The judgment here must be for something very much in excess of that. I have had to think considerably of what would be a fair sum, and I have come to the conclusion that I should not award a less sum here than £10,000."

The defendant appealed on the issue both of liability and the damages.

Lynskey, K.C. and *F. E. Pritchard* for the defendant.

W. Gorman, K.C. and *A. Hamilton* for the plaintiff.

GREER, L.J.—This is an appeal from a judgment of GREAVES-LORD, J., awarding a sum of £10,000 damages in a personal injuries case in which the plaintiff was a doctor and the defendant was the proprietor of a motor char-a-banc or coach.

The accident happened in a covered way adjoining the Lion Hotel in Warrington. The learned judge, having seen the witnesses, accepted the evidence of the plaintiff as to the way in which the accident happened. According to that evidence the plaintiff, after having placed his motor car in the yard, was coming with his companion into the covered way in order that he might enter the entrance of the dining room of the hotel where he desired to seek refreshment for himself and his companion. According to his evidence, when, coming round what has been called the buttress in the yard, he approached the covered way he saw the defendant's vehicle beginning to come from Bridge-street into the covered way, and he thereupon started to enter the covered way under the impression, which he got from the way in which the vehicle approached him, B that there would be from 2 ft. to 3 ft. between the side of the covered way in which he was and the vehicle that was advancing towards him, and that, if the position had remained as it was, there was no risk in his going forward as he did. He went a few paces—he put it at five paces, but I think he has over-estimated the distance which he had got into the covered way—when the approaching vehicle began to turn. A

One thing is clear. It is found by the learned judge upon the evidence of the defendant himself that he did not see the plaintiff, notwithstanding the fact that his vehicle had its side lights and its headlights on. That is only reconcilable with the fact of an accident having happened if he was not keeping a good look-out. It is true that he had to keep a good look-out on both sides, because there was, very nearly ahead of him, a lady standing near a bow window in the yard, and he had to be certain that he would not collide with her. I cannot help thinking that the learned judge was right in D finding that this accident was due solely to the negligence of the defendant in not keeping a good look-out, and that the allegation of contributory negligence was properly rejected by the learned judge, because the plaintiff when he entered the covered way had no reason to suppose that the driver of the approaching vehicle would not keep a good look-out, and that, if there was any risk, he would turn a little more towards the offside of the covered way, or he would stop his vehicle until the plaintiff had got past. E For these reasons I think that we ought not to interfere with the learned judge's finding as regards liability. C

But we are faced with a somewhat more difficult question, namely, the question whether we ought to interfere with the learned judge's judgment as to the amount of damages. The amount of damages awarded in this case is a very large one—£10,000—and though it is true that an appeal is a re-hearing of the case, and if we are satisfied that F the assessment of damages was wrong, we ought to re-open the question of damages and ourselves decide what the proper damages should be, it has been laid down in *Flint* v. *Lovell* (1) that this court does not readily interfere with the assessment of damages made by a learned judge at the trial. That assessment is necessarily an estimate, and an estimate is necessarily a matter of degree, and it seems to me that, unless we come to the conclusion that the learned judge took an erroneous view of the evidence as to the G damage suffered by the plaintiff, or made some mistake in giving weight to evidence that ought not to have affected his mind or in leaving out of calculation some consideration that ought to have affected his mind, we ought not to interfere. I cannot help thinking that the damages awarded in this case were on a generous scale. If I had had to estimate them as the trial judge I probably would have arrived at some considerably smaller figure, because one has got to think not merely about this case but about other H cases which will have to be decided, and not to allow an over-generous estimate to be regarded as an example of the kind of damages that ought to be given in cases of this sort.

I again call attention to the passages I quoted in my judgment in *Rose* v. *Ford* (2), from those of PARKE, B., in *Armsworth* v. *South-Eastern Rail. Co.* (3) (11 Jur. at p. 760), and of BRETT, J., in *Rowley* v. *London and North-Western Rail. Co.* (4) (L.R. 8 Exch. I at p. 231), showing that if a trial judge approaches the question from the point of view of giving complete damages so as to put the plaintiff in exactly the same position as he would have been if he had never been damaged at all, and to give him what might be considered the price of the injuries which he has sustained in the form of damages, that would be wrong.

I desire to add that if anything we say in this case were to encourage the idea that unduly large damages can be safely given either by juries or by judges in cases of personal injuries, the Court of Appeal has a free hand in dealing with the matter, especially in a case which is tried by a judge alone. But I have come to the conclusion, after hearing full argument on the question, that though we might ourselves have given a smaller sum, we cannot say that the learned judge made an entirely erroneous estimate of the damage to which the plaintiff is entitled.

The result is that this appeal will be dismissed with costs.

SLESSER, L.J.—I am of the same opinion, and wish only to add a few observations on the second matter which was argued before us, namely, that the damages awarded in this case are such that this court should revise them by reducing them.

This is a case where the appeal is brought from the judge assessing damages in his judgment, sitting without a jury. The position is different in some respects from that where the appeal is from a judgment following the verdict of a jury. First, as was decided in *Watt* v. *Watt* (5), this court has no power without the consent of the parties to alter the damages awarded by a jury when it is of opinion that those damages in law are indefensible, but can only order a new trial in which those damages may be reconsidered. In the case of trials by a judge alone this court has power, as the hearing is by way of re-hearing, to consider the matter, and, owing to recent legislation and Orders and Rules of the Supreme Court, it is now very usual for judges sitting alone to be required to assess damages in cases of negligence and in other matters. Another difference which arises is that the test which has been applied in so many cases in the case of a jury is not, on the face of it, applicable in quite the same manner when the case is tried by a judge alone. *Johnston* v. *Great Western Rail. Co.* (6), and other cases decide that where the damages are so improper that the court comes to the conclusion that the jury must have taken into consideration matters which they ought not to have considered, or applied the wrong measure of damage, the Court of Appeal will interfere. That test, of course, is applicable to the case of a judge trying a case alone. This finds expression in the judgment of GREER, L.J., in *Flint* v. *Lovell* (1), when he said ([1935] 1 K.B. at p. 360):

> " In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law. . . ."

Whether there be a jury or whether there be no jury if the tribunal acts upon a wrong principle of law this court may allow the appeal. But apart from this, in the case of a jury the question may arise whether the jury have returned such a high amount of damages as no twelve reasonable men could return. It is in circumstances of that kind also that the case may be sent to another jury for re-assessment. I do not think that this test of what twelve reasonable men could assess can be appropriate to the case of a judge sitting alone, and I would accept as a criterion what GREER, L.J., stated in *Flint* v. *Lovell* (1) as his second ground for this court re-assessing the damages on an appeal from a judge sitting alone ([1935] 1 K.B. at p. 360),

> " or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

I read those words to mean that, if the amount given is an amount which this court itself might feel disinclined to consider as an amount which they themselves would assess, that circumstance alone would not necessarily justify this court in making any amendment of the judge's award, and this court normally would have to be satisfied that there was, again to quote the words of GREER, L.J., " an entirely erroneous estimate of the damage." That is a question of degree, and I wish to guard against the supposition, if there be such a supposition, that because this court is hearing such an appeal by way of re-hearing, therefore it is ready to re-assess damages on the basis of what this court itself might have given as damages. It is incumbent, I think, on the parties wishing to disturb the damages awarded to satisfy this court that the judge had acted upon an erroneous estimate—meaning thereby something in which the error has so tinged the proceedings that it was a proper case of this court to assess the damages. Otherwise it seems to me a matter of discretion for the learned judge—a matter of degree.

Those remarks seem to me to apply to this case, because these damages, as I understand it, are more than I, for one, would have been willing to award, but they are not so much more than I am prepared to say that there has been an erroneous estimate justifying a re-assessment. I think, therefore, that this appeal fails on damages, not because I do not think that this medical man has been treated with overmuch generosity, but because I do not think that the estimate is so erroneous as to justify variation.

SCOTT, L.J.—I agree with the judgments that have been delivered and with the reasoning on which they are based. I only want to make one observation. In this case there are three elements of damage. The first, which I set aside, is the trivial amount of special damage for expenses incurred. The second is the necessity for employing an assistant, as to which the learned judge had to come to a conclusion as a question of fact and did come to the conclusion that an assistant would be necessary indefinitely throughout the plaintiff's remaining professional life. That involved an estimate in money of the cost of obtaining an assistant, and of the amount of compensating good that it would bring to the practice, and generally the question affecting the net cost, so to speak, to the doctor of having to have an assistant, including in that the drawback of the assistant not being the doctor personally and, therefore, the possibility of some patients discontinuing to be clients of the doctor. The other element is the element of pain and suffering, past, present and future, and of permanent disability and of its extent. Both these elements are essentially questions of degree, and in my view the question of the amount to be allowed in respect of the assistant is essentially a question of degree. With regard to all these matters the judge at the trial seems to me necessarily to be in a better position to form an estimate that any Court of Appeal can be.

I only desire to add that on damages, as on other matters where the decision depends on a question of fact and the exercise of a judge's discretion on matters of degree, this court ought to be very careful not to interfere unnecessarily with his decision at the trial.

Appeal dismissed.

Solicitors: *William Charles Crocker*, for *Wood, Lord & Co.*, Liverpool; *Vizard, Oldham, Crowder & Cash* for *H. J. Sharman*, Liverpool.

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

WICKHAMBROOK PAROCHIAL CHURCH COUNCIL *v.* CROXFORD

[COURT OF APPEAL (Lord Hanworth, M.R., Romer, L.J., and Eve, J.), March 22, May 3, 1935]

[Reported [1935] 2 K.B. 417; 104 L.J.K.B. 635; 153 L.T. 187; 51 T.L.R. 424; 79 Sol. Jo. 418]

Ecclesiastical Law—Impropriate rectory—Repair of chancel—Liability of impropriator—No limitation to amount of receipts from tithe—Liability to admonition on failure to repair—Right to contribution from other owners of tithe—Chancel Repairs Act, 1932 (22 *Geo.* 5, *c.* 20), *s.* 2 (3).

A rector of a parish, whether spiritual or lay, is liable to maintain in repair the chancel of the church; that liability is personal and several, not joint, and it is not limited to the amount of the rector's receipts from the tithe. Failure to discharge the obligation is a matter which, but for the provisions of the Chancel Repairs Act, 1932, would have rendered the impropriator, within s. 2 (3) of that Act, liable to be admonished to repair the chancel by the appropriate ecclesiastical court in a cause of office promoted against him in that court. In deciding the last question the court must consider only the question of liability arising from the ownership of tithe in whole or in part and not whether it would have been right and proper in all the circumstances to issue an admonition, but the owner of part of the tithe against whom liability is established can recover contribution from the owners of the remainder of the tithe.

Notes. Considered: *Wales Church Temporalities Commissioners* v. *Representative Body of Church in Wales and Tithe Redemption Commission,* [1940] 3 All E.R. 1. Approved: *Chivers* v. *Secretary of State for Air,* [1955] 2 All E.R. 607. Referred to: *Representative Body of the Church in Wales* v. *Tithe Redemption Commission,* [1944] 1 All E.R. 710.

As to liability for church repairs, see 13 HALSBURY'S LAWS (3rd Edn.) 398 et seq., and for cases, see 19 DIGEST 460 et seq. For the Chancel Repairs Act, 1932, see 7 HALSBURY'S STATUTES (2nd Edn.) 876.

Cases referred to:

(1) *Whinfield* v. *Watkins* (1812), 2 Phillim. 1; 161 E.R. 1059; 19 Digest 508, *3665*.
(2) *Morley* v. *Leacroft,* [1896] P. 92; 19 Digest 264, *473*.
(3) *Pense* v. *Prouse* (1695), 1 Ld. Raym. 59; 91 E.R. 934; 19 Digest 260, *420*.
(4) *Ball* v. *Cross* (1688), 1 Salk. 164; Holt, K.B. 138; 90 E.R. 975; 19 Digest 259, *418*.
(5) *Griffin* v. *Dighton* (1863), 5 B. & S. 93; 2 New Rep. 270; 33 L.J.Q.B. 29; 8 L.T. 500; 27 J.P. 359; 10 Jur. N.S. 69; 11 W.R. 804; 122 E.R. 767; affirmed (1864), 5 B. & S. 93, 108, Ex Ch.; 19 Digest 259, *415*.
(6) *Smallbones* v. *Edney* (1870), L.R. 3 P.C. 444; 19 Digest 283, *716*.
(7) *Neville* v. *Kirby,* [1898] P. 160; 19 Digest 264, *474*.
(8) *Davies' Case* (1620), 2 Roll. Rep. 211; 81 E.R. 757; 19 Digest 264, *472*.
(9) *Walwyn* v. *Auberry* (1677), 2 Mod. Rep. 254; Freem. Ch. 230; 2 Vent. 35; 3 Keb. 829.
(10) *Mackonochie* v. *Lord Penzance* (1881), 6 App. Cas. 424; 50 L.J.Q.B. 611; 44 L.T. 479; 45 J.P. 584; 29 W.R. 633, H.L.; 19 Digest 224, *16*.
(11) *Bishop of Ely* v. *Gibbons and Goody* (1833), 4 Hag. Ecc. 156; 162 E.R. 1405; 19 Digest 303, *1017*.
(12) *Hauxton Parochial Church Council* v. *Stevens,* [1929] P. 240; Digest Supp.

Appeal by the plaintiff council from an order of His Honour Judge HILDESLEY in the Bury St. Edmunds County Court of Suffolk.

The plaintiff council instituted this proceeding under the Chancel Repairs Act, 1932, claiming against the defendants, Yvonne Croxford (spinster) and Constance Edith Maria Croxford, wife of Frank Leonard Croxford, and mother of Yvonne Croxford as lay impropriators and as such liable for the repair either wholly or in part of the chancel of the parish church of Wickhambrook, the sum of £123 12s. 6d., the estimated cost of putting the chancel in repair. Notice to repair as required by sect. 2 (1) of the Act of 1932 was duly served on the defendants, and it was admitted at the hearing that the sum of £123 12s. 6d. represented the reasonable cost of necessary repairs.

By a tithe commutation agreement made in 1840 there was effected a merger of a large proportion of the tithes issuing out of lands in the parish of Wickhambrook. The remaining portion was commuted for a tithe-rent-charge amounting in the aggregate to £120 per annum. This was apportioned between the vicar and the impropriate rector, whose apportioned share amounted to £52 10s. The impropriate tithe rent-charge is now owned by several persons, of whom the defendant and (or) her daughter own rent-charge to the extent of £39 11s. 9d. Prior to Nov. 7, 1933, this tithe was under mortgage to one Edgar Armstrong Everington. By letter dated Sept. 28, 1933, Mr. Everington's solicitors informed one Justin Brooke, who was liable for tithe amounting to £6 14s. 6d., part of the amount of £39 11s. 9d., that Mr. Everington had disposed of the tithe to the Church Property Trust, Limited, and requested him to pay all tithes due or thereafter to become due to that trust or to their solicitor, Mr. Buttle. On Sept. 29, Mr. Buttle wrote to Mr. Brooke informing him that his clients, the trust, had acquired the tithe and enclosing a letter of authority from Mr. Everington's solicitors and an account of the amount due and requesting payment. To this Mr. Brooke replied on Sept. 30 noting that the trust had purchased the tithe and adding: " I welcome this, as the church is badly in need of repair . . . and I shall be glad to hear from you that the work is to be put in hand at once." Correspondence followed between Mr. Brooke and Mr. Buttle, and ultimately, on Feb. 17, 1934, the plaintiffs' solicitors sent to the Church Property Trust, Limited a notice to repair the chancel. To this Mr. Buttle replied stating that the trust " are not the owners of the rectorial tithe at Wickhambrook," but that " the tithe has been acquired for Miss Yvonne Croxford, for whom her mother, Mrs. Croxford, is trustee." Mr. Everington had, in fact, conveyed the tithe amounting to £39 11s. 9d. to Mrs. Croxford on Nov. 7, 1933, and, by deed poll executed on Jan. 10, 1934, expressed to be supplemental to the conveyance of Nov. 7, 1933, Mrs. Croxford executed a declaration of trust in favour of her daughter Yvonne. On March 28, 1934, notice to repair was given to each of the defendants.

F. J. Tucker, K.C., *W. T. Elverston*, and *W. S. Wigglesworth* for the council.
Vaisey, K.C., and *Miss Cross* for the defendants.

Cur. adv. vult.

May 3. The following judgments were read.

LORD HANWORTH, M.R.—The chancel of the parish church of Wickhambrook in the county of Suffolk is out of repair, and it has been estimated that a sum of £123 12s. 6d. represents the reasonable cost of executing the necessary repairs.

These proceedings are taken by the parochial church council of Wickhambrook under the Chancel Repairs Act, 1932, to enforce liability for the repair of the chancel upon the defendants Yvonne Croxford and Constance Edith Marie Croxford, her mother and trustee, who are lay impropriators of a part of the tithe rent-charge issuing out of lands in the parish of Wickhambrook, which amounts in the aggregate to £120. The share of this sum, which belongs to Mrs. Croxford as trustee for her daughter, is £39 11s. 9d. per annum, and the remainder of the tithe belongs to other persons who are not parties to these proceedings.

By the Chancel Repairs Act, 1932, s. 1, the jurisdiction of the ecclesiastical courts to enforce the repair of chancels is abolished and proceedings in future to enforce this liability are provided by s. 2 of the Act. These provisions are that where a chancel is in need of repair " the responsible authority," which is later defined in the Act to mean the parochial church council of the parish in which the chancel is situate, if, as is the case in the present proceedings, there is one, may serve upon any person who appears to them to be liable to repair the chancel, a notice in a prescribed form stating in general terms the grounds on which that person is alleged to be liable, the extent of the disrepair, and calling upon him to put the chancel in proper repair. If the chancel has not been put into repair in the course of a month from the service of the notice to repair, the responsible authority may bring proceedings in the county court of the district in which the chancel is situate against the person on whom the notice was served to recover the sum required to put the chancel into proper repair; and by s. 3 (4) (*b*), where judgment is given for the payment of a sum of money in respect of repairs not so far executed, the court may give directions in accordance with rules made therefor for the purpose of ensuring that the money is spent in executing the repairs. The sum for which judgment is to be given is, by s. 2 (3), to be such sum as appears to the court to represent the cost of putting the chancel into proper repair; and the person against whom judgment for this sum is to be given is a defendant who

> "would but for the provisions of this Act have been liable to be admonished to repair the chancel by the appropriate ecclesiastical court in a cause of office promoted against him in that court on the date when the notice to repair was served."

It is obvious that the legislature in this section adopted the precedent of obscurity set many years back by a statesman who, when confronted with a question as to what are the duties of an archdeacon, contented himself by explaining that he was an officer required to perform the archidiaconal functions.

The facts of the present case prove that the defendants are in possession of a right to a quota of the great tithe, not more than £39 11s. 9d. in value per annum, that Mrs. Croxford became possessed of that right in November, 1933, and executed a declaration of trust in favour of her daughter on Jan. 10, 1934, and that the total sum received or to be received from this quota of the tithe during a considerable time would be insufficient to defray the liability which is charged by the notice at £123 12s. 6d.

The county court judge gave judgment for the defendants on the ground that

> "it must be proved against an impropriator who is made a party that he has received tithes or other profits belonging to the rectory sufficient to cover the cost of repair."

He expressed his own opinion

> "that a monition would not have issued for the reason that the defendants have not received sufficient to defray the cost of the necessary repairs."

Further, he added,

> "I venture to assume that an ecclesiastical court, sitting as a court of conscience as well as a court of law, would have declined, in the exercise of its judicial discretion, to issue a monition against these defendants upon its being made to appear, not only that they had not received sufficient to defray the expenses of repair, but that it was alleged, and not denied by another party whom the promoters in a cause of office had refrained from citing, that these parties had received sums which they ought to have devoted to the same purpose."

The parochial church council appeal to this court. It is obvious that many difficult questions fall to be determined. They may be divided as follows: (i) Is there a liability upon a possessor of a part of the great tithe to repair the chancel? (ii) Is that liability personal, or only to the extent of the receipts from the tithe actually received by him? (iii) In either case would the defendants have been liable to be admonished to repair this chancel by the appropriate ecclesiastical court if a cause of office had been promoted against them? (iv) Is the mere question of liability arising from the ownership of tithe in whole, or in part only, to be considered, or is the county court and this court to consider whether it would have been right and proper in all the circumstances of the case to issue an admonition? (v) Can an owner of a part of the tithe against whom a liability is established recover contribution from the other owners of the remainder of the tithe?

At the outset it is necessary to construe the word "liable" as used in s. 2 (3). It is, I think, used in that subsection in a sense different from that in which it is used in s. 2 (1). In the latter subsection the words "any person who appears to them to be liable to repair the chancel" connote a liability that imports a duty resting upon that person for which he is answerable in law. In the later subsection it intends a peril of being admonished to which he is exposed and subject to or likely to suffer from.

The learned judge based his judgment upon a passage which he cited from Burn's Ecclesiastical Law (9th ed., 1842), vol. 1, p. 352, and which I need not repeat. Sir Robert Phillimore was the editor of that edition and "corrected" and added to the original work, but no authorities are cited for the propositions advanced. The same paragraph, again without any authority being attached to it, is found in Sir Robert Phillimore's Ecclesiastical Law (2nd ed., 1895), vol. 2, p. 1417, though slightly amended so as to bring it into accord with the state of the law in later years. Dr. Burn's paragraph had referred to the advisability of the churchwardens summoning a vestry. Then the vestry, having made a rate for the repair of the church, were to make an order for the churchwardens to prosecute the impropriators of the tithe at the parish expense.

Suits and proceedings to enforce church rates for ecclesiastical purposes were abolished in 1868 (Compulsory Church Rate Abolition Act, 1868), hence the paragraph was altered in this particular of procedure by the editor of his father's work in 1895, Sir Walter Phillimore—afterwards a judge of the High Court and of the Court of Appeal, and created Lord Phillimore in 1918.

But the substance of the statement for the present purpose remains the same. The learned county court judge was right in attaching weight to this statement and the propositions involved in it, laid down, as it was, by a succession of such eminent authorities upon ecclesiastical law. But the propositions are not easily interpreted and reconciled with what would seem to be just and equitable. It is clear that the statement decides that a suit brought against the impropriators is to enforce: (*a*) a duty and not the mere recovery of a sum of money; (*b*) a duty which lies upon each and all the impropriators; (*c*) that no abatement of the suit could be asked for by those sued on the ground that other impropriators were also liable.

But the liability is affirmed to be enforceable only if "the parties prosecuted have received tithes or other profits belonging to the rectory sufficient to repair it." It is not necessary to make every impropriator a party. It would seem, therefore, that the parties sued might escape because of the insufficiency of their receipts, although the total receipts of those sued and not sued might be sufficient to attract liability. If a liability is enforced, the burden of it is to be divided among those who have been held liable, and nothing is said as to any contribution being made by others liable who were not sued. It seems necessary, therefore, to go behind the authority of these text-books and examine the question afresh in the earlier authorities.

Upon the first question propounded above, it seems clear that a rector of a parish, whether spiritual or lay, is liable to maintain the chancel in repair: (see 2 Institutes 489; Comyns' Digest Eglise G. 2; *Whinfield* v. *Watkins* (1); and *Morley* v. *Leacroft* (2). In *Pense* v. *Prouse* (3), Lord Holt said that "by the canon law the parson ought to repair the whole; but by the custom of England, a parson shall repair the chancel, and the parishioners the nave of the church." He also decided the same in *Ball* v. *Cross* (4); and see the judgment of Sir A. Cockburn to the same effect in *Griffin* v. *Dighton* (5) (5 B. & S. at pp. 105 and 106). But the liability to repair the chancel may remain with the parishioners, altering the usual liability of the rector thereto, in parishes where a special custom to that effect has been established (1833, 4 Haggard, 156). If more modern authority for this proposition that a rector is liable in law to repair the chancel is required, it is to be found in the judgment of Mellish, L.J., in *Smallbones* v. *Edney* (6) (L.R. 3 P.C. at p. 450). He says:

> "Now a tithe owner is exempted from an ordinary church-rate for the repair of the body of a church because he is under a particular liability to repair the chancel. He is not less liable, but more liable, than the owners of other property in the parish to repair the church, being under a personal liability to repair a particular part of it."

I pass then to the second question: Is that liability personal and general, or only to the

A extent of the receipts from the tithe actually received by the tithe owner? The above authorities clearly show that the liability is personal and several, not joint; but is it limited to the extent of the tithe owner's receipts from the tithe? In *Neville* v. *Kirby* (1) LORD PENZANCE delivered a judgment which involved the question whether a liability could be attached to a lay rector in respect of an outlay already made in the repair of a chancel which the lay rector had a duty to repair. He thus states this liability:

B

> "If the chancel of a parish church is in need of repair, the ecclesiastical court entertains a suit complaining of its defective condition, and on proper proof as to the persons liable to repair, it issues a monition to such persons, commanding the thing to be done, which it follows up, if need be, by the usual ecclesiastical censures. But this is the limit of the court's interference, and there is no precedent or warrant for C the exercise of the coercive powers of the court to enforce against a layman a payment of a money claim."

It is noticeable that he does not introduce any limit to the liability based on the actual receipt of profits from the rectory; and this in spite of the question being definitely raised as to the jurisdiction over a person in respect of a money claim.

Turning to the chief authority on English canon law—the PROVINCIALE OF WILLIAM D LINDWOOD, who wrote in the reign of Henry VI in the earlier part of the fifteenth century, for he died in 1446 (edition printed at Oxford, 1679), I find in Book III, title 27, a precept of Archbishop Winchelsea, who was Archbishop of Canterbury from 1293 till 1313, a translation of which runs as follows:

> "In order that the parishioners of the several churches of our province of Canterbury may henceforth be more certain about the defects that fall upon them, lest any E doubt arise in times to come between the rectors and them, we will henceforth command that they be bound to find all the things below mentioned, namely legend, antiphonary, gradual, psalter, tropery, ordinal, missal, manual, chalice, principal vestment with chasuble, dalmatic, tunicle and with a cope in the choir with all its accessories, a frontal for the high altar with three towels, three surplices, one rochet, a processional cross, a cross for the dead, thurible, a lantern and little bell for carry- F ing before the body of Christ in the visitation of the sick, a pyx for the body of Christ, a suitable lenten veil, banners for the rogations, bells with ropes, a bier for the dead, a vessel for holy water, a pax, a candlestick for the Easter candle, a font with a lock, images in the church, the principal image in the chancel, the wall of the churchyard, the repair of the nave of the church inside and outside as well in images (or statues) as in glass windows, the repair of the books and of the vestments G whenever it shall happen that they need repairs. But everything else as well in the repair of the chancel as in other things not here expressed, according to divers approved customs, have to be repaired by the rectors and vicars of the places or those to whom (the liability) belongs, in all respects at their expense."

Then *Davies' Case* (8) decided in 1620, affirms this liability. The whole report is as follows:

H

> "A person who has the impropriation of the rectory ought to repair the chancel and in addition, if he has any land in the parish, he ought to contribute to the repair of the (nave of the) church as in this case the farmer and tenants of Mr. Seycomb Davies have the impropriation and also a farm in the same parish. This was decided by the court without question."

I In AYCLIFFE'S PARERGON (1726) pp. 458–9, the question of the remedy for failing to carry out the repair of the chancel is discussed. The duty so to do is founded in LINDWOOD, and the remedy in the case of clergymen is sequestration of the amount necessary to cover the outlay upon the repairs, and if a larger sum is taken "the party aggrieved may be relieved by the benefit of an appeal." The position of a lay impropriator is not defined, but again it is noticeable that the liability is not restricted to or measured by the receipts.

GIBSON in his CODEX JURIS ECCLESIASTICI ANGLICANI (2nd ed., 1761) quotes this same passage from LINDWOOD, and sets out the passage of Archbishop Winchelsea already referred to with the words "in omnibus reparari sumptibus eorundem." His words are: "as rectors or spiritual parsons, so also impropriators are bound of common right to repair the chancels under the limitations expressed in the foregoing article." None of those limitations imposes the limit of receipts from the tithe. The doctrine is said to be clear and uncontested, the only difficulty being in what manner they shall be compelled to do it, whether by spiritual censures only, in like manner as the parishioners are compelled to contribute to the repairs of the church, since impropriations are now become lay-fees, or whether by sequestrations. This point, he says, was twice under consideration in the time of Charles II—in the first, the court inclined that there could be no sequestration. He must be referring to *Walwyn* v. *Auberry* (9) argued in Trinity Term of 1677. There are two reports of the argument upon the case in 1 MODERN, 261, and in 2 MODERN, 259. It was an action of trespass for taking away certain loads of wheat and other agricultural produce, to which the defendant pleaded a justification that the goods were taken in sequestration of the tithes falling due to the plaintiff who was rector, and as such bound in law to repair the chancel of the parish church then out of repair. The facts relied upon were that, the chancel needing repairs and the plaintiff being liable to execute them, the bishop of Hereford had issued a monition to the plaintiff requiring him to fulfil his duty, and, as he failed to do so, the bishop had granted a sequestration of the tithes of the rectory, and that the defendants as churchwardens had carried out the sequestration and had taken the goods as alleged, which taking and trespass was thus justified. To this plea the plaintiff demurred. The question argued was whether a sequestration could be ordered as against a lay impropriator. The case was ultimately decided upon a defect in the pleading, which, inter alia, had omitted to aver that the defendants did not take into their hands more than was sufficient for the reparation of the chancel. A note is appended to this report of the case that from two other reports of the same case in 2 MODERN, 257, and in VENTRIS, 35, it appeared that the majority of the court inclined to the view that, as impropriations are now lay fees, they cannot be sequestered for the reparation of the chancel. Serjeant Barrell, who argued the demurrer on behalf of the plaintiff, admitted "that the rector of a rectory impropriate may perhaps be bound of common right to repair the chancel." He makes no reservation that the liability extended only to the amount received into the rector's hands from the tithe.

ATKYNS, J., suggests the limitation that the liability of the rector was in respect of the profits which he received and that sequestration could be applied to them. This view was the result of the character which in his opinion still attached to tithe, for it was still subject to the same penalties—including sequestration—as before the Statute of Dissolutions. The learned judge thought that the tithe was first to be expended in the performance of divine service and that only such surplus as remained after the discharge of "the first rights" passed to the rector. With this view of tithe he held that sequestration as an ecclesiastical form of execution still obtained, and the lay rector's duty as to the chancel was limited to what he had received by way of surplus from carrying out ecclesiastical requirements. There is no trace that the other members of the court acquiesced in this view.

VENTRIS, p. 35, gives a report of the same case although the date is stated to be 22 Charles II and not 29 Charles II as in the MODERN REPORTS. He states the defects in the pleadings on which the decision was given, but adds the court inclined that there could be no sequestration

> "for being made lay fee, the impropriation was out of their jurisdiction, and it was now only against the person as against a layman for not repairing the Church."

Again, there is no trace of any condition limiting the liability of the lay rector, and the inclination of the court's opinion cuts away the basis on which ATKYNS, J.'s view rests.

There is a note in 3 KEBLE'S REPORTS, p. 829, of the same case where the date is once more restored to 29 Charles II which records the doubtful view of the court as to sequestration but records that the spiritual court

> "clearly may excommunicate the impropriator for not repairing the chancel of the Church."

A There is still another report of *Walwyn* v. *Auberry* (9) in FREEMAN'S REPORTS, p. 230, and again the decision is given of the date 1677. It states that

> "the only question was whether or no in case the impropriator did neglect to repair the chancel, the ordinary might sequester."

It was agreed that sequestration was a proper remedy against spiritual persons, but not B against lay rectors. It was admitted that the ecclesiastical court had cognisance of the matter and that they might proceed by way of personal censures to excommunication against the impropriator. But then it is stated that NORTH, C.J., inclined that the ordinary could not sequester now it was become a lay-fee; "but the other three judges inclined contra." No decision is reported and the case ultimately turned upon the pleading point.

C I have examined and referred to all these reports, for insistence was naturally laid upon the opinion of ATKYNS, J., recorded in 2 MODERN REPORTS at p. 258. There is no decision upon the point, and the contradiction as to the view of the majority of the judges as reported in 2 MODERN and in FREEMAN'S REPORTS make the case an unsatisfactory one upon which to found a limitation of the liability laid down so expressly in LINDWOOD.

D WATSON'S CLERGYMAN'S LAW (ed. 1747), p. 395, takes note of the divergence of the reports upon the question which procedure was proper to enforce the liability of the rector to repair, but he offers no solution; he deals (p. 394) with "chancels repaired by rectors, impropriators, or appropriators" without any limitation of that liability, and passes on to consider the ordinary's power over the seating in chancel and church.

E Upon the authorities, I have come to the conclusion that the liability of a lay impropriator is personal and is not limited to the amount of his receipts from the tithe. In view of his right of contribution from other owners of a part of the tithe which I deal with later, this view is not so harsh as it might appear at first sight to be, and it secures that the duty of repair shall be effectively carried out.

Upon the third question propounded, it is, in my opinion, clear from the above F authorities that the defendants would have been liable to be admonished to repair the chancel by the appropriate ecclesiastical court if a cause of office had been promoted against them. The report in FREEMAN is explicit that the whole court were agreed on this point. GIBSON'S CODEX treats the sanction by spiritual censures as undoubted, and his law is derived from LINDWOOD; see also DEGGE'S PARSON'S COUNSELLOR (ed., 1820), p. 209. LORD PENZANCE'S statement in *Neville* v. *Kirby* (7) above set out, as to the G remedies against an impropriator for failure to fulfil his duty, appears to be well founded upon the authorities.

Upon the fourth question counsel for the defendants reminded the court that the jurisdiction that it is called upon to exercise is criminal, or quasi-criminal, and penal. But, as LORD SELBORNE said in *Mackonochie* v. *Lord Penzance* (10) (6 App. Cas. at p. 443), even in proceedings which are called, and in some sense are criminal and penal, H the ecclesiastical law has for its object, not the punishment of the individual offenders, but the correction of manners and the discipline of the church.

In *Morley* v. *Leacroft* (2), in which the liability of a lay rector to repair the chancel of a parish church was made clear by admission, an admonition was issued in pursuance of a duty which the chancellor felt was clear, and he indicated that he had power to enforce it if it were disobeyed.

I The real argument which was urged on behalf of the respondent was an appeal asking: Is it fair to impose the liability when at present so little has reached the hands of the tithe owner? More will come; and it may be hoped that the sum estimated to be required, if laid out, will render the chancel sound for a number of years. This appeal ad misericordiam does not appear to be founded on precedent. Section 2 (3) of the Act of 1932 refers to the defendant who would have been liable (*i.e.*, in peril), to be admonished on the date when the notice to repair was served upon him. Those words appear to indicate the time when the liability is to be discovered, which may be before the question of the appropriateness or harshness of an admonition could have been determined by an inquiry into the figures relevant to the case, and the portion of tithe received, or receivable, by the defendant.

Finally, it appears to me that the defendants would be entitled to enforce contribution from the other tithe owners, for they must settle amongst themselves the proportion that each is to pay. That is the statement of DR. BURN and SIR ROBERT PHILLIMORE. Order XI of the County Courts Rules provides the method whereby contribution can be enforced by third party procedure, and the respondent can make use of this for reimbursement of moneys paid by her beyond her proper share. Meantime all hardship against the respondent can be avoided by an order being made for payment of the sum due by instalments under s. 26 of the County Courts (Amendment) Act, 1934.

For these reasons I am of opinion that the appeal should be allowed and an order made as asked for in the notice of appeal.

ROMER, L.J.—The question to be determined upon this appeal is whether the defendant, Mrs. Croxford would, but for the Chancel Repairs Act, 1932, have been liable on March 28, 1934, to be admonished by the appropriate ecclesiastical court in a cause of office promoted against her in that court, to repair the chancel of Wickhambrook parish church. The facts existing on that date material to a decision of this question are as follows. The chancel was out of repair, and could only be put into proper repair by an expenditure of £123 12s. 6d. Mrs. Croxford was the legal owner in fee of impropriate tithe rent-charges charged upon land in that parish amounting in all to £39 11s. 9d. a year. Such rent-charges had only been conveyed to her on Nov. 7, 1933, and she had received in respect of them no more than £39 7s. 4d.

Upon this state of facts it is contended on her behalf that, inasmuch as the sum received by her was less than the amount necessary to put the chancel into repair, the ecclesiastical court would have had no power to admonish her to do the repairs or any of them. Alternatively, it is contended that, even if the court would have had such power, it would not have exercised it in the circumstances. It is contended, on the other hand, upon the part of the parochial church council that Mrs. Croxford could have been admonished, inasmuch as she was upon March 28, 1934, the owner of the tithe rent-charges, and that it is immaterial whether she had or had not at that date received any payment in respect of them. As to her alternative contention, they say that it is equally immaterial to consider whether the court would or would not have admonished her in the circumstances, and that the only question to be determined is whether the court had the power to do so.

Upon this latter point I think that the parochial church council are right. The Act does not impose as a condition precedent to the court giving judgment for the responsible authority that it should find that the defendant would, but for the provisions of the Act, have been in fact admonished; the question is whether the defendant would, but for those provisions, have been liable to be admonished. The word "liable" shows, in my opinion, that the question to be considered by the court is whether the defendant could, consistently with the law, have been admonished, and not whether the defendant would in fact have been admonished in the particular case. The only question, therefore, to be determined upon this appeal is whether the defendant could, but for the Act, have been admonished "to repair the chancel." If so, then the court was obliged by the Act to give judgment for the plaintiffs for the full sum of £123 12s. 6d. That this may in certain cases lead to considerable hardship is not a matter which we are entitled to take into consideration, because the words of the Act itself are unambiguous. All that we have to ascertain is the law relating to the repair of a chancel before the Act came into operation.

As to this law one thing clearly emerges from the numerous authorities to which our attention has been very properly called. It is this. The person or other the owner of the rectory, whether ecclesiastical appropriator or lay impropriator, was liable to keep the chancel of the parish church in repair. The real difficulty consists in finding out whether the duty to repair was one arising out of the possession of the rectory, irrespective of the profits received by its possessor, or whether it was merely a duty to apply the profits as and when received in effecting the repairs. Upon this question there does not appear to be any direct authority. Nor is this at all surprising, for down to comparatively recent times the question could not often have arisen. In earlier times the rectory can very seldom have been divided up among numerous holders, all or many of whom might be in possession of a share, the profits derived from which would be wholly insufficient of themselves to keep the chancel in repair. But as a result of the numerous Inclosure Acts passed during the latter end of the eighteenth century and the general commutation of tithes for tithe rent-charges, and the subsequent redemption of many such rent-charges for money or their extinguishment by merger in the lands out of which they issued, the property of the rectory, or what now represents it, is often in modern times found in the hands of a numerous and not easily ascertainable class. What the ecclesiastical courts would have done in such circumstances must, in the absence of direct authority, be largely a matter of inference to be drawn partly from what is said in the various authorities and partly from what is left unsaid. These authorities have been reviewed by the MASTER OF THE ROLLS in his judgment, which I have had the privilege of reading, and need not be referred to in detail here. They are unanimous in this, that except in some few cases where there has grown up a custom to the contrary, the parson or rector is responsible for keeping the chancel in repair. This is to be found stated over and over again without any qualification being added, and it seems reasonable to infer from this fact that no qualification was recognised.

There is, however, a passage in the judgment of ATKYNS, J., in *Walwyn* v. *Auberry* (9), from which it may be inferred that in the view of that learned judge the liability of a lay impropriator of a rectory to repair is not unqualified. In that case, of which the best report is to be found in 2 MODERN REPORTS, p. 254, a lay impropriator of a rector had been admonished by the ecclesiastical authority for not having kept the chancel in repair, and the question arose whether such admonition could be enforced by a sequestration of the profits of the rectory. The question was not in fact decided, inasmuch as the case went off upon a matter of pleading. ATKYNS, J., however, was of opinion, differing apparently in this respect from the view entertained by the majority of the court, that the profits of a lay impropriator could properly be sequestrated by the ecclesiastical court for the purpose of enforcing its admonition. His view was that the lay rector was entitled to retain only so much of the profits of the rectory as was not required for the repairs. If this were so, then it would seem to follow that such a rector could only properly be admonished for not having applied the profits come to his hand in effecting the repairs. So that if he had only received profits that were insufficient for the purpose he would not be admonished. But the majority of the court did not presumably take the same view of the lay rector's right to the profits that commended itself to ATKYNS, J. The question whether an admonition to repair could be enforced by sequestration of the profits or merely by excommunication would not necessarily have thrown any light upon the nature of the liability to repair, even if it had been decided. The case would, however, be valuable if the view taken by ATKYNS, J., of the nature of a lay impropriator's interest in the rectory could be accepted. Unfortunately, as I have pointed out, he appears on this question to have been in a minority. In these circumstances the case cannot be regarded as an authority for imposing a qualification upon the liability of a rector to repair that is not mentioned by any one of the other authorities, and that in four of them, at any rate, would almost certainly have been alleged if it had existed.

These four authorities are the *Bishop of Ely* v. *Gibbons* (11), *Morley* v. *Leacroft* (2), *Neville* v. *Kirby* (7), and *Hauxton Parochial Church Council* v. *Stevens* (12). In all these cases impropriators of a rectory or part of it were admonished for non-repair of the chancel, and in no one of them was it even averred that the person admonished had received profits from the rectory sufficient to enable him to effect the repairs. It is true that in all of them it was highly probable that sufficient profits for the purpose had in fact been received. But if such a receipt was a condition precedent to the existence of the liability it is almost incredible that the fulfilment of the condition should not have been averred.

There is one further matter to which I ought to refer before passing from the reported cases. It was stated by COCKBURN, C.J., in *Griffin* v. *Dighton* (5) (5 B. & S. at p. 104), on the authority of a passage in LINDWOOD, that where there are both rector and vicar A in the same church, they shall, there being no custom to the contrary, contribute to the repair of the chancel in proportion to their benefice. Some reliance was placed on behalf of the respondents upon this statement. It does not, however, help them, for it throws no light upon the question of whether the rector's liability is conditional upon his having received profits of the rectory. Indeed, so far as it goes, it seems to be against them. For the liability of the rector to contribute to any expenses incurred by the vicar in B effecting the repairs is again stated in general terms and without reference to the amount of profits actually received by him.

The defendants' case, however, receives considerable support from the passages in BURN'S ECCLESIASTICAL LAW and substantially repeated in SIR ROBERT PHILLIMORE'S book, to which the MASTER OF THE ROLLS refers. They appear to lay down the following propositions: (i) That where a rectory is held by several impropriators any one or more C of them may be proceeded against for non-repair of the chancel without making the others parties to the suit, if the parties proceeded against can be proved to have received between them profits belonging to the rectory sufficient to effect the repairs. (ii) That the parties so proceeded against must settle between themselves the proportions in which these expenses of repair are to be found. But no authority for the propositions is cited, and they seem in some respects very unsatisfactory and illogical. That one D only out of several impropriators may be proceeded against for non-repair of the chancel seems reasonably clear. Neither in the case of the *Bishop of Ely* v. *Gibbons* (11), nor in that of *Hauxton Parochial Church Council* v. *Stevens* (12) was the impropriator in question the owner of the whole rectory, yet no objection was taken on this score. But this throws no light upon the question whether the liability of a rector to repair the chancel is a merely personal one, or whether it is dependent upon the receipt of profits sufficient E for the purpose. For in the former case each owner of a share in the rectory must owe an unqualified duty to repair. In the latter case he must owe a duty to repair if he has received sufficient profits to cover the expense of repairing. In either case he could be admonished for the neglect of his duty without citing the owners of the other shares. But it is difficult to see why two or more impropriators can only be proceeded against for non-repair when it can be shown that they together have received sufficient profits to F effect the repairs. For if the duty of each one to keep the chancel in repair be unqualified, any such proof would be unnecessary. If, on the other hand, his duty be contingent upon his having received sufficient profits for the purpose, how can one impropriator, who has received either no profits at all or profits insufficient for the purpose, be made liable to admonition merely by joining with him another impropriator who has received enough profits to enable him to discharge his duty? For it can hardly be sug- G gested that one of several impropriators is under any obligation to compel the others to perform their own. The fact that two or more impropriators may be admonished for non-repair of the chancel without showing that each one has received profits for the purpose necessarily tends, therefore, in my opinion, to the conclusion that the duty of each one is an unqualified one. So too, though in a lesser degree, does the fact that one of several impropriators who has repaired the chancel can obtain contribution H towards the expenses from all the others. I say "all the others," as I cannot accept the proposition that contribution can only be obtained from those impropriators who have been joined in the proceedings, if DR. BURN intended to lay down any such proposition, which I venture to doubt. If the liability to repair be unqualified, then all the impropriators will have to contribute, and, on the analogy of the rector and the vicar, will do so proportionately to their shares in the rectory. If, on the other hand, the liability I to repair be a qualified one, as is suggested, the impropriators will only contribute proportionately to the profits they individually received, and the amount of these may be very difficult to ascertain. But, apart from the difficulty of ascertaining the amount of the individual contributions, an apportionment of the expenses according to the profits received would or might be grossly inequitable. For the owner of perhaps the largest share in the rectory would escape having to contribute anything at all if he had only recently acquired his share and had not at the time received any profits from that share.

In my opinion, for these reasons and for those given by the MASTER OF THE ROLLS, this appeal should be allowed.

EVE, J.—I have had an opportunity of reading both the judgments just delivered, and in acquiescing therein I hope I shall not be regarded as guilty of undue temerity in a case involving the consideration of matters in which I have had but little experience when I say that the result of those judgments does not appear to me to be reasonable or just, and would seem to be one to which the attention of the legislature might be properly directed.

Appeal allowed.

Solicitors: *Thomas Eggar & Son*, for *Greene & Greene*, Bury St. Edmund's; *Heald, Johnson & Co.*, for *Steed & Steed*, Long Melford.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

McPHERSON *v.* McPHERSON

[PRIVY COUNCIL (Lord Blanesburgh, Lord Macmillan and Lord Wright), July, 18, 19, 22, 23, December 16, 1935]

[Reported [1936] A.C. 177; 105 L.J.P.C. 41; 154 L.T. 221; 52 T.L.R. 166; 80 Sol. Jo. 91]

Open Court—Need for trial to be in—Undefended divorce suit—Hearing in judges' library—Voidability of decree.

Except in the case of some proceedings—*e.g.*, applications made under the rules in chambers and cases concerning infants—publicity is the authentic hall-mark of judicial, as distinct from administrative, procedure, and in no case is the observance of this principle more important than in an undefended divorce suit, for there is no class of case in which the desire of parties to avoid publicity is more widespread and in which it can be so clearly demonstrated to a judge that privacy would be both harmless and merciful. The actual presence of the public is never necessary; on some occasions there may be no members of the public available to attend, but the court must be open to any who may present themselves for admission. The remoteness of the possibility of any public attendance must never, by judicial action, be reduced to the certainty that there will be none.

The trial of an undefended divorce suit took place in the judges' law library at Edmonton, Canada, during the luncheon interval. The judge was not robed, neither was counsel. Before taking his seat the judge stated that he was sitting in open court. The judges' law library was approached through a double swing-door in the wall of the public corridor. One wing of the door was always fixed; the other, though swinging close, was usually unfastened; on the fixed wing was a brass plate with the word "Private" in black letters on it. The unfastened swing-door opened on an inner corridor in which was a door of the judges' law library. The opening wing of the swing-door was unfastened during the trial and the inner door of the library was kept open throughout. After taking the evidence the judge pronounced a decree nisi which was in due course made absolute. On a claim by the respondent to the divorce proceedings to have the decrees nisi and absolute against her set aside on the ground that the trial of the action in the library was not a trial in open court.

Held: the procedure adopted could not be justified, but the result of the irregularity was to make the decree absolute voidable, and not void, and the time for avoiding it was long past.

Notes. Section 57 of the Matrimonial Causes Act, 1857 (see infra) was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, and re-enacted in s. 184 (1) thereof. That subsection was in turn repealed by the Matrimonial Causes Act, 1950, and re-enacted in s. 13 (1) of that Act. A

Referred to: *Marsh* v. *Marsh*, [1945] A.C. 271, P.C.; *Wiseman* v. *Wiseman*, [1953] 1 All E. R. 601.

As to the need to hear cases in open court, see 9 HALSBURY'S LAWS (3rd Edn.) 345, 346, and as to the avoidance of decrees absolute, see 12 HALSBURY'S LAWS (3rd Edn.) 409, and for cases, see 16 DIGEST 128 et seq. and 27 DIGEST (Repl.) 592, 593, 594, 686. B

Cases referred to:

(1) *Scott* v. *Scott*, [1913] A.C. 417; 82 L.J.P. 74; 109 L.T. 1; 29 T.L.R. 520; 57 Sol. Jo. 418, H.L.; Digest (Practice) 535, *1979*.

(2) *Board* v. *Board and A.-G. for Alberta*, [1919] A.C. 956; 27 Digest (Repl.) 267, **942*. C

(3) *Dimes* v. *Grand Junction Canal Co.* (*Proprietors*) (1852), 3 H.L. Cas. 759; 8 State Tr. N.S. 85; 19 L.T.O.S. 317; 17 Jur. 73; 10 E.R. 301, H.L.; 36 Digest (Repl.) 372, *125*.

Appeal by Mrs. Cora Lillian McPherson from the judgment of the Supreme Court of Alberta (Appellate Division) on a preliminary issue in an action brought by her appellant to have the decrees nisi and absolute obtained by her husband against her rescinded and set aside, and for an order for restitution of conjugal rights. D

The appellant and the respondent, Oran Leo McPherson, were married on April 17, 1908, in the United States. Their subsequent matrimonial domicil was in Alberta. On March 17, 1931, the respondent instituted divorce proceedings against his wife, accusing her of adultery with one Leroy Mattern. No defence was put in, and the trial took place on April 22, 1931, before TWEEDIE, J., in the Court House at Edmonton. The judge pronounced a decree nisi, which was made absolute on July 28, 1931. In July, 1932, the respondent married Mrs. Mattern, the former wife of Leroy Mattern, she having obtained a divorce from her husband on account of his misconduct with the appellant. On Oct. 11, 1932, the appellant brought against the respondent this action to have the decrees nisi and absolute obtained by him set aside on various allegations put forward by the appellant. By an amendment to the statement of claim made in November, it was alleged that the trial of the divorce action had been a secret one, and that the decrees in question were null and void, and this new issue was directed to be tried as a preliminary issue before the earlier issues. At the hearing of the preliminary issue, EWING, J., held on the facts that the trial had been in open court, and his decision was affirmed by the Supreme Court of Alberta. The appellant appealed to the Judicial Committee. E F G

Wilfrid Greene, K.C., *Horace Douglas*, and *R. O. Wilberforce* for the appellant.

S. B. Woods, K.C. (of the Canadian Bar) and *Frank Gahan* for the respondent.

Dec. 16. **LORD BLANESBURGH.**—Questions of wide general importance—of interest in some of their aspects to the whole Dominion and even beyond—are raised by this appeal from the Supreme Court of the province of Alberta. The questions discussed in the judgments appealed from are concerned with the degree of publicity called for at the trial of divorce suits—in particular, undefended divorce suits in the province; their Lordships, however, will have to deal, in addition, with the effect upon a decree nisi made at such a trial and upon a decree absolute following thereon when it is shown—as in this case is alleged, that the proceedings at the trial were devoid of sufficient publicity—were, in short, not held in "open court." H I

The facts which raise these questions are not in the present case in dispute, and may be stated as follows:

The appellant and the respondent were married on April 17, 1908, in the United States. Their subsequent matrimonial domicil, however, was in Alberta. They lived at Edmonton, where they must have been prominent citizens—the respondent in 1931, being, or shortly afterwards succeeding to the office of, Minister of Public Works for the province.

On March 17, 1931, he instituted in the Supreme Court of Alberta divorce proceedings against his wife. He accused her of misconduct with one Leroy Mattern. She made no answer to the charge. She put in no defence. She filed no demand of notice. Accordingly, the action was appointed for trial without further intimation to her. It was tried on April 22, 1931, by TWEEDIE, J., sitting in the judges' law library of the Court House at Edmonton. The learned judge, on that day and in that place, after taking the evidence of the respondent and of two witnesses called on his behalf pronounced a decree nisi and gave to the respondent the custody of the four children of the marriage—all of them sons, the youngest then a boy of seven. It is not unlikely, if one may judge from passages in the record, that the retention by the respondent of the custody of that youngest son, lies at the root of much of the later troubles between the parents.

In due course, however, there having been no intervention by the appellant or anyone else, the decree nisi was, by decree of June 28, 1931, made absolute, and the marriage between the appellant and respondent was, at least apparently, finally dissolved, with this statutory result, that, after the time for appeal had expired, it became lawful for both parties to marry again as if their prior marriage had been dissolved by death—all in terms of s. 57 of the Matrimonial Causes Act, 1857—a section which has always been part of the law of Alberta. Of that privilege the respondent in due course availed himself. In July, 1932—long after the time for any appeal from the decree absolute had expired, he married Mrs. Mattern, the former wife of Leroy Mattern already mentioned. She had obtained a divorce from her husband on account of his misconduct with the appellant. Three months after the respondent's marriage to Mrs. Mattern—in October, 1932—the appellant commenced against him the action out of which this appeal proceeds.

As originally framed, the action was not directed to the questions with which their Lordships are now alone concerned. Its claim was to have rescinded and set aside the decrees nisi and absolute obtained by the respondent in the divorce action on the allegations, in effect, that these decrees had resulted from the respondent's perjury in stating in evidence at the trial that there had been no collusion between himself and the appellant whereby the necessary evidence of her adultery had been obtained, and that there had been no condonation of that adultery.

In the statement of claim as first delivered, it is recorded, almost casually, that the trial at which these alleged false statements were made took place in the law library of the court house at Edmonton. But none of the relief asked is grounded on that statement. Moreover, it is important to observe that the relief so far claimed was based upon the footing that the impugned decrees were voidable only and that the intervention of the court for their rescission was necessary. It was not until Nov. 13 following that the questions now in contest were raised by amendment: then for the first time it was alleged that the trial of the divorce action in the library was not a trial in open court—and as a result that the decrees in question were actually null and void—an allegation and a claim of peculiar seriousness not only to the respondent, in view of his second marriage, but to the wife of that marriage, who, be it noted, is no party to this appeal.

By order dated Nov. 28, 1932, this new issue was directed to be tried before the earlier issues in the cause.

And it has been so tried, with the result that by an order of the Supreme Court (EWING, J.) of Dec. 20, 1932, affirmed, on appeal, by an order of the Appellate Division of Feb. 21, 1933, it has, in effect, now been found that the divorce trial did take place in open court and the appellant's action so far as it questions the sufficiency of that trial has been dismissed.

The present is an appeal from these orders of dismissal. The appellant has by special leave been permitted to present and prosecute her appeal in forma pauperis. By it she challenges the finding in question. The trial, she contends, did not take place in open court, and once the finding that it did is displaced, it results, so she asserts, that the decrees following thereon being null and void should now be so declared.

It may be stated here that the original issues in the appellant's action have now also

A been tried and in the court of first instance have resulted in a judgment adverse to her. But that judgment is the subject of a pending appeal to the Appellate Division, and their Lordships accordingly do not further refer to it. They confine their attention exclusively to the questions raised by the issue separately tried, and it will, they think, be convenient first to deal with the actual finding of the courts below. Was the trial really held in open court, or was it not? An important question, as will presently be B seen.

The judges' library at Edmonton in which the trial took place is not one of the regular courts of the Court House there, and it is a circumstance on which reliance has been placed by the appellant that at the time of the trial in that room, and indeed throughout the afternoon of that day, one or more of these courts was available. Up to a point, however, this fact is of little or no importance. There is at Edmonton no C announcement with reference to a trial in a regular court that would be withheld in the case of a trial in the judges' library. There is there no daily cause list. No printed or written notice of the business in progress is apparently exhibited. Information on that subject is, it seems, obtained from the orderlies in attendance, and they, apparently, would know as much about a case appointed to be heard or being heard in the judges' library as about one appointed to be heard or proceeding elsewhere. Had the learned D judge on the occasion in question directed this divorce case to be taken in one of the empty courts, no greater degree of publicity would apparently, so far, have attended the proceedings.

In the matter of facilities for public access to the court rooms, on the one hand, and to the judges' library, on the other, there is, however, a very great difference to be noted: to the court rooms direct public access is provided from a public corridor which encircles the entire second floor of the court house. But there is no such direct access to the E judges' library. It is approached through a double swing door in the wall of the same corridor immediately opposite the top of the stairway. One wing of the door is always fixed—the other, although swinging close, is usually unfastened. On the fixed wing is a brass plate with the word "Private" in black letters upon it. As to the unfastened swing door—the door to which alone when it is open the word "Private" has any sensible application—it opens on to an inner corridor in which, opposite, is a door of the judges' F library.

It was in evidence that the word "Private" on the outer door did not in fact deter or hinder entry to the inner corridor by practitioners and other familiars of the building and the door unfastened is not usually officially guarded. It was accepted, too, that the opening wing of the swing door was unfastened during the trial, and it was proved, as will later appear, that the inner door of the library was kept open throughout. But G there remains the serious question, to which their Lordships must return, whether these swing doors with "Private" marked upon one of them were not as effective a bar to the access to the library by an ordinary member of the public finding himself in the public corridor as would be a door actually locked.

On the day of the trial TWEEDIE, J., was not a judge in attendance at the court house. For the convenience of one of the witnesses who was coming from a distance, he had H arranged to take the case himself on that day. It was only a few minutes before the hour appointed that he definitely selected the judges' library as the place for the hearing, and he so informed the clerk of the court.

The proceedings took place during the luncheon interval, probably as the most convenient hour for all concerned. They were in one respect less formal than those of an ordinary trial in open court. The learned judge was not robed, neither was counsel. I In other respects the proceedings seem to have been quite regular. TWEEDIE, J., entered the library from a door accessible only to judges. He was attended by an official shorthand writer and by the assistant clerk of the court, Mr. Mason. Before taking his seat at the head of the table in the library he stated that he was sitting in open court, a statement suggested, no doubt, by s. 5 of the Judicature Ordinance of the North-west Territories, later to be mentioned. He directed Mr. Mason to open and to keep open the door already mentioned leading from the library to the inner corridor. He evidently overlooked the swing door outside, with its appearance of being closed and

A its warning against public intrusion, for he gave no direction with regard to that door. Probably, the door being rarely closed, it was the legend upon it that he forgot. Had he recalled that word "Private" and appreciated its significance, then, judging by his action with reference to the inner door, he must either, it would seem, have had it plainly opened or he must have sat elsewhere.

In point of fact no member of the public entered the library while the trial proceeded. B Only the learned judge and counsel, the respondent with his two witnesses, called in one after the other, and the court officials already mentioned were there.

Having now closed their account of the proceedings, their Lordships pause, to join with everyone concerned, in affirming their own belief in the complete bona fides of the learned judge in everything he did on this occasion. He stated to EWING, J., the trial judge of this separate issue, that it was his desire to restrict publicity, but not in any C way out of regard for the feelings or in deference to the position of the respondent personally. The suggestion that the procedure adopted on this occasion is traceable to the fact that the respondent was a Minister of the Crown is one easily made and readily accepted by credulous minds. It is right, therefore, that being unfounded, it should be definitely repelled. Their Lordships unreservedly accept the statement of the learned judge on this subject. For the rest, they believe that it was unhealthy D notoriety rather than normal publicity that he really desired to restrict. It could hardly have been anything else. The respondent, after all, was plaintiff and not defendant in this undefended suit. He needed no protection, and in view of his position it is a satisfaction to place it upon record that learned counsel for the appellant disclaimed making any kind of reflection on the respondent in relation to any incident attending the trial. In that matter, at any rate, he is the victim of misfortune. Their Lordships, E reading his evidence—the evidence, they assume, of a layman—are very ready to conclude that to him there appeared to be nothing in the proceedings of that day in any way out of the normal.

Now, the learned judges in Alberta, applying to the case the principles enunciated in *Scott* (*otherwise Morgan*) v. *Scott* (1) as those by which they were bound have, as already stated, reached the conclusion—McGILLIVRAY, J., with some hesitation—that the trial F in the library, as just described, was a hearing in open court, and their Lordships are impressed by the weighty considerations that can be ranged in support of that view. The facts of this case, for example, have little correspondence with those in *Scott* (*otherwise Morgan*) v. *Scott* (1)—the authority constantly referred to in argument as the foundation for the appellant's claim. That suit was heard in camera by direct order of the registrar, his justification being that he was thereby merely following well established G and authentic practice. As a result the public were deliberately as well as effectively excluded from the court. Here, on the other hand, there was no actual exclusion of the public, although there was no actual public attendance. No such exclusion was intended nor, possibly, even desired. The learned judge would probably have been gratified by the presence of a small audience. But, even although it emerges in the last analysis that their actual exclusion resulted only from that word "Private" on the H outer door, the learned judge on this occasion, albeit unconsciously, was, their Lordships think, denying his court to the public in breach of their right to be present, a right thus expressed by LORD HALSBURY in *Scott* (*otherwise Morgan*) v. *Scott* (1) ([1913] A.C. at p. 440): "Every court of justice is open to every subject of the King."

To this rule, there are, it need hardly be stated, certain strictly defined exceptions. Applications properly made in chambers and infant cases may be particularised. But I publicity is the authentic hall-mark of judicial, as distinct from administrative, procedure, and it can be safely hazarded that the trial of a divorce suit, a suit not entertained by the old Ecclesiastical Courts at all, is not within any exception.

The actual presence of the public is never, of course, necessary. Where courts are held in remote parts of the province, as they frequently must be, there may be no members of the public available to attend. But, even so, the court must be open to any who may present themselves for admission. The remoteness of the possibility of any public attendance must never by judicial action be reduced to the certainty that there will be none.

And their Lordships, in reaching the conclusion that the public must be treated as having been excluded from the library on this occasion, have not been uninfluenced by the fact that the cause then being tried was an undefended divorce case. To no class of civil action is Lord Halsbury's statement more appropriate. In no class of case is the privilege more likely to be denied unless every tendency in a contrary direction, whenever manifested, is definitely checked.

So long as divorce, in contrast with marriage, is not permitted to be a matter of agreement between parties, the public at large—their Lordships are not now referring to the prurient minded among them who revel in the unsavoury details of many such cases—but the public at large are directly interested in them, affecting as they do, not only the status of the two individuals immediately concerned, but, not remotely when taken in the mass, the entire social structure and the preservation of a wholesome family life throughout the community.

Their Lordships are not surprised to find disclosed in the record traces of a practice existing in Edmonton, one not in their experience confined to Alberta, which seems to regard too lightly the duty of hearing these suits in public and with all appropriate ceremony. The trial of undefended suits in the judges' library with its warning off notice, although, perhaps, infrequent has been by no means unknown. Mrs. Mattern's suit, for instance, was heard there. Such suits seem to have been heard, on occasion, in a judge's private room, and, very probably, because no public attendance was anticipated, it appears that in the present case the discarding of the robe of ceremony was regarded both by judge and counsel as a matter of course.

There is perhaps no available way to correct these tendencies more effectively than to require that the trial of these cases shall always take place, and in the fullest sense, in open court. This requirement must be insisted upon because there is no class of case in which the desire of parties to avoid publicity is more widespread. There is no class of case in which, in particular circumstances, it can be so clearly demonstrated even to a judge that privacy in that instance would be both harmless and merciful.

Again publicity goes far to prevent the trial of these actions, where one is superficially so much like another, from becoming stereotyped and standardised so that the ability to dispose of them with a minimum expenditure of judicial time is even now apparently regarded in some quarters as the convincing test of judicial efficiency.

Moreover, the potential presence of the public almost necessarily invests the proceedings with some degree of formality. And formality is, perhaps, the only available substitute for the solemnity by which, ideally at all events, such proceedings, especially where the welfare of children is involved, should be characterised. That potential presence is at least some guarantee that there shall be a certain decorum of procedure. If at other public sittings of the court it is the rule for both judge and counsel to be robed it is pessimi exempli that for the trial of an undefended divorce case the gown of ceremony should be discarded.

These are some of the considerations which have led their Lordships to take a more serious view of the absence of the public from the trial of this divorce action than has obtained in the courts below. Influenced by them their Lordships have felt impelled to regard the inroad upon the rule of publicity made in this instance—unconscious though it was—as one not to be justified and now that it has been disclosed as one that must be condemned so that it shall not again be permitted.

It will be seen that in reaching this conclusion their Lordships, like the learned judges in Alberta, have dealt with the case as if the principles applicable were those enunciated in *Scott* (*otherwise Morgan*) v. *Scott* (1). In taking that course they have not forgotten the elaborate and careful argument by which counsel for the respondent sought to establish that, in view mainly of the section of the ordinance already referred to and the Divorce Rules of the Supreme Court, the rule of publicity in divorce suits was less rigid in Alberta than it is in England, maintaining, indeed, that in Alberta, for the trial of undefended divorce suits, no publicity was required. Their Lordships do not discuss this suggestion. They think that the answer to it made by counsel for the appellant in reply was complete and they leave it there, referring only to the decision of the Judicial

Committee in *Board* v. *Board and the A.-G. for Alberta* (2) as the source of the law of Alberta on this subject.

But what is the result of the irregularity in procedure now disclosed? This question had not to be dealt with in the courts below. It must now be disposed of by the board. The appellant claims that the irregularity operates to render the supervening decrees null and void: she advances the position that inevitably and with no power of rectification in any provincial authority, judicial or otherwise, the change of status effected on the face of it by the decree absolute does not result: that to this decree absolute s. 57 of the Matrimonial Causes Act, 1857, has no application and that any subsequent marriage of either party to it, not being entitled to the protection of that section and contracted in the lifetime of the other, is bigamous and its offspring illegitimate: that this inescapable result ensues, whatever be the breach of the rule in its attendant circumstances—whether, at one end of the scale, it be a calculated and interested secrecy, or whether, at the other end of the scale—and as here—the result of mere forgetfulness: and, finally, but separately, that a declaration to the effect stated can properly here be made in the absence, as respondent, of Mr. McPherson's second wife.

It is agreed, however, that there is no case to be found in the books justifying these propositions, and their Lordships are of opinion, that neither on principle nor by authority can they be supported, that the decrees here in question were voidable only, and not void, and that the time for avoiding them has long gone by.

Their Lordships would observe, in passing, that they are not in this case dealing with a decree nisi pronounced after a travesty of judicial proceedings—a mere stage trial. The quality of a decree pronounced after such an idle ceremonial may be left to be dealt with when it is produced. Here their Lordships are dealing with a decree pronounced after a serious trial free from every other defect in procedure, and one entered and remaining on the court files as regular in every respect. To say that such a decree is void would seem to be out of the question. If the law were so to treat it, the remedy would be far worse than the disease it was designed to cure. To say that it is voidable states a result which their Lordships think entirely meets the case.

That that is the true result emerges from an authority which, although not direct, is, in their judgment, completely analogous—*Dimes* v. *Grand Junction Canal Co.* (3), in which it was held that an order made by a Lord Chancellor who was personally interested in the result was, while voidable, not void. In that case the judges were consulted and their opinion was given by PARKE, B. It was to the effect that the Lord Chancellor, by reason of his interest, was disqualified from judging in the cause, but that his decree was not in consequence absolutely void. It was voidable only, and, challenged on appeal, it was set aside by the House of Lords.

Learned counsel for the appellant did not find it possible to distinguish *Dimes's Case* (3) from the present case except upon the ground that the objection there taken to the decree was one which, as it merely affected property, could have been waived by the appellant, and was, therefore, voidable only, but that the decrees here involved questions of status in which the public was interested: that there could be no waiver of the public right and that, accordingly, the decrees here were void. But this presupposes that no intervention in due time on the part of the public is, in such cases as the present possible, and that supposition is, their Lordships think, mistaken. In the present case it was open to the Attorney-General of the province or the King's Proctor on his behalf, had he in the public interest thought fit to move by way of appeal or before time for appeal had expired, to move the trial judge himself to discharge the impugned orders on the ground that the trial from which both resulted had not been held in open court.

In other words, the public through the Attorney-General had the fullest right of intervention. But any such intervention had to be made before time for appeal had expired or before the rights of third parties had intervened. Just as a contract to take shares in a company induced by fraud, being voidable only, may be set aside before winding-up commenced, but not later, after the rights of the company's creditors have intervened—so here the order absolute cannot be touched after the time for appeal therefrom has passed, and a new status has been acquired, or in this case after the respondent having re-married is entitled, as is also his wife, to the protection afforded by s. 57 of the Matrimonial Causes Act, 1857. It follows in their Lordships' judgment that the appeal fails: the order absolute, although originally voidable, having become unassailable by the time the appellant's claim was made.

In these circumstances it is unnecessary for their Lordships to consider whether any declaration that the decree was void could in any case have been made in a proceeding to which the present Mrs. McPherson was no party. Nor is it necessary for them further to examine *Scott* (*otherwise Morgan*) v. *Scott* (1) for the purpose of showing that the order there made was not regarded by any of the noble Lords concerned nor by the Attorney-General nor by either of the parties to the appeal as affecting in any way the order absolute which had in fact been made and at the instance of the appellant too while her appeal to the House of Lords was pending. The decree absolute in *Scott* (*otherwise Morgan*) v. *Scott* (1), as their Lordships have ascertained, still stands on the files of the court intact; and so stands along with many another previous decree in a nullity suit made after a hearing in camera. In fact, the decree was in no way affected by the judgment of the House, notwithstanding that, in its opinion, the order directing the proceedings at the trial to be held in camera was so completely beyond the powers of the court that, although obtained at the instance of the appellant herself, it might be disobeyed by her with impunity.

On the whole case their Lordships are of opinion that this appeal should be dismissed. And they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors: *Lawrence Jones & Co.*; *Blake & Redden.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

TATTERSALL *v.* DRYSDALE

[KING'S BENCH DIVISION (Goddard, J.), May 14, 1935]

[Reported [1935] 2 K.B. 174; 104 L.J.K.B. 511; 153 L.T. 75; 51 T.L.R. 405; 79 Sol. Jo. 418]

Insurance—Motor assurance—Third-party risks—Clause in policy indemnifying person driving with assured's permission—Right of such person to sue on policy—Duration of extension clause—Life Assurance Act, 1774 (14 *Geo.* 3, *c.* 48), *ss.* 1, 2—*Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 36 (4).

A policy of insurance which indemnified the owner of a motor car against third-party risks was extended to indemnify any person driving with the assured's permission.

Held: that by reason of the provisions of s. 36 (4) of the Road Traffic Act, 1930, such a person could sue on the policy although he had no insurable interest, as required by the Life Assurance Act, 1874, s. 1, and although his name was not inserted in the policy, as required by s. 2 of that Act.

A policy of insurance underwritten by the defendant by which the plaintiff insured himself against third-party risks in respect of a specified motor car was extended to cover him while he was temporarily using another car. During the continuance of the policy the plaintiff sold the car, the subject of the insurance.

Held: the policy insured the plaintiff in respect of the ownership and user of the specified car, and when he divested himself of his interest in that car the extension clause ceased to have effect.

Notes. Considered: *James & Son, Ltd.* v. *Smee*, *Green* v. *Burnett*, [1954] 3 All E.R. 273.

A As to the extension of the protection given by motor policies, see 18 HALSBURY'S LAWS (2nd Edn.) 558, 559, and for a case, see 29 DIGEST 408, *3215*. For the relevant statutes, see 24 HALSBURY'S STATUTES (2nd Edn.) 475 et seq.

Cases referred to:

(1) *Weddell* v. *Road Transport Insurance Co.*, [1932] 2 K.B. 563; 101 L.J.K.B. 620; 146 L.T. 162; 48 T.L.R. 59; 75 Sol. Jo. 852; Digest Supp.

B (2) *Rogerson* v. *Scottish Automobile and General Insurance Co.* (1931), 146 L.T. 26; 48 T.L.R. 17; 75 Sol. Jo. 724; 37 Com. Cas. 23; Digest Supp.

(3) *Jones* v. *Birch Bros.*, [1933] 2 K.B. 597; 102 L.J.K.B. 746; 149 L.T. 507; 49 T.L.R. 586; Digest Supp.

(4) *McCormick* v. *National Motor and Accident Insurance Union, Ltd.* (1934), 50 T.L.R. 528; 40 Com. Cas. 76; 49 Ll. L. Rep. 361.

C (5) *Williams* v. *Baltic Insurance Association of London, Ltd.*, [1924] 2 K.B. 282; 93 L.J.K.B. 819; 131 L.T. 671; 40 T.L.R. 668; 68 Sol. Jo. 814; 29 Com. Cas. 305; 29 Digest 408, *3215*.

(6) *Vandepitte* v. *Preferred Accident Insurance Corporation of New York*, [1933] A.C. 70; 102 L.J.P.C. 21; 148 L.T. 169; 49 T.L.R. 90; 76 Sol. Jo. 798; Digest Supp.

D **Action** claiming a declaration that the defendant, a Lloyd's underwriter, was liable to indemnify the plaintiff against claims made against him in respect of a motor accident, under a Lloyd's Eclipse policy subscribed by the defendant and others.

The question involved was whether, by virtue of s. 36 (4) of the Road Traffic Act, 1930, a person driving with the assured's permission, and, therefore, covered by the policy, E could sue on the policy, although not a party to it. That subsection provides as follows:

> " Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons."

F The facts found by the learned judge were that in 1931, the plaintiff insured himself against third-party risks in respect of his motor car with the London and Edinburgh Insurance Company, Ltd. He changed his car from time to time, and by an endorsement on the policy dated April 11, 1934, it covered the car he owned in August, 1934. At that date he decided to buy a new car from Gray Brothers and Kemp, Ltd., and a Mr. Gilling, a director of that company, agreed to lend him a Riley car until the new car G was delivered. The Riley car was insured by Gilling under a Lloyd's Eclipse policy, subscribed by the defendant, which contained the following clause:

> " The insurance shall extend to indemnify any person who is driving on the assured's order or with his permission in respect of any legal liability as aforesaid."

The plaintiff's policy with the London and Edinburgh Company contained a clause H covering him against liability for third-party claims while he was using another car temporarily.

While driving the Riley car the plaintiff became involved in an accident and had to pay £2,150 damages, and the issue was on which of the two insurance companies the liability fell of bearing that loss. The court had, therefore, to decide (i) whether the London and Edinburgh Company's policy was in force at the date of the accident, and I (ii) whether the plaintiff was entitled to sue on the Lloyd's policy.

Samuels, K.C. and *Soskice* for the plaintiff.

Croom-Johnson, K.C. and *Monier-Williams* for the defendant.

GODDARD, J.—This case raises a question of general interest and considerable importance in the law of motor-car insurance. It has to be determined, I think for the first time, what effect, if any, s. 36 (4) of the Road Traffic Act, 1930, has upon a clause which, in one form or another, has for many years appeared in motor-car policies whereby the underwriters declare that the insurance affords indemnity to persons not themselves parties to the policy, or otherwise insured, who may be driving the insured car with the permission of the assured. It affects not only civil rights but criminal liabilities, for if a person uninsured in his own name is driving a friend's car he is committing an offence which may involve him in serious penalties unless he is covered by the policy granted to the owner of the car.

The facts as I find them are as follows. Dr. Tattersall, the plaintiff, on Nov. 10, 1931, insured himself against third-party risks in respect of a Morris Oxford car under a policy subscribed by the London and Edinburgh Insurance Co., Ltd. He changed his car from time to time, the changes being duly endorsed on the policy, and by an endorsement dated Nov. 8, 1932, the insurance was enlarged so as to give full cover and not merely cover against liability to third parties. The last car which he owned before the events giving rise to this action, was a 16 horse-power Standard, covered by an endorsement dated April 11, 1934. Being minded to get yet another car, in August, 1934, he made an agreement with Gray Brothers and Kemp, Ltd., motor-car dealers, of Hull, of which company a Mr. Gilling was a director. He did not desire immediate delivery of a new car, and, indeed, he had not finally decided what car he would have. Messrs. Gray were to allow him £180 in respect of his Standard, which he was to transfer to them towards the price of the new car, and they wanted the Standard car at once, as they would have a better chance of selling it during the summer months. The bargain was reduced into writing by a letter of Aug. 13, which is in these terms:

> "Dear Sir—We beg to thank you for your valued order given to the undersigned to-day, and beg to confirm that we shall make you an allowance of £180 on your Standard Swallow saloon against any new car you care to select to the approximate value of £200, and, in the event of you spending more than this amount, we will make you an additional allowance of 7½ per cent on the amount in excess of the amount stated. We are arranging to send the Standard Swallow down to London to-morrow (Wednesday) morning and to bring back the Riley saloon, which we have pleasure in lending to you, free of charge, until such time as you get delivery of your new car."

The plaintiff handed over his car to the company on that day, and they disposed of it to a Mrs. Hay on Aug. 15. The Riley saloon which the company arranged to lend him was in fact the property of their director, Mr. Gilling, and was insured by him under a Lloyd's Eclipse policy, of which the defendant is one of the underwriters. Down to the time when the bargain was made there had been no mention of the insurance of the Riley car. This was delivered to the plaintiff on Aug. 17 or 18, it matters not which. When the plaintiff took possession of it he looked at his policy, or his certificate, and came to the conclusion, as did Mr. Stephenson the company's salesman, that for the purpose of the Road Traffic Act, 1930 he was insured while driving this car under his own policy. Mr. Gilling thought that it was his insurers that would have to bear any loss if there was an accident, and, accordingly, was anxious that the plaintiff should arrange for the Riley to be insured in his own name. The plaintiff was quite willing, and communicated with the agent of the London and Edinburgh Company. Unfortunately, before enough information had been given to enable the Riley car to be substituted for the Standard on the policy, the plaintiff was involved in a serious accident and had to pay £2,150 damages. This action is brought in effect to determine on which body of insurers that loss is to fall, and I am told, and it is right I should say so, that it has been arranged that the loss will in no case fall on the doctor. The Lloyd's policy provides that the insurance is extended to indemnify a person driving the insured car with the assured's permission provided that such person is not entitled to indemnity under any other policy. It is, therefore, necessary to examine the extension clause in the plaintiff's policy to determine whether that policy was in force at the time of the accident.

The plaintiff says that he is given a cause of action for indemnity against Mr. Gilling's underwriters by virtue of the subsection to which I have referred. He further says his policy had ceased to be in force at the time of the accident. He also alleges that, if the section gives him a right of action against the defendant, he is entitled to contribution to the extent of one-half, even if his own policy was in force at the time of the accident, under the doctrine laid down in *Weddell* v. *Road Transport Insurance Co.* (1). Though I had some doubt whether this alternative was properly raised in the pleadings, I allowed Mr. Samuels to argue it, though in the view I have formed it is unnecessary to express any opinion thereon.

The defendant's contentions are that the subsection gives the plaintiff no cause of action against him, that in any case the plaintiff was not driving the car with Gilling's permission, and that his own policy was still in force at the time of the accident. He says that, whatever be the true effect of the subsection, if these two latter contentions be correct the plaintiff cannot bring himself within it. I, therefore, consider them first.

As to the question of permission, I am clearly of opinion that he was driving with Gilling's permission. It was said that Gilling never intended that the plaintiff should drive the car until he had himself insured it and that this the defendant understood. The truth is that no bargain about insurance was ever made. Gilling, on handing over his car after the bargain had been made, wished the plaintiff to insure it, and he was willing to do so, but he was allowed to drive it as he wished, and Gray Brothers and Kemp Ltd., in whose hands Gilling had left the matter and at whose garage the plaintiff kept the car, knew he had not got it on to his policy. I have no hesitation in holding that there is nothing in that point.

I now turn to the question whether the plaintiff's policy was in force at the time of the accident. It is argued that it was not, because he had sold the car referred to in the policy and the company had not yet accepted the Riley which he was then using. The answer to the question mainly depends, on whether this case is governed by *Rogerson* v. *Scottish Automobile and General Insurance Co.* (2). The words of the extension clause in this policy are different from those used in *Rogerson's Case* (2), and Mr. Croom-Johnson argues that the latter case really turned only on the construction placed on the phrase " instead of the insured car," which do not appear in the clause under consideration. But, in my judgment, that view is too narrow. I think that both in the Court of Appeal and the House of Lords the decisive factor was that the subject-matter of the insurance was the specified car, and that, as the assured had parted with it, he no longer was interested in the policy. The true view, in my judgment, is that the policy insures the assured in respect of the ownership and user of a particular car, the premium being calculated, as was found in *Rogerson's Case* (2), partly on value and partly on horse-power. It gives the assured by the extension clause a privilege or further protection while using another car temporarily, but it is the scheduled car which is always the subject of the insurance. Though the words differ in the two policies, the effect and intention seem to me to be the same, and express provision is made for what is to happen when the assured parts with the car. To construe this policy otherwise would be to hold in effect that two distinct insurances were granted, one in respect of the scheduled car, and another wholly irrespective of the ownership of any car. It may be that a person who does not own a car can get a policy which would insure him against third party risks whenever he happens to be driving a car belonging to someone else, but the clause I am considering is expressly stated to be an extension clause, that is, extending the benefits of this policy, and, accordingly, if the assured ceases to be interested in the subject-matter of the insurance the extension falls with the rest of the policy.

The position, therefore, in my judgment, being that the plaintiff was driving the Riley with the permission of Mr. Gilling at the time of the accident, and that he was not entitled to indemnity under any other policy, I have now to consider whether he can claim indemnity against the defendant by virtue of s. 36 (4) of the Road Traffic Act, 1930. Considering that no less an authority than SCRUTTON, L.J., has said that he had read this subsection several times without understanding it; see *Jones* v. *Birch Bros.* (3), I naturally approach its construction with considerable diffidence. But with regard to the opening words of the section: " Notwithstanding anything in any enactment," I have the advantage of the decision of the Court of Appeal in *McCormick* v. *National Motor and Accident Insurance Union, Ltd.* (4). As I understand that case, these words exclude any consequences that might otherwise result from the operation of the Life Assurance Act, 1774. In *Williams* v. *Baltic Insurance Association of London* (5), it had been held in a court of first instance that this Act did not apply to a policy of motor insurance, and it seems, therefore, that this provision is inserted to preserve that decision to that extent, and to guard against the possibility of a higher court taking a different view.

The Eclipse policy which I am considering provides that

> "The insurance shall extend to indemnify any person who is driving on the assured's order or with his permission in respect of any legal liability as aforesaid"

—that is, to third parties. It has been decided by the Judicial Committee in *Vandepitte* v. *Preferred Accident Insurance Corporation* (6), that this clause confers no rights on such a person either at common law or in equity unless there was an intention on the part of the assured to create a trust for such person, or unless the assured was acting with the privity and consent of such person so as to be contracting on his behalf.

The question is, therefore, whether the statute has conferred a right of action on such a person and thereby altered the law. Does the section merely mean that, in spite of the provisions of the Life Assurance Act, 1774, the insurers shall indemnify the assured against any liability which the policy purports to cover, or does it mean that freed from any difficulties caused by the Life Assurance Act, 1774, as to insurable interest and as to the absence of any name in the policy other than that of the assured, the insurers shall indemnify every one whom they have said they will indemnify, in respect of the liability they have indicated?

In my judgment, both the policy of the Act and the words used point to the latter conclusion being the right one. The Act was aimed at the protection of the public by providing that there should be a body of insurers behind every driver of a car. As I said earlier in this judgment, this clause had been common, and I think universal, in all private motor car policies for many years. Parliament may be supposed to have known that this was so, and it seems to me no unreasonable supposition that they should enact that, if insurers say that they undertake the insurance of persons driving with the assured's permission, statutory effect should be given to their undertaking. The fact that the section mentions "classes of persons" seems to me to support this view. It is, I should think, difficult to envisage a motor car policy in which a class of persons contract with the underwriters; the latter contract with A., or with A., B., and C., or with A. B., Ltd. But if they say they will also cover the friends or servants of the assured in respect of certain liabilities, it seems to me that they are specifying a class of persons and that the policy purports to cover the liabilities of that class.

This view is, I think, supported by the judgment of GREER, L.J., in *McCormick's Case* (4). That case was concerned with an attempt by the injured person to sue the underwriters, and so is not a direct authority on the present case, but the LORD JUSTICE says:

> "I think it is quite clear that the section was intended to meet the difficulty that was patent; firstly, that no one who was not a party to a contract could bring an action on the contract, and, secondly, by reason of the statutory and well-known law that a person who has no interest in the subject-matter of an insurance cannot claim the benefit of that insurance."

I read that passage as meaning that, in his opinion, the section was not only intended to effect, but has effected, a change in the law and given a cause of action which hitherto did not exist to a person indicated in the policy but not a party to it, and I respectfully agree with that view.

If the words of the section will bear this construction, then, although another reading of the words may be possible, there seems to be an excellent and, indeed, compelling, reason for preferring it to any other. It must be that insurance companies and underwriters believe that the statute has placed them under a legal liability to indemnify persons who are driving with the assured's consent if they have so undertaken in the policy, for, otherwise, the undertaking is binding only in honour. No doubt many insurances are written which are only honour policies—p.p.i. policies at once occur as instances—and reinsurance treaties are constantly made which are invalid in law for want of a policy, though respectable underwriters never question them. But since the Road Traffic Act, 1930, insurers have to provide their assured with certificates of insurance in a form prescribed by the Minister of Transport. The prescribed form requires the certificate to indicate the persons or classes of persons entitled to drive the insured car. The certificates shown to me in this case, and, indeed, all certificates that I have ever seen since the Act came into force relating to a private car, state that among the persons or classes of persons entitled to drive is a person driving the car with the policy-holder's permission. These certificates are for the purpose, among other things, of affording proof to the police, and it may be to magistrates, that the driver is insured. If the insurers are bound in honour only, these certificates are in this respect entirely illusory, and it is not to be supposed that English insurance companies and underwriters would issue formal documents required by statute containing a statement that they had insured persons unless they believed that they had issued a valid insurance. Of course, if the section will not bear this interpretation, the belief or intention of the insurers will not make it do so, but, if it will, it seems to me right to prefer the construction acted upon by the large body of business men affected by it to any other.

Accordingly, I give judgment for the plaintiff, declaring that the defendant is liable to indemnify the plaintiff in respect of a judgment obtained against him by Frances Smith for £2,150, and costs, and for the costs he has incurred in dealing with and defending that claim to the extent of his proportion of his liability under an Eclipse policy of motor insurance subscribed by him in favour of Walter Gilling and dated April 1, 1932. The plaintiff will have the costs of this action.

Judgment for plaintiff.

Solicitors: *L. Bingham & Co.*; *Clifford-Turner & Co.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

GUTSELL *v.* REEVE

[COURT OF APPEAL (Lord Wright, M.R., Romer, L.J., and Eve, J.), October 14, 15, 1935]

[Reported [1936] 1 K.B. 272; 105 L.J.K.B. 213; 154 L.T. 1; 52 T.L.R. 55; 79 Sol. Jo. 796]

Limitation of Action—Action on simple contract—Claim to enforce statutory liability to make payment—Not action on specialty—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—*Civil Procedure Act,* 1833 (3 *&* 4 *Will.* 4, *c.* 42), *s.* 3.

The fact that a liability to make a payment is imposed by an Act does not necessarily lead to the conclusion that an action brought to enforce such a liability is an action on a specialty, *i.e.*, an action on the statute. Whether or not it is an action on the statute depends on the wording of the statute.

Between 1925 and 1927 the plaintiff was employed by the defendant as an agricultural worker at a wage below that prescribed under the Agricultural Wages Act, 1924. In 1935 he brought an action claiming from the defendant the difference between the wage he had received and that which he ought to have received.

Held: assuming that the plaintiff's claim was in debt, the whole basis of the Act of 1924 was the existence of a contract of employment; such a contract must contain many terms beside those providing for the amount of wages payable, and the only effect of the statute on the contract was to insert in it the proper rate of wages; and, therefore, the plaintiff's claim was on the contract of service as amended by the statute and not on the statute, and his action, being founded on a simple contract and not on a specialty, was out of time.

Per **Romer, L.J.:** The plaintiff was not bringing an action on the statute of 1924; he was merely suing in respect of a cause of action given him by the statute.

Notes. The Limitation Act, 1603, and the Civil Procedure Act, 1933, were repealed by the Limitation Act, 1939, and for the provisions now applicable, see s. 2 of that Act. The Agricultural Wages Act, 1924, was repealed by the Agricultural Wages Act, 1948, q.v.

Considered: *Pratt* v. *Cook, Son & Co.*, [1938] 4 All E.R. 356; *Breuton* v. *Woodward*, [1941] 1 All E.R. 470. Referred to: *Hulland* v. *Sanders (William) & Son*, [1944] 2 All E.R. 568.

As to limitation of actions, see 20 HALSBURY'S LAWS (2nd Edn.) 596 et seq., and for cases, see 32 DIGEST 319 et seq. For the Limitation Act, 1939, and the Agricultural Wages Act, 1948, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159 and 28 ibid., 2, respectively.

Cases referred to:

(1) *Cork and Bandon Rail. Co.* v. *Goode* (1853), 13 C.B. 826; 1 C.L.R. 345; 22 L.J.C.P. 198; 21 L.T.O.S. 141; 17 Jur. 555; 1 W.R. 410; 130 E.R. 1427; 32 Digest 320, *59*.

(2) *Salford Corpn.* v. *Lancashire County Council* (1890), 25 Q.B.D. 384; 59 L.J.Q.B. 576; 63 L.T. 409; 55 J.P. 85; 38 W.R. 661; 6 T.L.R. 362, C.A.; 32 Digest 320, *56*.

(3) *Re Cornwall Minerals Rail. Co.*, [1897] 2 Ch. 74; 66 L.J.Ch. 561; 76 L.T. 832; 61 J.P. 535; 46 W.R. 5; 13 T.L.R. 402; 41 Sol. Jo. 508; 10 Digest (Repl.) 1285, *9083*.

(4) *Thomson* v. *Lord Clanmorris*, [1900] 1 Ch. 718; 69 L.J.Ch. 337; 82 L.T. 277; 48 W.R. 488; 16 T.L.R. 296; 44 Sol. Jo. 346; 8 Mans. 51, C.A.; 32 Digest 320, *57*.

(5) *Derry* v. *Peek* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 35 Digest 27, *185*.

(6) *Aylott* v. *West Ham Corpn.*, *Sisson* v. *West Ham Corpn.* (1926), 95 L.J.Ch. 533; 135 L.T. 424; 90 J.P. 165; 42 T.L.R. 516; 24 L.G.R. 429, C.A.; 32 Digest 321, *65*.

Appeal from an order of His Honour JUDGE AUSTIN JAMES in the Hastings and St. Leonards County Court.

The following statement of the facts is taken from the judgment of the county court judge:

In 1925 the defendant agreed to employ the plaintiff, and the plaintiff agreed to serve the defendant as a farm worker in Sussex at a wage of £1 2s. a week. These wages were less than the minimum wage (£1 10s. or £1 11s.) prescribed for farm workers in Sussex by the Agricultural Wages Board under the Agricultural Wages (Regulation) Act, 1924, during this period, and it is admitted that the defendant should have paid to the plaintiff sums amounting to £39 8s. 6d. in addition to the wages which he in fact paid him. This sum of £39 8s. 6d. is claimed in this action. I find that the plaintiff knew throughout his employment by the defendant that he was being paid a lower wage than the minimum wage prescribed, and that he knew the amount of such minimum wage. The defendant contends that the claim is statute-barred, as a period of more than six years elapsed between May 9, 1927, when the plaintiff was last employed by the defendant, and June 1, 1935, when this action was commenced. The plaintiff admits that the action was brought more than six years after the plaintiff's employment ended, but contends that it is not statute-barred because it is an action for debt upon a statute, namely, the Agricultural Wages (Regulation) Act, 1924, and that the period of limitation for such an action under the Civil Procedure Act, 1833, is twenty years. I hold that this action is not an action for debt upon the statute, as the plaintiff has no right of action for debt upon the statute. By s. 7 (3), (4), and (7), provision is made for the recovery of sums due under the statute from an employer to a worker, but no right of action against his employer appears to have been given to a worker by any section of the statute. By s. 7 (7), provision is made for the institution by an officer appointed by the Minister of civil proceedings on behalf of or in the name of a worker, but this action was not instituted by such an officer. The plaintiff relies on s. 7 (9), which preserves

A to a worker any right that he may have to recover the amount due to him by civil proceedings, but the plaintiff does not contend that he has any right to recover the sum claimed apart from the statute, and I hold that the statute has not given him any right to recover it. The plaintiff's claim fails on the ground that he has no right of action against the defendant to recover the amount claimed, and that, if he has any right of action, it is not an action for debt upon the statute, and is statute-barred.

B The county court judge entered judgment for the defendant, and the plaintiff appealed.

Elliott M. Gorst for the plaintiff.

L. G. H. Horton-Smith for the defendant.

LORD WRIGHT, M.R.—This case raises a question of some interest, and a question on C which both learned counsel who have addressed this court so fully and so comprehensively have agreed there is no precise authority. The question is whether the claim here being brought is one which carries with it a statutory period of limitation of six years or a period of limitation of twenty years—in other words, whether the claim is one which comes within s. 3 of the Civil Procedure Act, 1833, the material words of which are: "Actions of covenant or debt upon any bond or other specialty," in which case D the period of limitation is twenty years, or, on the other hand, whether the case falls within the words of the Statute of Limitations, 1623, s. 3: "Actions of debt grounded upon any lending or contract without specialty," in which case the period of limitation is six years.

The plaintiff was employed by the defendant as a farm labourer for a period between June, 1925, and Easter, 1927. He is claiming in respect of what he alleges were under- E payments made to him in respect of wages during those periods. It is, therefore, clear that, unless he can bring his case within the Act of 1833, his claim must be statute-barred, because, if it falls within the statutory period under the statute of James, he is clearly out of time. He was employed as a workman at a weekly wage of 22s.—that was the express arrangement between him and the defendant. In June, 1925, the statutory rate of wages for farm labourers under the Agricultural Wages (Regulation) F Act, 1924, to which I shall refer a little later, was 30s. The plaintiff and the defendant apparently agreed on 22s. because the plaintiff was receiving 8s. disability rate at the time. In October, 1925, the statutory wages were increased by 1s. to 31s. and so it continued until the plaintiff left the employment about Easter, 1927. He brought his action on June 1, 1935, and in that action he alleged that the proper rate of wages which he ought to have received during the period in which he was employed was at the G rate of 30s. a week, and, a little later, at the rate of 31s. a week, in October, 1925. He claimed the difference between what he was paid and what he says he ought to have been paid, and that difference amounted to a total of £39 8s. 6d. It was not disputed that, subject to the Statute of Limitations, that claim was good. The question, therefore, arises: Is the plaintiff entitled to say that he comes within the definition of the Act of 1833, and that his claim is based on a debt upon a bond or other specialty?

H The forms of action have now been abolished, and, therefore, the claim of the plaintiff is not specifically laid in debt, and I do not think it necessary to decide here whether, according to the old forms, this claim was one technically in debt, or whether it was a claim in assumpsit, or whether it might properly have been laid under either form of action. I have assumed, without deciding it, that the claim is in debt, and I do so because it is apparent on the face of the Act of 1833 that that Act only applies to actions I which can be framed in debt. That, therefore, leaves the essential question to be decided: If the case is to come within the Act of 1833, is it an action upon any bond or other specialty?

The case made by the appellant is that this claim is a claim upon the Agricultural Wages (Regulation) Act, 1924, and on that ground is a claim within the Act of 1833. I must deal quite shortly with the relative provisions of this Act. The first of the provisions material to this case are to be found in s. 1 of the Act of 1924. That gives a power, subject to the provisions of the Act, for agricultural wages committees to fix minimum rates of wages for workers employed in agriculture for time work, and, if desirable or expedient, for piecework; and the minimum wages of 30s. and a little later of 31s., to which I have already referred, were duly fixed by proper committees in accordance with the Act. Section 7 provides as follows:

> "Where any minimum rate of wages has been made effective by an order of the Agricultural Wages Board under this Act, any person who employs a worker in agriculture shall, in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate, and, if he fails to do so, shall be liable on summary conviction in respect of each offence to a fine."

Sub-s. (2) provides:

> "In any proceedings against a person under this section it shall lie with that person to prove that he has paid wages at not less than the minimum rate."

Sub-ss. (3) and (4) give a court of summary jurisdiction, which deals with the prosecution for penalties under sub-s. (1), the power, whether there is a conviction or not, to

> "order the employer to pay, in addition to the fine, if any, such sum as may be found by the court to represent the difference between the amount which ought at the minimum rate applicable to have been paid to the worker during the period of six months immediately preceding the date on which the information was laid or the complaint was served and the amount actually paid to him during that period."

Sub-s. (4) contains similar provisions, though less limited in their application. It says this:

> "Where an employer has been convicted under this section [it is limited to a case of an actual conviction] for failing to pay wages to any worker at not less than the minimum rate applicable, then, if notice of intention so to do has been served with the summons, warrant or complaint, evidence may be given of any failure on the part of the employer to pay wages to that worker at not less than the minimum rate applicable to him at any time during the eighteen months immediately preceding the period of six months mentioned in the last preceding subsection, and on proof of the failure the court may order the employer to pay"

the difference between the amount actually paid and the amount that ought to have been paid in accordance with the Act. Section 7 (9) provides:

> "The powers given by this section for the recovery of sums due from an employer to a worker shall not be in derogation of any right of the worker to recover such sums by civil proceedings."

That, of course, clearly means that the special remedies under sub-ss. (3) and (4) are not to be exclusive and are not to bar the worker from proceeding, if he is so minded, by ordinary civil proceedings, and in any case it leaves him free to recover by civil proceedings any amount (as he is seeking to do here) to which he is lawfully entitled in accordance with the Act. By sub-s. (10):

> "Any agreement for the payment of wages in contravention of this Act, or for abstaining to exercise any right of enforcing the payment of wages in accordance with this Act, shall be void."

In sub-s. (11), the court is given power, subject to the various limitations and prohibitions, to

> "reckon as a payment of wages such amount as, in the opinion of the court, represents the value of any benefits or advantages (not being benefits or advantages prohibited by law) received by a worker under the terms of his employment."

It is obvious, in looking through those sections, particularly at s. 7, that the whole basis of this Act is that there should be an employment. In s. 2 (1), the minimum rates are to be for workers employed in agriculture; in s. 7 (1), the minimum rate of wages is to be effective against any person who employs the worker; in sub-s. (3), the proceedings referred to are to be those against an employer, and the same is true of sub-s. (4); in sub-s. (9) the sums to be recovered are to be those due from an employer to a worker; sub-s. (10) refers to an agreement of employment; and sub-s. (11) also refers to the terms of the worker's employment. In s. 16 (1), the definition section, there is this:

> "The expression 'employment' means employment under a contract of service or apprenticeship, and the expressions 'employed' and 'employer' shall be construed accordingly."

I have referred to this specifically because I want to emphasise the importance of this matter a little later. The question is whether the action is an action in debt upon a specialty, and, if the claim is a claim under the statute within the meaning of the expression, it is a claim upon a specialty. What is meant by that is very carefully discussed in a leading case of *Cork and Bandon Rail. Co.* v. *Goode* (1), which is relied upon by the counsel for the plaintiff. In that case the defendant was the holder of thirty shares in the railway company and he was sued in respect of nine calls. The declaration set out that an action had accrued to the company by virtue of the Companies Clauses Consolidation Act, 1845, and the Cork and Bandon Railway Company Act, 1845, but the declaration went on, "the defendant had not paid the same, or any part thereof." To that there was a second plea, "that the action is upon contracts without specialty" and that the causes of action accrued did not accrue within six years before the suit.

> "To this plea the plaintiffs demurred, the ground of demurrer stated in the margin being that the statute of limitations referred to by the second plea, and therein pleaded, was not pleadable to the causes of action declared on."

It was held that that plea was a bad plea, because the proper limitation for such an action was twenty years under the Act of 1833. I draw attention there to the form of the declaration, which simply sets out that the defendant was the holder of thirty shares whereby an action had accrued to the company by virtue of the two Acts referred to. That is the whole of the case and nothing more. It was held, as I say, that that was an action upon the statute (or statutes), and, therefore, upon the specialty. Some observations made by the judges in the course of the argument are very significant. Maule, J., says to the counsel for the plaintiff (13 C.B. at p. 829): "You say that the facts stated here do not show any contract, except for the statute?" and counsel naturally agrees. Then Cresswell, J., says (ibid. at p. 831): "What is the contract between the shareholders and the company? When is it made? And how? By writing, by word of mouth, or by instrument under seal?" Maule, J., says: "Where is the shareholder's undertaking to pay calls but for the statute?" and it is answered by counsel for the defendant, "It must be conceded that there is none." Maule, J.: "Then he undertakes by the statute. Is an action brought upon that undertaking an action upon a contract without specialty?" obviously answering it in the negative. There are other passages to the same effect; and when I turn to the judgment itself, Jervis, C.J., says: "But for the Act of Parliament no action could be brought by the company against one of its own members." That, I think, is limited to the matter in debate, namely, an action for calls. "This, therefore, is an action brought in respect of a liability created by statute, and therefore is an action founded upon the statute." Maule, J., to the same effect, says:

> "It is manifest, upon reading the declaration, that it is a declaration in debt upon these two statutes. Now, a declaration in debt upon a statute, is a declaration upon a specialty; and it is not the less so because the facts which bring the defendant within the liability, are facts dehors the statute: that must constantly arise in actions for liabilities arising out of statutes. That appearing to be so, the allegation in the plea, that the action is upon contracts without specialty, is a false allegation of a matter of law."

The learned judge, when he says that the facts which bring the defendant within the liability are facts dehors the statute, is merely referring, as I understand it, to the circumstances that the defendant must have become a shareholder; once he has become a shareholder then the statute applies and defines the whole of his contract and all the rights and liabilities which flow from it. Maule, J., goes on to say:

> " There may, undoubtedly, be cases where a statute enables an action to be brought, which nevertheless is not an action on the Act of Parliament. But the question is, whether that state of things exists here. I think it manifestly appears that this is an action of debt, and upon the statute, and therefore an action upon a specialty."

Those words, as I shall show in a moment, are of first-rate importance. Then the judge points out,

> " whether assumpsit or case would lie, leaves altogether untouched the question whether this plea is an answer to this action."

Cresswell, J., says: " This is plainly an action upon a statutory liability to pay the calls"; and Talfourd, J., being of the same opinion, says:

> ' The relation between the shareholders and the company is the creation of the Act of Parliament. The action is in terms founded upon the Act of Parliament, and consequently an action upon a specialty."

Does that case cover the present case? In my judgment, it does not. In my judgment, the question which has to be determined here, and which can only be determined by looking at the Act of 1924 in connection with all the circumstances of the case, shows something entirely different. There is, as I think, here a contract of service between the plaintiff and the defendant, a contract of employment. That was a contract entered into in June, 1925, at a time, no doubt, when the Act was in force, but that was a contract which contained many terms, besides the mere question of what wages were payable, and it is on that contract that the plaintiff is here suing. What he seeks to do is to isolate the question of wages and say that that is a matter which arises in abstracto, and he seeks to say that his right to wages is the right in the Act and from nothing else, and that no other part of the relationship into which he entered with his employer, the defendant, can be considered. But I think that that contention is entirely unwarranted. It is clear that the contract of employment must contain many other conditions, many other terms. It is contemplated in s. 7 (11), and it is contemplated throughout—the whole position depends upon a relationship of employer and employed, the scope of which cannot be limited to the mere amount of wages which is payable. It is true that under s. 7 (10), there is a provision that,

> " Any agreement for the payment of wages in contravention of this Act, or for abstaining to exercise any right of enforcing the payment of wages in accordance with this Act, shall be void,"

but that does not say that the employment as a whole—that is to say, the contract of employment as a whole—shall be avoided. On the contrary, s. 7 contemplates that the relationship of employer and employed continues, even though the employer has not been paying the proper rate of wages. That is perfectly clear by looking at sub-ss. (1), (3), (4) and (5), where the employer who has failed to pay the proper rate of wages is still treated as the employer, and must be so treated in all respects, except in regard to matters of wages. In my judgment, the effect of sub-s. (10) is merely to provide that where you have a contract of employment one item under the terms of that contract is to be, as it were, reconstructed by striking out the rate of wages, which is lower than it ought to be, and by inserting the proper rate of wages in accordance with the statute. It is not contended that the whole agreement, or the whole employment, is to be abrogated and swept aside.

If that is the true position, I think it is clear that the matter stands outside the ruling of *Cork and Bandon Rail. Co.* v. *Goode* (1). As I have already said, there, once the defendant had become a shareholder, the whole scope of his rights and duties and liability arose under the statute and nothing else; there was nothing outside the statute to which reference could be made, and, therefore, the claim against him was a claim upon the statute. But here the claim by the worker against the employer is a claim on the basis of the whole contract of employment, which is a contract involving many terms, and the only effect of the statute upon that contract is to insert, against, it may be, the overt agreement of the parties, the proper rate of wages and to eliminate the improper rate of wages, and in that way the worker, suing on the contract and not upon the Act, is able to claim that he should be paid the proper rate of wages. His claim really here is for 30s., or 31s., at the various appropriate dates, with a set-off against that of the amounts that he has actually received, and that, as I say, is a claim on the contract as amended by the statute.

We have been referred to a number of authorities which do seem to throw some light upon the general position and, as I think, support the view which I have already expressed, but none of these authorities seems to determine the question which is now before this court or to settle the problem which I have attempted to solve. I will not refer to the earlier cases before the *Cork and Bandon Rail. Co. Case* (1), and I can pass, at once, to *Salford Corpn.* v. *Lancashire County Council* (2), where it was held that the action could not be an action in debt at all, but could only be an action on the case, and, if it could not be an action in debt, still less could it be an action for debt on a statute. The matter was really decided on a quite different ground. It was a claim against the justices of the county by the borough council for the payment of certain moneys which, under a statute, the borough might claim to have recouped to them; but the claim, being against the justices, was not a claim in debt or a personal claim; it was a claim to be refunded either out of a particular fund which the council had or out of a rate which the council might raise to meet this expenditure if the fund were not sufficient. The substance of the decision was that that was a claim which could only be enforced by mandamus, and I need say no more about the incidental references made by LORD ESHER to this matter, the effect of which I have already indicated.

In *Re Cornwall Minerals Rail. Co.* (3) the claim was for interest on debenture stock, and there it was held, as I read it, on the same principle as that which is laid down in the *Cork and Bandon Rail. Co. Case* (1), that the liability was purely statutory and that the period of limitation was twenty years. *Thomson* v. *Lord Clanmorris* (4) deals with a claim under s. 3 of the Directors' Liability Act, 1890

> "to recover from the directors compensation for loss or damage sustained by the plaintiff by reason of untrue statements in the prospectus of the company on the faith of which he subscribed for his shares."

That Act, as we all know, was passed to obviate the conclusion arrived at as to the liability of directors in *Derry* v. *Peek* (5), and was to put their liability in certain circumstances on negligence instead of leaving it, as had been the case before, as a liability only for deceit. The Act by s. 3 (1), which is the important one, provides that the director should, in the events specified in the Act, be liable to pay compensation to all persons who subscribed for shares, debentures or debenture stock on the faith of the prospectus. That was a liability in one sense created by the statute and in one sense it might be said to be a liability upon the statute; but it clearly was not a case on the same footing as the *Cork and Bandon Rail. Co. Case* (1). VAUGHAN WILLIAMS, L.J., points that out very clearly, and I need only read one short passage from his judgment ([1900] 1 Ch. at p. 728):

> "But it is said that this is not an action on the case, but an action on the statute, and *Cork and Bandon Rail. Co.* v. *Goode* (1) is relied on. But it must be remembered that there the action was for a statutory debt, and the sole question was whether that debt was, within the terms of s. 3 of the statute of James, 'grounded on a contract without specialty.' It does not seem to me that that decision is really material to the case now before us. MAULE, J., pointed out that there is a difference between an action which is given by a statute and an action on the statute."

These words, I venture to think, are most relevant here. In this present case, the action for the 30s. or 31s. a week is given in one sense by the statute, because unless the statute had fixed the wages of the employment at those figures no action could have been brought for those figures, but, in my opinion, it is not an action on the statute;

it is an action on the contract of employment which is effected in the respect of the rate A
of wages in that matter. Then the LORD JUSTICE goes on to add: "*Cork and Bandon Rail. Co.* v. *Goode* (1) was an action of debt on the statute." I think that is all I need read. These are very important words from that great judge.

I come to the last of the cases to which this court has been referred: that is *Aylott* v. *West Ham Corpn.*; *Sisson* v. *Same* (6). That case again was, on the facts, very different from the present case. It arose from a resolution of the council of the West Ham B
Corporation in September, 1914, to the effect that if their employees, married or single, were called up or volunteered for service with the forces they should be granted full civil pay. The plaintiff came within that definition. He was granted full civil pay, and when he brought his action in 1925 he claimed that he had not got full civil pay, because, although he had been paid the difference between his army pay and the rate of pay which he was getting at the time when he was called up in 1914, various increments would C
have been added to his pay from time to time. He contended that these extra amounts ought to be paid to him in order to fulfil the obligation of the corporation. It was clear that in 1914 the resolution and promise to pay the full civil pay was ultra vires the corporation, but they were given the necessary power by the Local Government (Emergency Provisions) Act, 1916, and that Act was retrospective. But it is clear that the Act was merely permissive. It retrospectively gave power to the local authority, which D
they had not originally possessed, to make such a contract, but unless and until they did make a contract the question of the validity of that contract could not arise, and, therefore, the claim of the plaintiff in that case was based, not on the permissive statute, but on the promise, the contract, contained in the resolution, and in the act on the part of the plaintiff in going into military service. Therefore, the relevancy of the Act was merely to get rid of the objection that the promise to pay full civil pay was ultra vires, E
and on that ground it was held by ROMER, J. (as he then was) and by the Court of Appeal that the plaintiff could only recover such increments and pay as became payable in the six years preceding the issue, of the writ in the action, and *Cork and Bandon Rail. Co. Case* (1) was distinguished. There are, however, some observations which are somewhat helpful in dealing with the present question. ROMER, J., says this ([1927] 1 Ch. at p. 39): F

> "Had the Act of 1916 been in force at the time that the plaintiff enlisted in reliance upon the resolution of the defendants' council, the action would without doubt have been one founded upon simple contract, even though the power of the defendants to make the contract would have been derived from the Act,"

and having said that he then proceeds to discuss the relevancy of the Act in question. G
Then ROMER, J., observes ([1927] 1 Ch. at p. 41) in respect of *Re Cornwall Mineral Rail. Co.* (3) which I have already referred to:

> "There was no contract by the company to pay the interest. Its liability to do so was to be found in the statute and in the statute alone."

Then the learned judge (as he then was), after referring to the other cases, finally says H
again ([1927] 1 Ch. at p. 44):

> "If, at the time the plaintiff enlisted, the Act of 1916 had been in force, his action would have been brought upon the simple contract subsisting by reason of the offer contained in the defendants' resolution, and the acceptance of that offer by the plaintiff,"

I
and then, having arrived at that conclusion, so far, he discusses the Act and says this:

> "It"—that is the Act—"provides in effect that the contract entered into with a servant of the former class is to be binding on the authority to the extent (though only to the extent) to which it would have been binding if the provisions of the Act had then been in force. It seems to follow from this that for the purpose of considering the rights and liabilities of the parties to such a contract I am to treat it as though, at the date it was entered into, the provisions of sub-s. (1) had been in force."

I think that the action here must also be treated as a claim in simple contract, namely, on the contract of employment, even though there has been the amendment or alteration, by reason of the statute, of the rate of wages, which is one of the elements in the contract, but not the whole of the contract. The Court of Appeal put the matter in very much the same way, and Warrington, L.J., if I may refer to a short passage in his judgment, says this (135 L.T. at p. 427):

> "The contention is that, inasmuch as the Act made the antecedent promise for the first time binding on the corporation, therefore the action upon that promise is an action upon the statute. In my opinion that is an entire misconception of the effect of the statute. The action is an action on the contract, upon the promise made in 1914. Without that promise there would be no action at all. All that the statute does is to make that promise binding so that, in case it is not performed, an action may be brought upon it."

The learned Lord Justice there is distinguishing between an action brought upon a statute and an action which can only be brought because of some provisions of a statute which has made the promise enforceable, and I think the same is true of a case like the present, where the effect of the statute upon a contract has been to alter or amend one term of that contract—a very material term no doubt, but one term of the contract, that is to say, the rate of wages payable under the contract.

In my opinion, this is not an action brought upon a specialty—that is to say, upon a statute within the meaning of the Act of 1833—and I think the appeal should be dismissed with costs.

ROMER, L.J.—The question which arises upon this appeal may be stated in this way: Is the plaintiff bringing an action on the statute of 1924, or is he merely suing in respect of a cause of action given to him by that statute? In my opinion, he is merely suing upon a cause of action given him by the statute.

It is quite true that s. 7 (1) of the statute in question, which is the Agricultural Wages (Regulation) Act, 1924, does in terms purport to impose upon the employer a liability to pay wages at the minimum rate, but as I ventured to point out in *Aylott* v. *West Ham Corpn.*, *Sisson* v. *Same* (6) ([1927] 1 Ch. at p. 41), the fact that a liability to make a payment is imposed by an Act does not necessarily lead to the conclusion that an action brought to enforce such liability is an action upon a specialty—that is, an action upon the statute. Whether it is or is not an action on the statute depends upon the wording of the statute. A good illustration of that is to be found in the case the Master of the Rolls has already referred to of *Thomson* v. *Lord Clanmorris* (4). The statute in question there was the Directors' Liability Act of 1890 which, by s. 3, in terms at any rate, purported to impose upon the directors, and other persons who authorised the issue of a prospectus, a liability to pay compensation to persons who subscribed for shares and so forth upon the faith of such prospectus for loss or damage they had sustained by reason of untrue statements therein contained. In that case the question was debated—it was not an action which was tried, because it did not become necessary to decide it—whether an action brought by a person who had been deceived by a prospectus to recover compensation from directors who had authorised the issue of a prospectus, was an action upon the statute, or whether it was an attempt to enforce a cause of action given by the statute. Vaughan Williams, L.J., expressed the opinion that, notwithstanding the words of the section, the section merely imposed a new statutory duty upon directors and gave to the persons who had been damaged by the prospectus or misled by the prospectus a new cause of action against the directors. But, for the purpose of deciding that question, he said ([1900] 1 Ch. at p. 727):

> "One must consider what is really the nature of the enactment contained in s. 3 of the Directors' Liability Act, 1890."

Therefore, for the purpose of deciding the question on this appeal, it is necessary to consider the wording of the section which it is said creates a liability and enables a person to maintain an action founded upon the statute. The section in question is s. 7, but before reading s. 7 I should like to refer to the definition section—s. 16 (3). There it is said: A

> "The expression 'employment' means employment under a contract of service or apprenticeship, and the expressions 'employed' and 'employer' shall be construed accordingly."

Bearing that definition in mind, one must read s. 7 (1), as follows: B

> "Where the minimum rate of wages has been made effective by an order of the Agricultural Wages Board under this Act any person who employs under a contract a worker in agriculture shall, in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate";

and sub-s. (10) of that section provides that C

> "Any agreement for the payment of wages in contravention of this Act, or for abstaining to exercise any right of enforcing the payment of wages in accordance with this Act, shall be void."

In my opinion, the true effect of that s. 7 is that in all contracts of employment of a worker in agriculture where the wages fixed for that contract are less than the minimum D rate of wages ordained by the Agricultural Wages Board there shall be substituted in the contract for the wages, or provided for by the contract, the minimum rate of wages mentioned in the order of the Agricultural Wages Board, and that the provision in the contract fixing wages less than that minimum wage is rendered void under sub-s. (10). That, I think, is the natural meaning of the section. There are words in the section which seem to me to confirm the view which I have taken of that as meaning that if an E action, such as the present one, is an action brought on the statute, it must be an action or a proceeding under s. 7. But if one looks at sub-s. (3) of s. 7 it becomes apparent that in the view of the Legislature no proceedings under the section can be taken, except proceedings of a criminal nature, that is to say, proceedings to recover the fine which is imposed by s. 7 (1), in respect of an offence against the subsection. I will not examine sub-s. (3) further than to say it is really apparent, if that subsection be read F carefully, that the Legislature contemplates that the proceedings under the section are proceedings of a criminal nature and not otherwise. Proceedings in respect of the cause of action given by the section are dealt with, as I read the subsection, by sub-s. (9), which provides that

> "The powers given by this section for the recovery of sums due from an employer to a worker shall not be in derogation of any right of the worker to recover such sums by civil proceedings"; G

the right, in other words, to sue upon the contract as altered by the statute is in terms preserved.

I think the view I have taken of the construction of the Act is further confirmed by this consideration: supposing that at the time the first order of the Agricultural Wages H Board came into operation a worker in agriculture was employed at a weekly wage of 30s. Certainly up to the time the order came into force the only liability of the employer to pay that wage was a liability under the contract. Can it be said that from the moment the order came into force the employer was under two liabilities—a liability to pay 30s. under the contract and another liability to pay 30s. under the statute? It would be ridiculous to make any such suggestion. Then when the second order of the I Board came into force and the minimum wage was 31s., can it really be said that as from that date the employer was under two liabilities, a liability to pay 30s. under the contract and a liability to pay 31s. under the statute? It appears to me to be ridiculous. In both cases the liability of the employer was one, and one only, namely, a liability under his contract to pay the wage of the worker, not as fixed in the contract, but as altered and fixed by the statute.

For these reasons, in addition to those given by the MASTER OF THE ROLLS, I think that this appeal fails.

EVE, J.—This action is founded only on the contract of employment, and I agree that the proper statutory limitation applicable to the case is that created by the statute of James, and there is no room, in my opinion, for the application of any other principle. I agree that this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Harold Eves*; *Dixons, Ward & Co.*, for *F. W. Morgan*, Hastings.

[*Reported* by G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

WATH-UPON-DEARNE U.D.C. *v.* JOHN BROWN & CO., LTD.

[CHANCERY DIVISION (Luxmoore, J.), March 5, 7, 9, 13, 14, 22, 1935]

[Reported [1936] Ch. 172; 105 L.J.Ch. 81; 154 L.T. 295; 51 T.L.R. 353; 79 Sol. Jo. 342]

Coal Mining—Working of mine—Letting down surface—Surface owned by water undertakers—Acquisition from vendors of common law right of support—Waterworks Clauses Act, 1847 (10 *&* 11 *Vict., c.* 17), *ss.* 18 *to* 27*—Public Health Act,* 1875 (*Support of Sewers*) *Amendment Act,* 1883 (46 *&* 47 *Vict., c.* 37), *s.* 3 (2).

In 1901 the plaintiffs, statutory undertakers for the supply of water, purchased land which in 1810 had been allotted under an Inclosure Act to the predecessors in title of the vendor, there being then reserved to the lord of the manor the right to work minerals, subject to liability to compensate the allotment-holders for damage done to the surface. In 1911, the plaintiffs having erected reservoirs thereon, the defendants, lessees of coal lying under and adjacent to the plaintiffs' works, gave notice under the Waterworks Clauses Act, 1847, and the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, of intention to work coal under and within a distance of forty yards of the plaintiffs' works. The plaintiffs did not give any counter notice expressing willingness to treat or to make compensation for preventing, or of their intention to prevent or interfere with, the working of minerals within the forty yards area or outside it, as provided by the Act of 1847. In 1914 the plaintiffs acquired additional land from the same vendor, subject to the same reservations, and built other reservoirs thereon. In 1928 the working of the coal, by subsidence of the surface, caused damage to the plaintiffs' works.

Held: on the true construction of the Inclosure Act of 1910 there was no provision therein excluding the common law right of support possessed by the owners of the surface of the land, and, further, there being no evidence that at the date of the passing of the Act it was known that the minerals under the land could not be worked without letting down the surface, such right was not excluded by necessary implication; in the Waterworks Clauses Act, 1847, ss. 18 to 27, and the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, s. 3 (2), there was no provision, express or to be implied, prohibiting a statutory undertaker from purchasing by agreement land with a right to support from the subjacent minerals from the owner who had such a right attached to his land as against the mineral owner; and, therefore, the right of support which the vendor to the plaintiffs had under the Inclosure Act passed to the plaintiffs in 1901 and 1914, and the defendants were not entitled to ignore those rights although the plaintiffs had not given any counter notice under s. 23 of the Act of 1847.

Observations of LORD LOREBURN, L.C., and of LORD MACNAGHTEN in *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (1), [1906] A.C. at pp. 309, 313, applied.

Pountney v. *Clayton* (6) (1883), 11 Q.B.D. 820, distinguished.

Notes. Section 18 of the Waterworks Clauses Act, 1847, is reproduced in the Water Act, 1945, Sched. III, s. 11, as a provision to be incorporated in orders relating to water undertakings.

Referred to: *Newcastle under Lyme Corpn.* v. *Wolstanton, Ltd.*, [1947] 1 All E.R. 218.

As to minerals under waterworks, see 22 HALSBURY'S LAWS (2nd Edn.) 641 et seq., and for cases, see 34 DIGEST 700 et seq. For the Acts of 1847 and 1883, see 26 HALSBURY'S STATUTES (2nd Edn.) 729, and 19 HALSBURY'S STATUTES (2nd Edn.) 120.

Cases referred to:

(1) *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, [1906] A.C. 305; 75 L.J.Ch. 541; 94 L.T. 795; 70 J.P. 361; 22 T.L.R. 516, H.L.; 11 Digest (Repl.) 66, *909*.

(2) *Davis* v. *Treharne* (1881), 6 App. Cas. 460; 50 L.J.Q.B. 665; 29 W.R. 869, H.L.; 19 Digest 166, *1152*.

(3) *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, [1910] A.C. 381; 79 L.J.Ch. 411; 102 L.T. 609; 26 T.L.R. 415, H.L.; 19 Digest 172, *1197*.

(4) *Warwickshire Coal Co., Ltd.* v. *Coventry Corpn.*, [1934] Ch. 488; 103 L.J.Ch. 269; 151 L.T. 181; 78 Sol. Jo. 336, C.A.; Digest Supp.

(5) *New Moss Colliery Co., Ltd.* v. *Manchester Corpn.*, [1908] A.C. 117; 77 L.J.Ch. 392; 98 L.T. 467; 72 J.P. 169; 24 T.L.R. 386; 6 L.G.R. 809; sub nom. *Manchester Corpn.* v. *New Moss Colliery Co., Ltd.*, 52 Sol. Jo. 334, H.L.; 11 Digest (Repl.) 166, *383*.

(6) *Pountney* v. *Clayton* (1883), 11 Q.B.D. 820; 52 L.J.Q.B. 566; 49 L.T. 283; 47 J.P. 788; 31 W.R. 664, C.A.; 11 Digest (Repl.) 302, *2088*.

(7) *Great Western Rail. Co.* v. *Bennett* (1867), L.R. 2 H.L. 27; 36 L.J.Q.B. 133; 16 L.T. 186; 15 W.R. 647, H.L.; 11 Digest (Repl.) 164, *375*.

(8) *Consett Waterworks Co.* v. *Ritson* (1889), 22 Q.B.D. 702; 64 L.J.Ch. 293, n.; 124 L.T. 818, n.; 59 J.P. 199; 43 W.R. 122, n.; 5 T.L.R. 435; 13 R. 123, n., C.A.

(9) *Howley Park Coal and Cannel Co.* v. *London and North Western Rail. Co.*, [1913] A.C. 11; 82 L.J.Ch. 76; 107 L.T. 625; 29 T.L.R. 35; 57 Sol. Jo. 42, H.L.; 11 Digest (Repl.) 165, *379*.

(10) *Beard* v. *Moira Colliery Co., Ltd.*, [1915] 1 Ch. 257; 84 L.J.Ch. 155; 112 L.T. 227; 59 Sol. Jo. 103, C.A.; 34 Digest 707, *943*.

(11) *Davies* v. *Powell Duffryn Steam Coal Co.*, [1921] W.N. 161; 125 L.T. 432; 37 T.L.R. 607; 65 Sol. Jo. 567, C.A.; 17 Digest (Repl.) 326, *1326*.

(12) *Barr* v. *Baird & Co.*, 1904, 6 F. (Ct. of Sess.) 524; 41 S.L.R. 385; 11 S.L.T. 710.

(13) *Neill's Trustees* v. *William Dixon, Ltd.*, 1880, 7 R. (Ct. of Sess.) 741; 17 S.L.R. 496.

(14) *Aynsley* v. *Bedlington Coal Co.*, [1918] W.N. 274; 87 L.J.K.B. 1031; 119 L.T. 557, C.A.; 34 Digest 703, *915*.

(15) *Love* v. *Bell* (1884), 9 App. Cas. 286; 53 L.J.Q.B. 257; 51 L.T. 1; 48 J.P. 516; 32 W.R. 725, H.L.; 11 Digest (Repl.) 67, *913*.

Action for an injunction restraining the defendants from working minerals so as to damage the plaintiffs' lands and for damages.

The following statement of facts is taken from the judgment:

The plaintiff council is the statutory undertaker for the supply of water for the Wath-upon-Dearne urban district, and in that capacity is the owner of certain surface lands on which waterworks with the appropriate reservoirs and filter beds have been constructed. The defendant company are the lessees of a seam of coal lying under and adjacent to the council's waterworks. The council claims that the defendant company, by working the seam of coal, have caused the council's land to subside, and that substantial damage has thereby resulted. It claims an injunction restraining the defendant company, "their servants, workmen, and agents from working the minerals lying under or near the said lands of the plaintiffs in such a manner as to cause injury or damage to the plaintiffs' said lands, reservoirs, and filter beds or any of them." It also claims damages or compensation for the damage or injury to the plaintiffs' works, and ancillary relief.

The defendant company alleges that the council has no ground of complaint against it, because no subsidence has been caused by its working. It further alleges that, if subsidence has in fact been caused by that working, the defendant company is not liable, because the council, having received due notice of the defendant company's intention to work its coal under the land within forty yards of the plaintiffs' waterworks in accordance with the provisions of the Waterworks Clauses Act, 1847, the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, took no steps to acquire the coal, or any part of it, or to make compensation for it, or to prevent or interfere with the working of the coal. To this the council replies that it relies, not on any statutory right, but on the common law right to support, which was vested in the vendors to the council at the date of the sale and conveyance to it in respect of the land sold and conveyed. In answer to this contention, the defendant company says, first, that the vendors had no right of support at common law, and, secondly, if the vendors had any such right, it did not pass to the council by the conveyance of the land in question, and that the council's only right of support is that afforded by the provisions of the Acts of 1847 and 1883.

For some period before 1898 and down to the passing of the Wath-upon-Dearne Urban District Council (Water) Act, 1898, the area comprised in that district was supplied with water by the West Melton Waterworks Company. The 1898 Act authorised the taking over of the existing works of the last-named company, and constituted the council the statutory undertaker for the supply of water for the district. It incorporated, among other general Acts, the Waterworks Clauses Act, 1847, the Waterworks Clauses Act, 1863, and the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883. By s. 15, the council was authorised to purchase by agreement additional lands. It is in the following terms:

> "The council may for any of the purposes of their water undertaking purchase by agreement any lands not exceeding one hundred acres, but the council shall not create or permit the creation or continuance of any nuisance on any such lands or use such lands for any building except offices and dwellings for persons in their employ and such buildings and works as may be incident to or connected with their waterworks."

The Act does not confer on the council any authority to purchase compulsorily. Section 20 confers on the council the necessary powers to maintain the waterworks.

On June 14, 1901, the council purchased 4,840 sq. yds. of land in the highest part of Wath Wood. The vendors were the trustees for sale of a settlement made on the marriage of a Mr. R. C. Otter. This land had, with other land, been allotted to the vendors' predecessors in title under an Act passed in the year 1810 intituled an Act for enclosing lands in the township of Wath-upon-Dearne. The allotment was made subject to a reservation to the then Earl Fitzwilliam, as lord of the manors of Wath-upon-Dearne and Thornhill Hall, of any mines of coal and other minerals in or under the allotted lands. I will refer to this Act with more particularity later. The conveyance of 1901 was expressed to be subject to the exception and reservation of minerals, and the power to work the same "granted to the lord of the manor by the inclosure award for the parish of Wath-upon-Dearne," meaning the 1810 Inclosure Act. By the end of the year 1903 the council had constructed two reservoirs and three filter beds on the land conveyed to it by the conveyance of June 14, 1901.

Before the land was purchased, coal had been worked under it. There are a number of seams of coal under the land in question and throughout the district. One of these seams is known as the Barnsley seam. This lies at a depth of some 264 yds. below the surface of the land comprised in the 1901 conveyance. Another of the seams is known as the Parkgate seam, and lies at a depth of about 780 yds. below the surface, and 505 yds. below the Barnsley seam. The Barnsley seam has substantially been worked out under the land comprised in the 1901 conveyance, and in its immediate neighbourhood. The working took place mainly between the years 1881 and 1885, and any subsidence resulting from it occurred long before any date material to be considered in this action, and it was admitted that no further subsidence was likely to occur in respect of the old workings, provided these were not disturbed by the subsequent working of any of the seams below the Barnsley seam.

On Jan. 21, 1911, the defendant company gave to the council a notice of its intention to work the coal under and within a distance of forty yards from the plaintiff council's waterworks. This notice was given under the provisions of the Waterworks Clauses Act, 1847, and the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883. The receipt of this notice was duly acknowledged, but the council did not then, or at any later date, give to the defendant company any counter notice of willingness to treat or to make compensation for preventing or of its intention to prevent or interfere with the working of any underlying or surrounding mines or minerals, whether within or outside the forty yards area. At the date of the notice the defendant company had not worked any of the coal within a distance of some 250 yards from the council's waterworks. On Oct. 5, 1914, the council purchased from the then trustees of the same settlement a piece of land adjoining the land bought in 1901. This land comprised an area of 3,886 sq. yds., and was conveyed subject to a similar exception and reservation of the mines and minerals to that contained in the 1901 conveyance. It formed part of the land allotted to the vendors' predecessors in title under the 1810 Allotment Act, and was subject to the reservation of mines and minerals in favour of Earl Fitzwilliam as Lord of the Manors to which I have already referred. By the end of the year 1915 the council had constructed and completed two further reservoirs, two new filter beds, an engine house, and water-tower on this land.

The defendant company, after the expiration of the statutory period of thirty days from the giving of the notice, started to work the Parkgate seam, and by September, 1928, had reached a point within the forty yards area. No sign of trouble was manifested at the plaintiff council's waterworks until October, 1926. At that date, while one of the new reservoirs constructed in 1915 was being cleaned, fine vertical cracks were noticed in the angles of the east and west walls of that reservoir, and some slight cracks were observed in its floor. These cracks were made good, and for a time there was no further trouble; but on Oct. 12, 1928, it was discovered that a large quantity of clear water was collecting on the surface of the land which is adjacent to and on the south-west side of the council's waterworks. Examination of the waterworks disclosed the fact that water was escaping from the base of one of the filters at the rate of 57,000 gallons a day, and serious cracks were found in its west wall and floor. These cracks were dealt with temporarily. On Jan. 16, 1929, it was noticed that the level of the water in the new reservoir was dropping at a rate out of all expected proportions to the service then being given, and in consequence the two filters were tested. It was found that there were serious cracks in both filters, and that water was being lost at the rate of over 65,000 gallons per day. On Jan. 20 and 21, 1929, the reservoir was again tested, and the cracks were found to be worse than they were on Jan. 17. Letters were written to the defendant company and to Messrs. Stewarts and Lloyds, Ltd., who were the lessees of the Barnsley seam. The plaintiff council repaired its works by lining them with a bitumastic sheeting, so that in effect there was a system of tanks constructed inside the original filters and reservoirs. In the result, there has been no further loss of water, and it is apprehended that, even if any further cracks should develop in the filters or reservoirs, no water is likely to escape. The total cost of the work done to remedy the damage was stated to be £1,349 18s. 7d.

On Feb. 18, 1930, the defendant company gave to the council a further notice, which was expressed to be in confirmation and continuation of the notice previously given to the council in 1911. In it the defendant company is described as the owner, lessee or occupier of mines or seams of coal, including the Parkgate seam, under and near the council's waterworks, and under the lands within the distance of forty yards therefrom. The notice stated that the defendant company was desirous of working this seam of coal at the expiration of thirty days from the service of the notice. No counter notice was served on behalf of the plaintiff council under the provisions of the Waterworks Clauses Act, 1847, and the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, or either of them.

On May 30, 1930, the writ in this action was issued against the defendant company, and Messrs. Stewarts and Lloyds, Ltd. On July 26, 1930, the plaintiff council gave to Messrs. Stewarts and Lloyds, Ltd., notice of discontinuance, and since that date the action has proceeded against the defendant company alone.

Spens, K.C., and *Gilbert*, for the plaintiffs. In the Inclosure Act of 1810 there was no provision to let down the surface: (*Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (1); *Davis* v. *Treharne* (2); *Butterley Co.* v. *New Hucknall Colliery Co.* (3); *Warwickshire Coal Co.* v. *Coventry Corpn.* (4)). On those authorities the plaintiffs claim relief.

Archer, K.C., and *Rabagliati*, for the defendants. The plaintiffs have no common law right of support: (*New Moss Colliery Co.* v. *Manchester Corpn.* (5); *Pountney* v. *Clayton* (6); *Great Western Railway* v. *Bennett* (7); *Consett Waterworks Co.* v. *Ritson* (8); *Howley Park Coal and Cannel Co.* v. *London and North Western Railway* (9)). The mine had been worked for years before the plaintiffs acquired it. There cannot be coal mining without subsidence, and they must have known it. It cannot be supposed that the surface will be covered with buildings: (*Beard* v. *Moira Colliery Co.* (10); *Davies* v. *Powell Duffryn Steam Coal Co.* (11); *Warwickshire Coal Co.* v. *Coventry Corpn.* (4)). The Inclosure Act gave the right to let down the surface, subject to compensation. A right of support never passed to the plaintiffs. The Code was in substitution of the common law right. The Inclosure Act must be construed as to compensation as a covenant in a deed: (MACSWINNEY ON MINES, 5th edit., p. 197; *Barr* v. *Baird* (12); *Neill's Trustees* v. *William Dixon, Ltd.* (13)). The covenant did not extend to statutory works.

Spens, K.C., in reply. The right to compensation arises because of an extraordinary user by a neighbouring owner: (*Aynsley* v. *Bedlington Coal Co.* (14); *Love* v. *Bell* (15)).

The material parts of the statutes referred to are set out in the judgment.

Cur. adv. vult.

March 22, 1935.—**LUXMOORE, J.** [after stating the facts as set out above, continued:] The question which I have to determine is whether the plaintiff council has any legal cause of complaint against the defendant company. To answer the question a number of other questions arise or may arise for solution. Some of these are of considerable difficulty. I propose to formulate the questions which seem to me to require or may require consideration, and to state them in what appears to me to be their logical sequence. (i) Had the vendors to the council, at the respective dates in 1901 and 1914, when they conveyed to it the two plots of land already mentioned, any right of support for the surface of these plots from the subjacent minerals and adjacent land and minerals? (ii) If the answer to this question is in the affirmative, did such right pass to the council? (iii) If the answer to the first question is in the negative, had the vendors at the same dates any right to receive compensation for damage which might thereafter be suffered in respect of the land in question by reason of the working of the mines and minerals? (iv) If the answer to the third question is in the affirmative, did that right pass to the council? (v) Is the council entitled to any, and what, relief, having regard to the answers to the preceding questions?

The answer to the first question necessitates a careful consideration of the Wath-upon-Dearne Inclosure Act of 1810. In construing the Act, it is necessary to bear in mind the rules laid down in the cases which have been decided with reference to other Inclosure Acts of a similar character. These rules were summarised by LORD LOREBURN and LORD MACNAGHTEN in *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (1), where LORD LOREBURN, L.C., said ([1906] A.C. at p. 309):

> "Whenever the minerals belong to one person and the surface to another, the law presumes that the surface owner has a right to support, unless the language of the instrument regulating their rights, or other evidence, clearly shows the contrary. In order to exclude a right of support, the language used must unequivocally convey that intention, either by express words or by necessary implication. For the same presumption in favour of a right of support which regulates the rights of parties in the absence of an instrument defining them will apply also in construing

> the instrument when it is produced. If the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would not create an inconsistency with the actual clauses of the instrument, then it means that the surface cannot be let down. Illustrations are numerous in the reports. Words, however wide, that merely authorise the getting of all the minerals, have been held not to authorise so getting them as to let down the surface. Where power is given to get the minerals on paying compensation for damage done to the surface, the court will still scrutinise the compensation clause. Are there any rights belonging to the mine owner on the surface—such as a right of making roads—to which the compensation clause may refer? If the compensation clause is capable of being satisfied by reference to acts done *on* the surface, then, though it may be wide enough to cover also damage done *to* the surface by taking away the support, still it must be confined to damage done *on* the surface, and the inference that support may be taken away on payment of compensation will not be drawn. Again, courts have asked whether the compensation is manifestly inadequate for such an injury as letting down the surface, and have commented upon the absence of any provision for compensation. Either of these circumstances has supplied judges with a reason for so cutting down wide language in a grant of minerals as to imply a condition that the surface shall be supported. The process of reasoning in such cases seems to be that parties must not be supposed to have intended what would be unreasonable and unjust. I think that in each of them a clause providing for a continuance of support would not have been inconsistent with the actual clauses."

A

B

C

D

Then LORD MACNAGHTEN in the same case said ([1906] A.C. at p. 313):

> "The result seems to be that in all cases where there has been a severance in title and the upper and the lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance is authorised by the instrument of severance either in express terms or by necessary implication. This presumption in favour of one of the ordinary and most necessary rights of property holds good whether the instrument of severance is a lease, or a deed of grant or reservation, or an inclosure Act or award. To exclude the presumption it is not enough that mining rights have been reserved or granted in the largest terms imaginable, or that powers and privileges usually found in mining grants are conferred without stint, or that compensation is provided in measure adequate or more than adequate to cover any damage likely to be occasioned by the exercise of those powers and privileges. Nor is it enough, in the case of a lease, that the lessee is bound to work out the minerals or to work the minerals in a prescribed manner, or, in the case of an inclosure Act or award, that the lord in whose favour the mines are reserved or regranted may be authorised to work the minerals and enjoy the property as fully and freely as if the inclosure Act had not been passed. The difficulty of applying such an hypothesis to the altered condition of things brought about by an inclosure Act has, as it seems to me, led this House to treat the provision in which it is found, and of which it would seem at first sight to be the keynote, as a dead letter for any practical purpose."

E

F

G

H

No limitation or alteration of these rules has been introduced by any subsequent decision. Indeed in *Butterley Co.* v. *New Hucknall Colliery Co.* (3)—where it was held that on the construction of a lease the right of support from subjacent minerals was excluded—the House of Lords expressly approved and applied the statements which I have quoted from the *Butterknowle Case* (1).

I

The material provisions in the 1810 Inclosure Act are those contained in the proviso dealing with the rights of the lord of the manor. Read shortly they are as follows:

> "Nothing in this Act contained shall be construed or adjudged to extinguish defeat release lessen or prejudice the right title or interest" of the lord of the manor "of in or to any mines of coal"

A and a number of specified metals, followed by the general words

> "or to any other mines ores or minerals whatsoever, or to any beds of marl and clay save and except all quarries of stone and slate and such clay as is used for making common red bricks and tile"

already discovered or thereafter to be discovered in all or any of the allotments thereby B directed to be made. The proviso contains express reservation to the lord of the manor of

> "full and free liberty to search for work dig win raise get carry away and dispose of"

the excepted mines, ores, and minerals and also

> C "to erect any engine or engines, or other machines or buildings, and to open sink drive make and use such pits shafts soughs levels roads and ways in through upon and over"

the allotments as may be thought necessary for the purposes of the reservation. Pausing here, it is to be observed that the word "under" is absent. The proviso goes on to state that the lord is to make and pay full and ample satisfaction to the allotment owners D for any damage which shall or may be thereby—by the exercise of the powers reserved to the lord—

> "occasioned to the surface of the lands so allotted."

The proviso concludes with a declaration that the lord of the manor is

> E "to have hold use exercise take and enjoy all and every the seigniories rights . . . authorities liberties privileges advantages and emoluments"

belonging or incident to the manor other than and except all quarries of stone and slate and such clay as is used for making common red bricks and tile as aforesaid

> "in as full ample and beneficial a manner, to all intents and purposes as he . . . F [had theretofore] held used exercised or enjoyed or might or could have held used exercised and enjoyed in case"

the general Inclosure Act and the 1810 Inclosure Act had not been made.

In the first instance I propose to consider the words of the proviso apart from any evidence as to mining methods and knowledge in or before 1810. The language is undoubtedly wide, but it is not wider than that to be found in some of the other Inclosure G Acts which have been already considered in these courts. If the test laid down in the *Butterknowle Case* (1) is applied—and it is assumed that there is introduced into the 1810 Act an express provision that the mines and minerals must be worked so as not to let down the surface—it seems to me that there is no difficulty in construing the Act without rejecting any part of it as being inconsistent with the provision so introduced. I consequently come to the conclusion that there is no provision in the 1810 Act on its H true construction to exclude the right of support. The question then arises whether the evidence submitted in this case has introduced by way of necessary implication an unequivocal intention to exclude the right of support. To bring about this result the evidence must be sufficient to satisfy the court that at the date of the passing of the 1810 Act it was known that the reserved mines and minerals could not be worked at all by the methods then employed in the district without letting down the surface. The I evidence falls to be considered without reference to any light which might be thrown on it by reason of modern knowledge or modern systems of working. It has been suggested in this case, as it apparently was suggested in some of the more recent cases, that it is now known that there is no method by which any coal can be worked in any part of the country so as not to cause subsidence. MAUGHAM, L.J., pointed out in the most recent case to be found in the reports (see *Warwickshire Coal Co.* v. *Coventry Corpn.* (4) ([1934] Ch. at p. 518) that such a statement requires modification and explanation and is probably only true if applied to the working of coal at a commercial profit by the means now in use and with prices and wages as they are at the present time.

I have carefully considered the evidence in the present case. It was stated in argument that the plans of the workings of coal in this district produced during the hearing were more complete than in any of the previous cases of a like nature tried in these courts. The plans show that coal was being worked in this district before 1810 by a system which is a modification of that known as "the long wall system." It is said that under the system used the surface must have invariably subsided and that persons living in the district could not have failed to see that subsidence; but the plans themselves establish that in working the system it was usual to leave support for buildings and reservoirs if necessary, and that there was no difficulty in making variations in the system of working in any case where it was necessary to leave support. I do not think the available evidence justifies a finding that it was common knowledge in the year 1810 that it was impossible to work coal in this district without letting down the surface. The evidence establishes that at this date the deepest workings of coal then known in this country were carried out on a commercial basis under systems which entailed the retention of a high percentage of coal in order to prevent surface subsidence. In my judgment the defendant company has not discharged the onus of satisfying the court that the common law right of support was excluded by necessary implication on the true construction of the 1810 Act, and I hold that the vendors to the council had in 1901 and 1914, respectively, a common law right to have the surface of the lands conveyed to the council supported by the subjacent minerals and adjacent land and minerals.

The next question that arises is: Did this common law right of support pass to the council by the conveyances of 1901 and 1914? Apart from any statutory enactment prohibiting such a result it would seem to be reasonably clear that a vendor entitled to land without the subjacent minerals, but with a right to have his land supported by the subjacent minerals and the adjacent land and minerals, is at liberty to sell his land together with that right of support. If such a vendor sells to a purchaser other than a statutory undertaker, it is clear that that purchaser gets the vendor's land, together with the right of support attached to it. Why should not the statutory undertaker get the same advantage? It is said he is precluded from doing so by reason of the provisions of the Waterworks Clauses Act, 1847, and the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, and by the decided cases. The provisions relied on are those to be found in ss. 18 to 27 of the Waterworks Clauses Act, 1847, and s. 3 (2) of the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883. The sections are frequently referred to in cases like the present as "the code." Section 18 provides that the undertakers are not to be entitled to any mines under any land purchased by them "unless the same shall have been expressly purchased." This section has no application to the present case because the vendors to the council never had any of the minerals under the land sold by them. Sections 19, 20, and 21 provide for the making and deposit of certain maps or plans of the undertakers' works and for their inspection. Section 22 is in these terms:

> "Except where otherwise provided for by agreement between the undertakers and other parties, if the owner, lessee, or occupier of any mines lying under" the waterworks "or within the prescribed distance, if any, and if no distance be prescribed, within forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give the undertakers notice in writing of his intention so to do thirty days before the commencement of working; . . ."

In that event the undertakers may, to put it shortly, prevent the working of the mines and make compensation to the mine-owners. This section was slightly amended in the case of tenants for life by the Settled Land Act, 1925, s. 58 (3), and also in the case of a university or college by the Universities and College Estates Act, 1925, s. 17 (3), but neither of these amendments affect the question now before the court. Section 23 provides for the cases in which the undertakers are unwilling to make compensation. In any such case the mine-owner is enabled to work the mines,

> "by means of engines or otherwise, as if this Act and the special Act had not been passed, so that no wilful damage be done to the said works, and so that the said mines be not worked in an unusual manner; . . ."

Sections 24 to 27 deal with matters which are not material to be considered for present purposes.

Section 3 (2) of the 1883 Act—which only applies to cases where the undertakers are local authorities—provides that

> "the local authority, by or with any notice under the Waterworks Clauses Act, 1847, of willingness to treat for or make compensation, or of intention to prevent or interfere with the working of any mines, may specify, and define the nature and extent of support which they require to be left, and any such notice may extend to minerals beyond the distance of forty yards mentioned in the Act or to such less distance as the local authority may think fit."

The decisions with reference to "the code"—and for this purpose I include the cases under the somewhat similar provisions of the Railway Clauses Act, 1845—have settled beyond further controversy that in cases where the undertaker purchases from an owner who is entitled to land and the minerals under it, the undertaker who does not expressly purchase the minerals gets no common law right to support for his land from the minerals or from the adjacent land or the minerals under it within forty yards of the land purchased, and is relegated solely to such rights and privileges with regard to subjacent minerals and adjacent land and minerals as is conferred on him by "the code." But the common law right to support beyond the forty yards limit is left untouched. It was decided in *New Moss Colliery Co.* v. *Manchester Corpn.* (5) that an undertaker purchasing by agreement land expressly including the subjacent minerals is not affected by "the code," and that the common law right of support for the land and the subjacent minerals from the adjacent land and the minerals under it remains unimpaired. There is no actual decision covering the case where the undertaker purchases by agreement land from which the minerals have been completely severed before the purchase so that the land and the minerals are in different ownership. Of course, if, on the severance, the mineral owner became entitled to work so as to let down the surface and the owner of the land has no right of support, no question can arise, because the undertaker purchasing from the owner of the land could not by any possibility acquire from him a right of support which he himself had not got. But if, on the severance, the owner of the land obtained a common law right to support, it is difficult to appreciate why that owner should not be free to sell to the undertaker by agreement his land with that right of support, or why the undertaker should not be free to purchase it; or why—having purchased it—the undertaker should not be entitled to rely on it. It is equally difficult to understand why in such a case the mine-owner should be freed from his duty to support the land by reason of the fact that the owner of the land has, instead of keeping it or transferring it to a transferee other than a statutory undertaker, sold it to a statutory undertaker. If such be the case, the statutory undertaker is deprived of the right of support attached to the land purchased, although he has paid for such right and the mineral owner is without payment freed from a burdensome duty to his own pecuniary advantage. There is certainly no express provision in "the code" prohibiting a statutory undertaker from purchasing by agreement land with a right of support from the subjacent minerals from the owner who has such a right attached to his land as against the mineral owner, and if the statutory owner is precluded by "the code" from purchasing the common law right of support in such a case, it must be because there is some necessary implication to that effect introduced by the actual provisions of "the code." It is to be observed that s. 22, which lays down the conditions precedent to the working of the minerals by the mineral owner, is introduced by the words

> "except where otherwise provided by agreement between the undertakers and other parties,"

that is, parties other than the particular mineral owner. It seems to me that these words exclude from the operation of the section a case in which there is an agreement between the undertaker and a third party affecting the right of support, and that a purchase of land from a third party with such right of support is an agreement within the express words of this exception. In my judgment, the principles laid down in the

A *New Moss Colliery Case* (5) are applicable to the present case and lead to the conclusion that the council was free to purchase surface land with the right of support from the Otter trustees, and that the purchases made in 1901 and 1914 were outside the provisions of "the code."

It is said, however, that I am precluded from coming to such a conclusion by authority which is binding on me. The authority relied on is the decision of the Court of Appeal in *Pountney* v. *Clayton* (6). B The question in that case arose in respect of a compulsory purchase under the Railway Clauses Consolidation Act, 1845. The railway company had purchased surface land under the compulsory powers conferred by its special Act incorporating the Lands Clauses Consolidation Act, 1845. There was no purchase of the minerals nor was any compensation paid for them. The vendor was the owner of the minerals in question, subject to a demise thereof to the defendants for a term of years. C The mine owner had reserved a right of support for the surface during the term of the lease, but there was no complete severance of the minerals from the surface because the reversion expectant on the determination of the lease remained vested in the vendor. The surface purchased by the railway company was sold as superfluous land to the plaintiff by the railway company. The minerals were worked by the defendants—the lessees—and subsidence was thereby caused. It was held that the plaintiff acquired no higher right than the railway company from which he derived D his title and had no cause of action against the lessees. It is plain that, if there had been no demise of the minerals, the railway company would have got no right of support from those minerals by reason of the purchase of the surface. It is true that the vendor had by reason of the demise a right as against the lessees to have the surface support during the term of the lease. It is equally plain that the railway company did not in express terms acquire from the vendor any right of support during the term of the lease, and it is E difficult to understand why in that case it should be said that the existence of the contractual right of support during the term of the lease should have resulted in the transfer of the complete common law right of support for all time by reason of the conveyance of the land without the subjacent minerals. On the actual facts of the case the point which has arisen for decision by me was not before the court and was not considered, with the result that, so far as the present case is concerned, the statements which are now relied F on by the defendant company are dicta. BOWEN, L.J., appears to have drawn a distinction between the right of a railway company to have surface supported where the purchase is by agreement and its right where the purchase is compulsory. After enumerating the rights of the surface owner where there are minerals under that surface, he divided surface owners into four classes. The third is the class material to the consideration of the present case, and is that in which the surface owner has the right to G support created by the document which effected the severance, in which case the extent of the right of support depends on the terms of the document and their true construction. Pausing there, the Otter trustees, who sold the surface lands to the council in the present case, fall within this class. BOWEN, L.J., proceeded to consider the case of a railway company making a purchase from the surface owner voluntarily. He says this (11 Q.B.D. at p. 340): H

> "What in that case does such a company get from the surface owner? First, they get only what he has got to give and, secondly, what he intended to give, and as to that last one must look at and construe the deed of conveyance."

He then proceeded to consider the position of each class of surface owner from that point of view, and said with regard to the third class: I

> "The surface owner in the third class is one whose right to support depends on the document, and if by virtue of it he can give the right to support he gives it to the railway company."

This dictum seems to apply to and cover the present case. He goes on to say:

> "I wish to observe that where he" [that is the surface owner] "was the lessor of the mine, and has such right to support created by the deed by which he leased the

> mines, he transfers the right to support to the railway company to whom he has conveyed the surface, not because the covenant between his lessee and himself runs with the land, but because, if such was the intention of the parties, the railway company are entitled to the benefit of any covenant express or implied between the lessor and lessee."

The intention, as BOWEN, L.J., has already pointed out, depends on the construction of the conveyance. In the absence of an express assignment of the benefit of the covenant, it would be difficult to imply such an intention in the absence of any reference to the right of support on the determination of the lease. Having dealt with the position of a voluntary purchase, he proceeds to consider the case of a compulsory purchase under the Act, and decides that the surface owner who still has an interest in the minerals is still entitled to such rights as are afforded to a vendor on a compulsory sale notwithstanding the fact that he has made a partial disposition of the minerals by reason of an existing demise.

It must, further, be borne in mind that the provisions of the Railway Clauses Act, 1845, differ from those of the Waterworks Clauses Act, 1847. Section 78 of the former Act, which corresponds with s. 22 of the latter, does not contain the words to which I have already referred, namely:

> "except where otherwise provided by agreement between the undertakers and other parties";

while s. 79 of the former Act provides that the mine-owner's power to work in default of a counter notice is

> "in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate";

in other words, this section confers on the mine-owner a new power to work the minerals, and this is the only power on which he can rely. On the other hand, s. 23 of the Waterworks Clauses Act, 1847, provides that the mine-owner may work "as if this Act and the special Act had not been passed." These words seem to me to be apt not to create a new statutory power of working, but to lift the embargo imposed by s. 22 on the exercise of the right which existed apart from the Act. The restrictive words which follow:

> "so that no wilful damage be done to the said works, and so that the said mines be not worked in an unusual manner,"

seem to me to support this view.

The view I have ventured to express with regard to the decision in *Pountney* v. *Clayton* (6) is in accordance with that taken by CAVE, J., in *Consett Waterworks Co.* v. *Ritson* (8). It is true that in that case SMITH, J., expressed a different view of *Pountney* v. *Clayton* (6), but with the greatest possible deference to that learned judge, and with due humility, I feel bound to state my preference for the opinion and reasoning in support of it to be found in the judgment of CAVE, J.

In my judgment, and for the reasons I have endeavoured to state, I think that the right of support, which the Otter trustees had by reason of the provisions of the 1810 Inclosure Act, passed to the council, and that the defendant company was not and is not entitled to ignore those rights although the council failed to give any counter notice under s. 23 of the 1847 Act.

So far I have only dealt with the position under the 1847 Act. If I am wrong in the view I have expressed as to the effect of that Act, it is, I think, well settled that there is nothing in it to affect the council's right to support from the minerals outside the forty yards area: (see *Howley Park Coal and Cannel Co.* v. *London and North Western Rail. Co.* (9). Has this position been altered in the case of statutory undertakers who, like the plaintiff council, are also local authorities by s. 3 (2) of the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883? The section is difficult to construe, but it seems to me to confer on the local authority undertaker an option to acquire or prevent the working of minerals beyond the forty yards area. The words of the section are A in form permissive, and there is nothing in the section depriving the local authority of such right as it may have outside the forty yards area if the option is not exercised; and for this reason I think the council's right to support remains unaffected outside that area because it did not in fact exercise the option.

Having regard to the answers given by me to the first and second questions, the third and fourth questions propounded by me do not arise, and I do not propose to consider B them.

The fifth question is: Is the council entitled to any relief in view of the answers given to the first and second questions? In my judgment, the council is entitled to a declaration that the defendant company is not, in the events that have happened, entitled to work the Parkgate seam or any other minerals under the waterworks or under the adjacent land, whether within or beyond the forty yards area, in any manner so as to C interfere with the council's common law right of support for their land in its natural state. Having regard to the evidence that the possibility of future damage is remote, I do not think it is necessary to grant any injunction at the present time. The order I propose to make will reserve liberty to the council to apply for an injunction, if so advised.

During the argument a question arose as to the meaning of the words in s. 23 of the D Waterworks Clauses Act, 1847, conferring on the mineral owner the right to work the minerals in the events there stated "so that no wilful damage be done to the said works." On the primâ facie meaning of these words, it would seem to prohibit the mineral owner from working the minerals, even though the statutory undertaker has not expressed its willingness to make compensation to the mineral owner if the mineral owner knows that the inevitable consequence of his working must result in damage E to the undertaking. It is not necessary to decide this question at the present moment, and I only refer to it to call attention to the fact that such a question may hereafter arise.

There will be an inquiry as to the damages sustained by the council by reason of the defendant company's mining operations, and I order the defendant company to pay the costs of the action up to and including the date of this order. The costs of the inquiry F will be reserved, and there will be general liberty to apply.

Solicitors: *Ridsdale & Son*, for *Nicholson & Co.*, Wath-upon-Dearne; *Johnson, Weatherall, Sturt, & Hardy*, for *Parker Rhodes, Cockburn & Co.*, Rotherham.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

BRITISH COAL CORPORATION *v.* REGEM

[PRIVY COUNCIL (Lord Sankey, L.C., Lord Atkin, Lord Tomlin, Lord Macmillan and Lord Wright), March 18, 19, 21, 22, 28, 29, April 1, 2, 8, 9, June 6, 1935]

[Reported [1935] A.C. 500; 104 L.J.P.C. 58; 153 L.T. 283; 51 T.L.R. 508; 79 Sol. Jo. 541]

Canada—Dominion legislation—Right to enact law repugnant to English law and having extra-territorial operation—Statute of Westminster (22 *&* 23 *Geo.* 5, *c.* 4), *s.* 2 (2), *s.* 3.

Statute—Construction—Act giving Dominion legislature power to legislate for peace, order, and good government.

The Judicial Committee Act, 1833, recites that " from the decisions of . . . courts . . . in the . . . Dominions . . . an appeal lies to His Majesty in Council."

By s. 2 of the Colonial Laws Validity Act, 1865, any colonial law which was repugnant to the provisions of an Act of the Imperial Parliament was to be void and inoperative to the extent of such repugnancy.

By s. 2 (1) of the Statute of Westminster, 1931: " the Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act [Dec. 11, 1931] by the Parliament of a Dominion." By s. 2 (2): " No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any . . . Act of Parliament of the United Kingdom . . . and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act . . . in so far as the same is part of the law of the Dominion." By s. 3: " . . . the Parliament of a Dominion has full power to make laws having extra-territorial operation."

By s. 17 of the Criminal Code Amendment Act of Canada, 1933: " Notwithstanding any Royal prerogative or anything contained in the Interpretation Act, or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any Court of Appeal or authority by which in the United Kingdom appeals or petitions to his Majesty in Council may be heard."

Held: the limitations on the legislative powers of the Parliament of the Dominion of Canada imposed by the Colonial Laws Validity Act, 1865, and by the doctrine which forbids extra-territorial legislation by a Dominion Parliament were abrogated by the provisions of the Statute of Westminster; section 91 of the British North America Act, 1867, invested the Dominion Parliament with power to prohibit an appeal from a court within the Dominion to the Sovereign in Council; and, therefore, the provisions of the Canadian Act of 1933 were valid, and a petition for special leave to appeal from an order of a provincial appeal court in a criminal matter was barred.

Per curiam: A statute giving a Dominion or colony legislative power to make laws for the peace, order, and good government of the Dominion or colony must be given that construction which is most beneficial to the widest possible amplitude of those powers.

Nadan v. *The King* (*A.-G. of England and A.-G. of Canada interveners*) (1), [1926] A.C. 482, *explained.*

Notes. Considered: *A.-G. for Ontario* v. *A.-G. for Canada*, [1947] 1 All E.R. 137. Referred to: *Renouf* v. *A.-G. for Jersey*, [1936] 1 All E.R. 936; *Trinidad Lake Asphalt Operating Co.* v. *Income Tax Commissioners for Trinidad and Tobago*, [1945] 1 All E.R. 9.

As to the evolution of independent status of Dominions and the powers of their legislatures, see 5 HALSBURY'S LAWS (3rd Edn.) 446–457, 474–488, and as to Canada, see ibid., 488 et seq. For the relevant statutes, see 6 HALSBURY'S STATUTES (2nd Edn.) 177 et seq.

Cases referred to:

(1) *Nadan* v. *R.*, [1926] A.C. 482; 95 L.J.P.C. 114; 134 L.T. 706; 42 T.L.R. 356; 28 Cox, C.C. 167, P.C.; 8 Digest (Repl.) 704, *116*.

(2) *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409; 49 L.J.P.C. 63; 42 L.T. 445, P.C.; 8 Digest (Repl.) 115.

(3) *A.-G. for Ontario* v. *Reciprocal Insurers*, [1924] A.C. 328; 93 L.J.P.C. 137; 130 L.T. 738; 68 Sol. Jo. 383; 40 T.L.R. 273, P.C., 8 Digest (Repl.) 708, *137*.

(4) *A.-G. for Ontario* v. *A.-G. for Canada*, [1912] A.C. 571; 81 L.J.P.C. 210; 106 L.T. 916; 28 T.L.R. 446, P.C.; 8 Digest (Repl.) 704, *122*.

(5) *Hodge* v. *R.* (1883), 9 App. Cas. 117; 53 L.J.P.C. 1; 50 L.T. 301, P.C.; 8 Digest (Repl.) 703, *113*.

(6) *A.-G. for Canada* v. *Cain*, *A.-G. for Canada* v. *Gilhula*, [1906] A.C. 542; 75 L.J.P.C. 81; 95 L.T. 314; 22 T.L.R. 757, P.C.; 8 Digest (Repl.) 711, *164*.

(7) *Edwards* v. *A.-G. for Canada*, [1930] A.C. 124; 99 L.J.P.C. 27; 142 L.T. 98; 46 T.L.R. 4; 73 Sol. Jo. 711, P.C.; 8 Digest (Repl.) 697, *68*.

(8) *Cuvillier* v. *Aylwin* (1832), 2 Knapp. 72; 3 State Tr. N.S. App. 1280; 12 E.R. 406, P.C.; 8 Digest (Repl.) 811, *632*.

(9) *Re Louis Marois* (1862), 15 Moo. P.C.C. 189; 8 Jur. N.S. 268; 15 E.R. 465; 10 W.R. 326, P.C.; 8 Digest (Repl.) 818, *698*.

Preliminary objection on a petition for special leave to appeal by the British Coal Corporation and four other coal importing companies from an order of the Court of King's Bench (Appeal Side) of the province of Quebec, dismissing the appeal of the petitioners from a conviction before the King's Bench (Crown Side), on a charge of combining to restrict the coal industry when the petitioners were fined $30,000.

The constitutional question raised by the preliminary objection was whether s. 17 of the Criminal Code Amendment Act of Canada, 1933, took away the right of appeal to His Majesty in Council in criminal matters.

Wilfrid Greene, K.C., *C. J. Burchell, K.C.* (of the Nova Scotia Bar), *J. H. Stamp*, and *Potter A. Oyler* (of the Nova Scotia Bar) for the petitioners.

Sir Stafford Cripps, K.C. and *Cyril Radcliffe, K.C.*, for the A.-G. for Quebec.

W. N. Tilley, K.C. and *J. E. Read, K.C.* (of the Nova Scotia Bar), for the A.-G. for Canada (intervening).

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *Wilfrid Lewis* to assist the Board.

June 6. **LORD SANKEY, L.C.**—This is a petition for special leave to appeal from a judgment of the Court of King's Bench (Appeal Side) of the province of Quebec, delivered on Oct. 5, 1934. The petitioners had been convicted on Dec. 12, 1933, under s. 498 of the Canadian Criminal Code and under ss. 2 and 32 of the Combines Investigation Act, 1923, before the Court of King's Bench (Crown Side) and had been subjected to fines totalling $30,000, but the more serious effect to the petitioners of the conviction was that their business operations in the import of British anthracite coal were held to be illegal. The conviction was upheld by the judgment of the Appeal Court.

Before their Lordships proceeded to consider questions appertaining to the merits of the petition, they decided in the first instance to determine a preliminary objection, which was that the petition was incompetent by reason of the provisions of s. 17 of the Canadian Statute 23 & 24 Geo. 5, c. 53 (an Act to amend the Criminal Code) which was in the following terms:

> S. 10 (4) of the said Act (the Criminal Code) is repealed and is hereby re-enacted as follows. . . . "(4) Notwithstanding any royal prerogative or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any Court of Appeal or authority in which in the United Kingdom appeals or petitions to His Majesty may be heard."

It is clear that, if this enactment is valid, the petition is barred. It is, however, contended on behalf of the petitioners that the section is invalid.

A section in identical terms had been held invalid by the Judicial Committee in *Nadan* v. *R.* (*the A.-G. of England and the A.-G. of Canada interveners*) (1), and that decision was founded upon in these proceedings by the petitioners, who contended on various grounds that the enactment of the Statute of Westminster, 1931, had not affected the position which the decision just cited had established. On behalf of the respondent it was argued that the Statute of Westminster, 1931 (which will be referred to here as "the statute"), had removed certain fetters which, according to that decision, had till then affected the legislative competence of Canada in the relevant respects, and that, these fetters being removed, the provisions of the British North America Act, 1867, had full effect to invest the Parliament of Canada with power to enact the section in question.

It will be convenient to summarise in the briefest terms the nature of the appeal from Dominion or colonial courts to His Majesty in Council. The position of this board, the Judicial Committee of the Privy Council, in relation to such appeals may first be indicated. The Judicial Committee is a statutory body established in 1833 by an Act of 3 & 4 Will. 4, c. 41, entitled an Act for the better Administration of Justice in His Majesty's Privy Council. It contains (inter alia) the following recital:

> "and whereas from the decisions of various courts of judicature in the East Indies, and in the plantations, colonies, and other dominions of His Majesty abroad, an appeal lies to His Majesty in Council."

The Act then provides for the formation of a committee of His Majesty's Privy Council, to be styled the Judicial Committee of the Privy Council and enacts [s. 3] that

> "all appeals or complaints in the nature of appeals whatever, which, either by virtue of this Act or of any law, statute, or custom, may be brought before . . . His Majesty in Council"

from the order of any court or judge should thereafter be referred by His Majesty to, and heard by, the Judicial Committee, as established by the Act, who should make a report or recommendation to His Majesty in Council for his decision thereon, the nature of such report or recommendation being always stated in open court. The Act contained a great number of provisions for the conduct of appeals. It is clear that the committee is regarded in the Act as a judicial body or court, though all it can do is to report or recommend to His Majesty in Council, by whom alone the Order in Council which is made to give effect to the report of the committee is made. But according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus, in truth, an appellate court of law, to which by the statute of 1833 all appeals within their purview are referred.

A later Act, the Judicial Committee Act, 1844, must next be mentioned. Apart from certain changes in procedure, the main effect of that Act was to authorise Her Majesty to provide, by Order or Orders in Council made for that purpose, for the admission of any appeals to Her Majesty in Council from judgments or orders of any court of justice within any British colony or possession abroad even though such court might not be a court of error: this followed a recital that by the laws in force in certain of Her Majesty's colonies no appeal could be brought save only from courts of error or of appeal and that it was expedient to provide that Her Majesty in Council should be authorised to admit such appeals. In effect, therefore, Her Majesty in Council was thus empowered to override a colonial law limiting or excluding appeals to Her Majesty in Council from any colonial court.

In this way the functions of the Judicial Committee as a court of law were established. The practice had grown up that the colonies under the authority either of Orders in Council or of Acts of Parliament should provide for appeals as of right from their courts to the King in Council and should fix the conditions on which such appeals should be permitted. But outside these limits there had always been reserved a discretion to the King in Council to grant special leave to appeal from a colonial court irrespective of the limitations fixed by the colonial law: this discretion to grant special leave to appeal was in practice described as the prerogative right: it was, indeed, a residuum of the royal prerogative of the Sovereign as the fountain of justice. In early days it was to the King that any subject who had failed to get justice in the King's court brought his petition for redress. As time went on, such petitions were brought to the King in Parliament (which was the origin of the modern judicial functions of the House of Lords) or to the King in his chancery (from which flowed the jurisdiction of the Court of Chancery). But this was so only in causes which had been dealt with in English courts: from the courts of the Channel Islands and later from the courts of the plantations or colonies the petition went to the King in Council, and this continued to be the practice after the jurisdiction of the Privy Council in English common law cases had been abolished. It was this appellate jurisdiction (along with other jurisdictions such as in Admiralty or Ecclesiastical Causes) which was affirmed and regulated by Parliament in the Privy Council Acts of 1833 and 1844. Although in form the appeal was still to the King in Council, it was so in form only and became in truth an appeal to the Judicial Committee which as such exercised as a court of law in reality, though not in name, the residual prerogative of the King in Council. No doubt, it was the order of the King in Council which gave effect to their reports, but that order was in no sense other than in form either the King's personal order or the order of the general body of the Privy Council.

In 1865 the Colonial Laws Validity Act was passed. It was described as an Act to remove doubts as to the validity of colonial laws. For this context it is enough to say that it was an Act which declared that a colonial law should be deemed to be and to have been void to the extent that it was repugnant to any Act of the Imperial Parliament extending to the colony or any order or regulation made under such Act.

In 1867 the British North America Act was passed. It was an Act to provide for the establishment in Canada of one Dominion and for the legislative authority in the Dominion and to declare the nature of the executive government therein. It was declared that the executive government of and over Canada should be vested in the Queen, and that there should be a council (the Queen's Privy Council in Canada) to aid and advise in the government of Canada. The legislative power was vested in the Parliament for Canada, which by s. 91 was to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects assigned by s. 92 exclusively to the legislatures of the provinces. Without restricting the generality of that provision, certain matters were specifically enumerated as falling within the exclusive legislative authority of the Parliament of Canada: of these it is sufficient here to mention No. 27, which was:

> "The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters."

On the other hand, among the matters assigned by s. 92 exclusively to the provincial authority there fell No. 14:

> "The administration of justice in the province, including the constitution, maintenance and organisation of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts."

By s. 101 of the Act it was provided:

> "The Parliament of Canada may notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance and organisation of a general court of appeal for Canada and for the establishment of any additional courts for the better administration of the laws of Canada."

Under the last-mentioned section the Parliament of Canada by an Act of 1875 established (along with the Exchequer Court) "The Supreme Court of Canada" which was to exercise an appellate civil and criminal jurisdiction within and throughout the Dominion of Canada: it was provided by s. 47 that

> "the judgment of the Supreme Court should be in all cases final and conclusive. . . . Saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal Prerogative."

In 1880 in *Cushing* v. *Dupuy* (2) which was an appeal from the Court of Queen's Bench for Quebec, the Judicial Committee had to consider the effect of a Dominion Act dealing with insolvency, which contained a clause providing that

> "the judgment of the court to which under this section the appeal can be made shall be final."

That court in the case in question was the Court of Queen's Bench for Quebec. The Judicial Committee decided that as the Act in question

> "contains no words which purport to derogate from the prerogative of the Queen to allow as an act of grace appeals from the Court of Queen's Bench in matters of insolvency, her authority in that respect is unaffected by it."

But they added that they did not consider it necessary "to consider what powers may be possessed by the Parliament of Canada to interfere with the royal prerogative."

In 1888 a section identical in terms with the section now in question was enacted as s. 1025 of the Criminal Code of Canada. Between that year and 1926 appeals came before the board in which the question of the validity of that section might have been raised, but was not, or, if it was raised, was not the subject of decision. To take one instance, in *A.-G. for Ontario* v. *Reciprocal Insurers* (*A.-G. for Canada intervener*) (3) ([1924] A.C. at p. 348) the Judicial Committee said that their order

> "involved no decision as to the power of the Parliament of Canada to enact s. 1025 of the Criminal Code."

But in 1926 in *Nadan* v. *R.* (*the A.-G. of England and the A.-G. of Canada interveners*) (1), a decision was for the first time given on the question whether the section was valid. It was held that the section was ultra vires and invalid. It is essential, however, to determine the ratio decidendi on which this judgment was based. The ratio decidendi is, in their Lordships' opinion, to be found in a comparatively short passage which follows a citation of the Privy Council Acts of 1833 and 1844, and which is of so vital an import that it must be here quoted in full ([1926] A.C. at p. 492):

> "Under what authority, then, can a right so established and confirmed be abrogated by the Parliament of Canada? The British North America Act, by s. 91, empowered the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to matters not coming within the classes of subjects by that Act assigned exclusively to the Legislatures of the Provinces; and in particular it gave to the Canadian Parliament exclusive legislative authority in respect of 'the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters.' But however widely these powers are construed they are confined to action to be taken in the Dominion; and they do not appear to their Lordships to authorise the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal. Further, by s. 2 of the Colonial Laws Validity Act, 1865, it is enacted that 'any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament or having in the Colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative,' In their Lordships' opinion s. 1025 of the Canadian Criminal Code, if and so far as it is intended to prevent the Sovereign in Council from giving effective leave to appeal against an order of a Canadian Court, is repugnant to the Acts of 1833 and 1844 which have been cited, and is therefore void and inoperative by virtue of the Act of 1865. It is true that the Code has received the royal assent, but that assent cannot give validity to an enactment which is void by Imperial statute. If the prerogative is to be excluded, this must be accomplished by an Imperial statute; and in fact the modifications which were deemed necessary in respect of Australia

> and South Africa were effected in that way: (see Commonwealth of Australia Act, 1900, s. 74, and Union of South Africa Act, 1909, s. 106)." A

The judgment then goes on to review a number of authorities, and thus concludes ([1926] A.C. at p. 495):

> "Upon a review of these authorities, it appears to their Lordships that they contain nothing inconsistent with the conclusion which their lordships have reached upon principle, and that, so far as they go, they support that conclusion." B

On a careful consideration of the judgment of the Board in *Nadan's Case* (1), their Lordships are of opinion that the judgment was based on two grounds only: (i) that s. 1025 was repugnant to the Privy Council Acts of 1833 and 1844 and was, therefore, void under the Colonial Laws Validity Act, 1865; (ii) that it could only be effective if construed as having an extra-territorial operation, whereas, according to the law as it was in 1926, a Dominion statute could not have extra-territorial operation. These two difficulties as the law then stood could only be overcome by an Imperial statute: the Australian and South African Acts were cited as illustrations of Imperial statutes containing clauses apt to define or limit this prerogative. Such, their Lordships think, is the meaning of the decision in *Nadan's Case* (1); they do not find in it any clear or precise determination of what, if these two fundamental difficulties had been removed, would have been held to have been the true effect of the Act, nor can their Lordships say how, apart from these objections, the Judicial Committee would have decided the issue whether or not the Act had given the Canadian Legislature power to enact s. 1025. C D

Their Lordships have now to decide that very same question, and to decide it, as they conceive, without any direct help or guidance from earlier decisions of the Judicial Committee, now that the statute has removed the two difficulties which were decisive in *Nadan's Case* (1). The relevant sections of the Statute of Westminster which have this effect are as follows: E

> "2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.
>
> "(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion. F
>
> "3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation. G
>
> "7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.
>
> "(2) The provisions of s. 2 of this Act shall extend to the laws made by any of the provinces of Canada and to the powers of the legislatures of such provinces. H
>
> "(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the provinces respectively."

What is the extent of the legislative competence in the relevant regard conferred on the Canadian Parliament, putting out of question the limitations which are now removed, must be ascertained from the words of the constituent Act [the British North America Act, 1867]. In construing the words of that Act, it must be remembered what the nature and scope of the Act are. They are indicated in the words used by LORD LOREBURN, L.C. in delivering the judgment of the Judicial Committee in *A.-G. for Province of Ontario* v. *A.-G. for Canada* (4) ([1912] A.C. at p. 581): I

> "In 1867 the desire of Canada for a definite constitution embracing the entire

> Dominion was embodied in the British North America Act. Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada."

The same principle was recognised in the following language used in *Hodge* v. *R.* (5) (9 App. Cas. at p. 132) in respect of the powers of provincial legislatures:

> "When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in s. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by s. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect."

The same language can properly be used in regard to the Dominion Parliament, to which, indeed, the passage just quoted was applied in *A.-G. for Canada* v. *Cain, Same* v. *Gilhula* (*Consolidated Appeals*) (6). That was a case in which it was held that the power to make laws for the peace, order and good government were wide enough to enable the Dominion Parliament to pass a statute vesting in the Dominion executive the prerogative power to expel and deport aliens. Indeed, in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted. This principle has been again clearly laid down by the Judicial Committee in *Edwards* v. *A.-G. for Canada* (7) ([1930] A.C. at p. 136):

> "Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs. 'The Privy Council, indeed, has laid down that courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British colony': see CLEMENT'S CANADIAN CONSTITUTION, (3rd ed.,) p. 347."

No doubt, the principle is clearly established that the King's prerogative cannot be restricted or qualified save by express words or by necessary intendment. In connection with Dominion or colonial matters that principle involves that, if the limitation of the prerogative is by a Dominion or colonial Act, not only must that Act itself deal with the prerogative either by express terms, or by necessary intendment, but it must be the Act of a Dominion or colonial legislature which has been endowed with the requisite power by an Imperial Act likewise giving the power either by express terms or by necessary intendment. In the matter now in question it is beyond question that s. 17 of the Canadian Act [of 1933] is expressed in precise terms. The next question is whether s. 91 of the Act invests the Dominion Parliament, in cases within its jurisdiction, with the power to regulate or prohibit the appeal to the King in Council. Their

Lordships are of opinion that the Act does invest the Dominion Parliament with these powers. It does not, indeed, do so by express terms, but it does so by necessary intendment. Section 91 of the Act, read along with the rest of the Act, is according to its true construction, in their Lordship's opinion, apart from the limitations already referred to, intended to make and is apt to make the Dominion legislature supreme and endow it with the same authority as the Imperial Parliament, within the assigned limits of subject and area, just as it was said in *Hodge* v. *R.* (5) that s. 92 of the Act had that effect in regard to the provincial legislatures. It is true that before the Statute of Westminster the Dominion legislature was subject to the limitations imposed by the Colonial Laws Validity Act, and by s. 129 of the Act, and also by the principle or rule that its powers were limited by the doctrine forbidding extra-territorial legislation, though that is a doctrine of somewhat obscure extent. But these limitations have now been abrogated by the statute. There now remain only such limitations as flow from the Act itself, the operation of which as affecting the competence of Dominion legislation was saved by s. 7 of the statute, a section which excludes from the competence of the Dominion and provincial Parliaments any power of "repeal, amendment, or alteration" of the British North America Acts. But it is well known that s. 7 was inserted at the request of Canada and for reasons which are familiar. It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired; indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the statute. But that is theory and has no relation to realities. In truth, Canada is in enjoyment of the full scope of self-government; its legislature was invested with all necessary powers for that purpose by the Act, and what the statute did was to remove the two fetters which have already been discussed.

Among the powers which go to constitute self-government there are necessarily included powers to constitute the law courts and to regulate their procedure and to appoint their judges; save for the provisions of the British North America Act, 1867, these powers in regard to the then newly constituted Dominion would have all belonged to the King as the fountain of justice; but by the Act these powers are vested in the Dominion legislature, and thus pro tanto the prerogative is merged in the statutory powers. A most essential part of the administration of justice consists of the system of appeals. It is not doubted that with the single exception of what is called the prerogative appeal, that is, the appeal by special leave given in the Privy Council in London, matters of appeal from Canadian courts are within the legislative control of Canada, that is, of the Dominion or the provinces as the case may be. Even conditions of the appeal "as of right" to the Privy Council, have been dealt with by the Parliaments of Quebec and Ontario, acting under the powers vested in them under the Constitutional Act, 1791.

It may now be considered whether there is since the Statute of Westminster any sufficient reason why this matter of the special or prerogative appeal to the King in Council should be treated, as, according to the contentions on behalf of the petitioners, it should be treated, as being something quite special and as being a matter standing, as it were on a pedestal by itself. Ought it not to be treated as simply one element in the general system of appeals in the Dominion? The appeal, if special leave is granted, is from the decision of a Canadian court, and is to secure a reversal or alteration of an order of a Canadian court; if it is successful, its effect will be that the order of the Canadian court will be reformed accordingly. Rights in Canada and law in Canada will thus be affected. The appellant and respondent in any such appeal must be either Canadian citizens or persons who have submitted to the jurisdiction of the Canadian courts. Such appeals seem to be essentially matters of Canadian concern and the regulation and control of such appeals would thus seem to be a prime element in Canadian sovereignty as appertaining to matters of justice. But it is said that this class of appeal is a matter external to Canada; emphasis is laid particularly on the fact that the Privy Council sits in London, and that in form the appeal by special leave is not to the Judicial Committee as a court of law, but to the King in Council exercising a prerogative right outside and apart from any statute. As already explained this latter proposition is true only in form, not in substance. But even so the reception and the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian court and which concludes and reaches its consummation in the Canadian court. What takes place outside Canada is only ancillary to practical results which become effective in Canada. And the appeal to the King in Council is an appeal to an Imperial, not a merely British, tribunal.

Their Lordships can see no valid reason since the Statute why the power to regulate or prohibit this type of appeal should not be held to be vested in the Dominion Parliament by the Act, with the consequence that it was validly exercised by the impugned section of the Act to amend the Criminal Code. Their Lordships do not construe the decision in *Nadan's Case* (1) as involving the negation of that general power: the view there stated that the prerogative power to admit appeals could only be abrogated by an imperial statute was, in their Lordships' opinion, based on the special grounds that it would affect matters not confined locally to Canada and would contravene an Imperial Act. Before 1867, it had been held in *Cuvillier* v. *Aylwin* (8) that the Constitution Act of 1791 had conferred power on the Canadian legislature to take away the prerogative right of appeal: that decision was indeed, criticised in *Re Louis Marois* (9), but the ground of actual criticism, or, perhaps, dissent, was not based on the general limits of power of the Canadian legislature, but on the view that the relevant enactment of that legislature was not sufficiently express in its terms. After 1867 the same ground for denying the validity of the enactment there in question was taken in *Cushing* v. *Dupuy* (2) as already explained.

It was further contended on behalf of the petitioners that if the Imperial Parliament desired to regulate in a constitutional enactment the prerogative right of petitioning for leave to appeal to the King in Council, an entirely different method of dealing with the problem was adopted, as was done in s. 74 of the Commonwealth of Australia Act, 1900, and in the South African Act. It is difficult to see how light can be thrown on the construction of the Act of 1867 by comparing with it an entirely different Act of 1900. But in any case the contrary argument may be drawn from the Commonwealth Act: the truer view may well be that the express limitation inserted in the Act of 1900 was so inserted because the general powers conferred on the Commonwealth by that Act would have included the abrogation of the prerogative appeal if the specific limitation had not been expressed. But it is to be noted also that the Commonwealth was invested with power to alter or amend the provisions of the Commonwealth Act relating to the prerogative appeals. A similar power is given in the South African Constitution. In the report of the Imperial Conference, 1926, at p. 19, it is stated that

> "it was no part of the policy of His Majesty's government in Great Britain that questions affecting judicial appeals (*i.e.*, to the Judicial Committee of the Privy Council) should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected."

Their Lordships have in this judgment been dealing only with the legal position in Canada in regard to this type of appeal in criminal matters. It is here neither necessary nor desirable to touch on the position as regards civil cases.

For all these reasons their Lordships are of opinion that the petition should be dismissed. As they are of this opinion on the sole ground that the petition is barred by s. 17 of the amended Criminal Code, it is not necessary to discuss the merits of the petition.

In the result their Lordships, being of opinion that the petition should be dismissed, will humbly so advise His Majesty.

Petition dismissed.

Solicitors: *Clifford-Turner & Co.*; *Blake & Redden*; *Charles Russell & Co.*; *Treasury Solicitor.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

OFFER *v.* MINISTER OF HEALTH

[COURT OF APPEAL (Greer, Slesser and Roche, L.JJ.), June 24, 1935]

[Reported [1936] 1 K.B. 40; 105 L.J.K.B. 6; 153 L.T. 270; 51 T.L.R. 546; 79 Sol. Jo. 609; 33 L.G.R. 369, C.A.]

Housing—Clearance order—Validity—Ex parte advice given by Ministry to local authority before order made—Housing Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 14), *s.* 117—*Housing Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 39) *ss.* 1, 11 (3), *Sched. I., para.* 4.

A clearance order having been made by a local authority, objection was taken by the applicants, who were the owners of certain houses in the area in question. The Minister of Health caused a public local inquiry to be held, and at that inquiry it was elicited that, without giving notice to the applicants, a visit of inspection to the area had been made by an official of the Ministry, and that during that visit advice was given by the official to representatives of the local authority, the effect of which was to encourage the local authority to declare the area a clearance area. Subsequently, the Minister confirmed the order.

Held: while the Minister, in considering objections to a clearance order made at a public inquiry and deciding whether or not to confirm the order, was performing a quasi-judicial function and must not consider any ex parte statements, the inspection made by the official in the present case in no way bound a person who might hold a subsequent inquiry, nor the Minister in considering the order, and, in those circumstances and in view of the provisions of s. 117 of the Housing Act, 1925, there was no ground on which the order should be quashed.

Notes. The Housing Act, 1925, was repealed by the Housing Act, 1936, but s. 117 was re-enacted by s. 179 of the later Act. Section 11 (3) of the Housing Act, 1930, has been re-enacted by the Housing Act, 1936, Sched. II, para. 2. The powers and duties of the Minister of Health relating to housing have been transferred to the Minister of Housing and Local Government.

Considered: *Horn* v. *Minister of Health,* [1936] 2 All E.R. 1299; *Darlassis* v. *Minister of Education* (1954), 118 J.P. 452.

As to the powers of the Minister and clearance orders, see 26 HALSBURY'S LAWS (2nd Edn.) 530 et seq., and for cases, see 38 DIGEST 212 et seq. For Housing Act, 1936, see 11 HALSBURY'S STATUTES (2nd. Edn.) 444.

Cases referred to:

(1) *Re Birkenhead* (*Cambridge Place*) *Clearance Order, Ex parte Frost,* [1935] 1 K.B. 286; 104 L.J.K.B. 218; 51 T.L.R. 171; 152 L.T. 330; 99 J.P. 87; 33 L.G.R. 20; Digest Supp.

(2) *Errington* v. *Minister of Health,* [1935] 1 K.B. 249; 104 L.J.K.B. 49; 152 L.T. 154; 99 J.P. 15; 51 T.L.R. 44; 78 Sol. Jo. 754; 32 L.G.R. 481, C.A.; Digest Supp.

(3) *Local Government Board* v. *Arlidge,* [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 30 T.L.R. 672; 12 L.G.R. 1109, H.L.; 38 Digest 97, *708.*

(4) *Board of Education* v. *Rice,* [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 27 T.L.R. 378; 55 Sol. Jo. 440; 9 L.G.R. 652, H.L.; 38 Digest 602, *290.*

(5) *Jackson* v. *Barry Rail Co.,* [1893] 1 Ch. 238; 68 L.T. 472; 9 T.L.R. 90; 2 R. 207, C.A.; 2 Digest 380, *424.*

Appeal from an order of SWIFT, J., made upon an application by H. J. Offer and his wife under s. 11, (3), of the Housing Act, 1930, for an order to quash a clearance order made by the Kingston-upon-Thames Corporation.

The facts as set out in the judgment of SWIFT, J., were these: "Mr. and Mrs. Offer owned a number of dwelling-houses which were included in the Kingston-upon-Thames (Canbury Passage, Area A) Clearance Order, 1934, and having received notice of the making of the order they objected in the manner prescribed by the Housing Act, 1930, to the Minister of Health. The Minister caused a public local inquiry to be held by Mr. A. R. Dent, one of his inspectors, at which inquiry objectors were given an opportunity of presenting their cases in opposition to the making of the order. Mr. Offer and his wife were represented at that inquiry by counsel. It was elicited by counsel on their behalf from Mr. Perry, the chief sanitary inspector of the corporation, that before the area was officially declared a clearance area Mr. Collin, the senior housing inspector of the Ministry, had visited the area and inspected it along with Mr. Perry. Although Mr. Perry would not go the whole length, I think, probably, the suggestion was right that the effect of what Mr. Collin said at the inspection encouraged the corporation to declare the area a clearance area. What the inspector said, according to Mr. Perry's recollection, was that the houses appeared to him to be houses which the corporation could deal with under the Housing Act, 1930. Upon that counsel for the present applicants intimated to the inspector that he proposed to take exception to this preliminary visit of inspection by Mr. Collin, of which his clients had had no notice, and at which they had had no opportunity of being present."

In giving judgment, Swift, J., said: "This case has been presented to me by Mr. Hill, who contended that the Minister, acting through his officials, is at all times a judicial or quasi-judicial authority, or, if he was not even before objection a quasi-judicial authority, still by his conduct before objection was made he had put it out of his power to act impartially when the objection had to be heard and determined. I cannot distinguish the position of the Minister in the *Birkenhead* (*Cambridge Place*) *Clearance Order Case* (1) from the position of the Minister in the *Kingston-upon-Thames* (*Canbury Passage, Area A*) *Clearance Order Case*. It is not necessary for me to repeat what I said in the *Birkenhead Case* (1) I propose to follow it, and if this case goes to the Court of Appeal, then the reasons which I gave in the *Birkenhead Case* (1) can be examined and criticised as though I had given them in this case. In my view, the Minister here was doing his bounden duty under the Act in advising local authorities as to the scope and operation of the Act, and the steps which they could or might take under it, and I see no reason for thinking that he has done anything which is in the least degree wrong or which invalidates his order. This application must be dismissed." The applicants appealed.

H. A. Hill for the applicants.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *H. L. Parker* for the Minister were not called upon to argue.

GREER, L.J.—This is an appeal by the owner of certain property in Kingston-upon-Thames, which has been included in a clearance order. Under the Housing Act, 1930, a clearance order was made by the local authority in reference to an area which is called the Canbury Passage, Area A. After the clearance order was made objections were taken to the order in accordance with the statutory provisions. It then became the duty of the Minister of Health to cause a public inquiry to be held in order that the objections of the objectors might be considered by the inspector who held the inquiry, and that a report should be made by him to the Minister before the Minister decided whether the order should or should not be confirmed. In a case of that sort the order has no effect after there has been a public inquiry until the Minister has considered the result of the inquiry into the objections which have been made and the report of the inspector whom the Minister has caused to hold the inquiry.

In these circumstances I have not the slightest doubt that the Minister, when he comes finally to deal with the subject-matter, is acting in a semi-judicial capacity, and that, once the objections have been heard and the report has been made, he is not entitled—as we held in *Errington* v. *Minister of Health* (2)—to hear one side in the absence of the other, namely, either to hear the local authority in the absence of the property-owning objector, or to hear the property-owning objector in the absence of the local authority. He must, in giving his final decision, act judicially, but by the statute power is expressly given to the Minister to deal with matters of this kind and he has a general jurisdiction to exercise his powers for the purpose of maintaining the good health of the inhabitants of this country. Under s. 117 of the Housing Act, 1925, which has to be read as one with and as part of the Housing Act, 1930, he has these powers:

> "If it appears to the Minister that owing to density of population, or any other reason, it is expedient to inquire into the circumstances of any area with a view to determining whether any powers under this Act should be put into force in that area or not, the Minister may require the local authority to make a report to him containing such particulars as to the population of the district and other matters as he may direct, and the local authority shall comply with the requirement of the Minister, and any expenses incurred by them in so doing shall be paid as expenses incurred in the execution of such part of this Act as the Minister may determine."

Surely that is not confined merely to asking for a report without, first of all, making some investigation whether it is a proper case for a report or not, or making an investigation after the report has been made in order to see whether or not further action should be taken? To my mind, Parliament intended that these semi-official duties should be conferred on a Minister who naturally will have some knowledge of the matter before he begins his semi-judicial inquiry, and will possibly have had communications before what I have called the lis is joined between the objecting property owners and the local authority, and have had some knowledge and given some opinion about it.

All that was done here is stated in Mr. Collin's affidavit, which has been read by counsel for the applicants. It is this. Before there was any knowledge whether there would be any objection by any property owner at all, and before any step had been taken to put the Act into force with regard to any area in Kingston, one of the Minister's inspectors was asked by the representatives of the corporation of Kingston-upon-Thames with regard to their 1933 five-year slum clearance scheme. A circular was sent out by the Minister on April 6, 1933, in which he stated that he was prepared to place the services of his staff at the disposal of local authorities who found any difficulty, technical or otherwise, in preparing their programmes. Then Mr. Collin goes on in his affidavit to say:

> "I declined to give any advice as I was not sufficiently acquainted with the conditions in the borough."

At that time there could not be any complaint, and was not, about what was done by the inspector on this occasion. The affidavit continues:

> "I cannot remember exactly what was said by me at the meeting of Sept. 11, 1933, but I probably indicated in a general way the matters which the council should consider before they decided upon any course of action."

He then inspected the district with the sanitary inspector, Mr. Perry and he says:

> "As a result of this inspection I informed Mr. Perry that on the information then before me the properties which I had seen appeared, primâ facie, to be the class of property which other local authorities were including in clearance orders."

I cannot conceive what objection can be taken to the making of that statement to the corporation by the inspector. It did not in any way bind either Mr. Perry or any other person who might hold the inquiry, or the Minister of Health, to any opinion upon the question which might ultimately have to be determined whether certain objections, if made by the owners, ought to be given effect to and the scheme, therefore, refused confirmation. It was in no way inconsistent with the duty which the Minister would have to perform when he came to exercise his powers of saying whether he would or would not confirm the order made by the local authority. I cannot conceive, therefore, the slightest ground for saying that what had been done in any way prejudiced the decision which was finally made by the Minister of Health on the report of the inspector and after full consideration of the objections which had been made.

It seems to me that the applicants have no ground for complaint against the order which was made. There is no ground for saying that the order was one which ought to be quashed because it was made in a semi-judicial inquiry by a tribunal which had acted contrary to natural justice. I see no reason whatever to suppose that the order was made in any such circumstances, or that anything improper was done from beginning to end. I agree, although, perhaps, not for entirely the same reasons, with the decision of the learned judge. I see nothing in the decision in this case at all inconsistent or contrary to the decision in *Errington* v. *Minister of Health* (2). That case depended on different facts and upon the action of the Minister, who, after a public inquiry had been held, held a private inquiry to which the property owners were not invited and took into consideration ex parte statements with which the owners had had no opportunity of dealing.

For these reasons I think that the judgment was quite right, and the appeal will be dismissed, with costs.

SLESSER, L.J.—I am of the same opinion. The problem which has been raised in this case by counsel for the applicants is one which has arisen in many cases where public authorities are entrusted both with executive and with quasi-judicial functions. The principles on which such public authorities have to proceed have been laid down with great clarity by the House of Lords in the leading case of *Local Government Board* v. *Arlidge* (3), following a decision of the House of Lords in *Board of Education* v. *Rice* (4). Lord Haldane, in his speech in *Local Government Board* v. *Arlidge* (3), points out that although the tribunal must act in accordance with natural justice, yet the actual limits of its obligations must be considered in respect of the other obligations imposed on it by statute. Lord Haldane said ([1915] A. C. at p. 132):

> "The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a court of law tradition in this country has prescribed certain principles to which, in the main, the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration rather than to the exercise of the judicial functions of an ordinary court, to authorities whose functions are administrative and not in the ordinary sense judicial."

What is complained of in this case—and this is the ground for impeaching this order under s. 11 (3), of the Housing Act, 1930—is that the body which had in its quasi-official function to consider whether an order should be confirmed or not, had previously given advice on the matter, or some part of the matter, upon which it had to determine, and that, therefore, it did not arrive at the determination under the Act with an open mind. Applying the test which Lord Haldane, in *Arlidge's Case* (3), tells us to apply, though the problem there was different, we come to this result, that the Housing Act, 1930, and the Housing Act, 1925, both give to the Minister of Health the very right which is here complained of—that is to say, the right to give the advice to local authorities and to make inquiries.

My Lord has referred to s. 117 of the Act of 1925, which is to be read together with the Act of 1930, and which in terms says:

> "If it appears to the Minister that owing to the density of population, or any other reason, it is expedient to inquire into the circumstances of any area with a view to determining whether any powers under this Act should be put into force in that area or not, the Minister may require the local authority to make a report to him."

Our attention has been drawn to other consequential provisions in the Act of 1930, which make it clear beyond question that the Minister is acting fully within his rights in proffering or giving advice to local authorities. If the Minister has that right to give that advice, and also has the duty imposed on him under s. 2 of the Housing Act, 1930, of confirming orders, it follows that he must or may carry out both these obligations, and they cannot be said to be contrary to one another when the legislature has in fact given him the power both to do the one and to do the other—namely, first give the advice, and, secondly, consider quasi-judicially the confirmation of the order. Such a provision does not seem to me to be a very startling one.

Here we are dealing with legislation conferring rights and obligations, but a very similar problem long ago arose in a case where the parties to a contract had agreed that the person who had to perform certain duties as between the parties should also act as their arbitrator—such as in the case of an engineer, in building and similar contracts, as was pointed out by Bowen, L.J., in *Jackson* v. *Barry Rail. Co.* (5), which is the leading case on that class of authority, where the parties had agreed that the engineer who knew all the facts and had authority, and was to act in that capacity, none the less was to be the arbitrator.

Although we have not an agreement but an obligation or right imposed by the legislature, the result, to my mind, between the parties is precisely the same, and to say that the Minister's order is invalid because he is doing the very thing which the Act authorises him to carry out appears to me, with every respect to counsel for the applicants, to be unarguable. I agree with my Lord that there is no relation at all between this case and *Errington* v. *Minister of Health* (2), which lays down that the Minister must act, when he has to perform quasi-judicial functions, in a quasi-judicial manner.

ROCHE, L. J.—But for the earnest argument of counsel for the applicants I should have thought this case was difficult to argue. I agree that the appeal should be dismissed for the reasons given by the Lords Justices who have given judgment.

I only desire to add a few words with regard to the case of *Errington* v. *Minister of Health* (2). I have nothing to add or to take away from what I said in that case. With regard to the distinction between that case and the present case I have nothing to add to that which Swift, J., said in his judgment in *Re Birkenhead (Cambridge Place) Clearance Order*, 1934, *Ex parte Frost* (1), to which he referred in his judgment in this case. I am not referring to the earlier remarks of the learned judge where, with a humility that I cannot help thinking was undue, he professes an inability to understand *Errington's Case* (2) but I am referring rather to the passage where the learned judge says:

> "From the moment an objection is made the Minister is exercising quasi-judicial functions, but it seems to me to be clearly recognised by the Court of Appeal that up to the time of objection being made the Minister acts in an administrative, and not a judicial, capacity."

That shows plainly that he quite well understood the difference between the two cases, and expresses the difference so admirably that I desire to adopt and approve his language.

Appeal dismissed.

Solicitors: *H. Chandler; Solicitor to the Ministry of Health.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*

WALKER *v.* BAIRDS & DALMELLINGTON, LTD.

[HOUSE OF LORDS (Lord Tomlin, Lord Thankerton, Lord Macmillan, Lord Wright, and Lord Alness), May 13, June 3, 1935]

[Reported 1935 S.C. 28; 1935 S.L.T. 387; 153 L.T. 322; 28 B.W.C.C. 213]

Workmen's Compensation—Injury by accident—Broncho-pneumonia—Result of immersion in cold water to clear mine sump—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), s. 1 (1).

A workman was employed by the respondents to clean out a sump in their colliery into which water was collected from the underground workings. In carrying out the work it was necessary for the workman to stand in cold water about waist-deep. After coming out of the sump on the material occasion he contracted a chill which developed into broncho-pneumonia, from which he died. On an application by his widow for compensation under s. 1 (1) of the Workmen's Compensation Act, 1925.

Held: in the circumstances the disease from which the workman died was a "personal injury by accident" within s. 1 (1), and, as it was not disputed that it arose out of and in the course of his employment, the widow was entitled to compensation.

Notes. The Workmen's Compensation Act, 1925, was repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the latter Act provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the wording of s. 1 (1) of the Act of 1925.

Considered: *Fife Coal Co.* v. *Young*, [1940] 2 All E.R. 85. Referred to: *Lochgelly Iron & Coal Co.* v. *Walkenshaw* (1935), 28 B.W.C.C. 230; *Patrick* v. *Sharpe*, [1954] 3 All E.R. 216.

As to "accidents" within the Workmen's Compensation Acts, see 34 HALSBURY'S LAWS (2nd Edn.) 816 et seq., and for cases, see 34 DIGEST 266 et seq. As to Workmen's Compensation Act, 1925, see 16 HALSBURY'S STATUTES (2nd Edn.) 202, and for National Insurance (Industrial Injuries) Act, 1946, see ibid., 797.

Cases referred to:

(1) *Raeburn* v. *Lochgelly Iron and Coal Co.*, 1927 S.C. 21; 1926 S.N. 138; 1926 S.L.T. 728; Digest Supp.

(2) *Treloar* v. *Falmouth Docks and Engineering Co. Ltd.*, [1933] A.C. 481; 102 L.J.K.B. 708; 148 L.T. 507; 49 T.L.R. 250; 26 B.W.C.C. 214, H.L.; Digest Supp.

(3) *Partridge Jones and Paton, Ltd.* v. *James*, [1933] A.C. 501; 102 L.J.K.B. 760; 148 L.T. 553; 77 Sol. Jo. 100; 49 T.L.R. 233; 26 B.W.C.C. 277, H.L.; Digest Supp.

(4) *Drylie* v. *Alloa Coal Co.*, 1913 S.C. 549; 50 S.L.R. 350; 1913, 1 S.L.T. 167.

(5) *Brown* v. *John Watson, Ltd.*, [1915] A.C. 1; 83 L.J.P.C. 307; 111 L.T. 347; 30 T.L.R. 501; 58 Sol. Jo. 533; 7 B.W.C.C. 259, H.L.; 34 Digest 268, *2284*.

(6) *Fenton* v. *Thorley & Co., Ltd.*, [1903] A.C. 443; 72 L.J.K.B. 787; 89 L.T. 314; 52 W.R. 81; 19 T.L.R. 684; 5 W.C.C. 1, H.L.; 34 Digest 266, *2264*.

(7) *Ismay, Imrie & Co.* v. *Williamson*, [1908] A.C. 437; 77 L.J.P.C. 107; 99 L.T. 595; 24 T.L.R. 881; 52 Sol. Jo. 713; 1 B.W.C.C. 232, H.L.; 34 Digest, 267, *2276*.

(8) *Clover, Clayton & Co.* v. *Hughes*, [1910] A.C. 242; 79 L.J.K.B. 470; 102 L.T. 340; 26 T.L.R. 359; 3 B.W.C.C. 275; *sub nom. Hughes* v. *Clover, Clayton & Co.*, 54 Sol. Jo. 374, H.L.; 34 Digest, 273, *2316*.

(9) *Welsh* v. *Glasgow Coal Co. Ltd.*, 1916 S.C. (H.L.) 141; [1916] 2 A.C. 1; 53 S.L.R. 311; 1916, 1 S.L.T. 272.

(10) *Lyons (or Docherty)* v. *Woodilee Coal and Coke Co. Ltd.*, 1917 S.C. 48; 54 S.L.R. 404; 1917, 1 S.L.T. 274; 86 L.J.P.C. 137; 117 L.T. 65; 61 Sol. Jo. 490, H.L.

(11) *Dennis* v. *Midland Rail. Co.* (1921), 90 L.J.P.C. 144; 125 L.T. 545; 37 T.L.R. 623; 65 Sol. Jo. 511; 14 B.W.C.C. 71, H.L.; 34 Digest 269, *2288*.

(12) *M'Millan* v. *Singer Sewing Machine Co. Ltd.*, 1913 S.C. 346; 50 S.L.R. 220; 1912, 2 S.L.T. 484.

Appeal from a judgment of the Second Division of the Court of Session (reported 1934 S.C. 484) arising out of an application by Mrs. Mary Currie McCrorie or Walker in the Sheriff Court at Ayr for an award of compensation under the Workmen's Compensation Act, 1925, in respect of the death of her husband, John Walker, underground fireman, while in the employment of Bairds and Dalmellington Limited, coalmasters, Auchincruive Collieries, Prestwick. The Sheriff-Substitute refused compensation and, at the request of the applicant, stated a Case for appeal.

The Case set forth:

"1. On March 24, 1933, the deceased John Walker was in the employment of the respondents at No. 3 Auchincruive Colliery as an underground fireman. 2. At said colliery there is a sump into which water from the underground workings gathers, and from which the water is taken to the surface by a suction pipe. 3. Owing to sludge or dirt accumulating in the bottom of the sump, tending to choke the suction pipe, the sump requires to be cleaned about once every three months, and it had been the practice so to clean it. 4. The deceased had for several years prior to his death been regularly employed to clean out the sump. 5. The work of cleaning out the sump was not part of the deceased's work as an underground fireman, but was extra work, which he voluntarily undertook, and for which he received pay equal to that for one and one-half shifts at his ordinary work. 6. It is not proved that specially qualified men were necessary for the work. 7. On March 24, 1933, the deceased, who had worked at his ordinary work on the morning shift from 6.30 a.m. to 2.30 p.m., was requested to clean the sump that afternoon. 8. He then went home, had his dinner, returned to the pit, and about 5 p.m. went down to the pump-room, which is above the sump, changed into old clothes and put on the oilskins which are supplied for this work, and then proceeded down a ladder on to a scaffolding above the water where he waited in accordance with the usual practice, along with another man who was employed on the job, until the water was pumped down to the level at which it should be when the sump is to be cleaned. 9. When the water reached the proper level, which was about 3½ ft. from the bottom of the sump, the deceased and the other man entered the water and proceeded to clear away the sludge in the usual way, which was by bending forward and pulling a pail along the bottom of the sump and scooping up the sludge in the pail. 10. To do this the men had usually to stand in water about waist-deep, and the deceased had to do so on this occasion. 11. The oilskins provided for the men do not protect them from getting wet when they are in the sump. 12. While working in the sump the deceased was wet through up to the waist. 13. The water felt cold to the men when they entered it, but that it is not proved that the water was unusually cold. 14. The pails, when filled, were attached to a rope, quickly hauled up, emptied, and returned by the rope, and there was very little waiting for the return of the empty pails. 15. The time during which the deceased was in the water cleaning the said sump was not less than thirty-five minutes. 16. The usual time during which the men required to be in the water for this purpose is between half-an-hour and an hour. 17. After cleaning the sump, the deceased returned to the pump-room, took off his wet clothes, washed himself in cold water, and put on his ordinary clothes, a proceeding which occupied about twenty minutes. 18. Thereafter he walked home with the other man who had been in the sump and an oversman, arriving home about 7 p.m. 19. While dressing in the pump-room the deceased had an appearance of being cold and shivering, but did not make any remark about it. 20. When walking home the deceased did not complain of cold. 21. When he arrived home the deceased told the appellant that the water in the sump had been cold and took a hot bath to warm him. 22. He then had some food, and after that sat in the house until he went to bed about ten o'clock. 23. Between two and four o'clock the next morning the deceased became unwell, suffering from rigor and shivering and vomiting, and during the day developed symptoms of broncho-pneumonia. 24. When a doctor was called in on the afternoon of that day (March 25), deceased explained to the doctor that he had been cleaning the sump at the pit on the previous day and had felt chilled after doing so. 25. On the following day the deceased had become worse and was definitely suffering from broncho-pneumonia, which became steadily worse until he died of broncho-pneumonia on March 30, 1933. 26. The appearance of coldness and shivering which the deceased had when he left the sump, was a symptom that he was suffering from a chill caused by the exposure to cold and water while he was cleaning the sump. 27. The rigor, shivering, and vomiting from which he suffered between two and four o'clock next morning were symptoms that he was suffering from a chill. 28. Broncho-pneumonia is an infection due to organisms causing the infection, which are commonly present in the nose and throat of an apparently healthy person, invading the lungs, the invasion being made possible either by the inhalation of foreign particles or by a chill, involving congestion of the lining membranes of the respiratory tract. 29. Broncho-pneumonia so caused by a chill may not develop immediately, but may appear in any time from three to forty-eight hours after the chill. 30. As an inference from the foregoing facts, the broncho-pneumonia from which the deceased died was caused by a chill which he contracted through exposure to cold and water while cleaning the sump. On these facts I found in law that the death of Walker was not caused by accident arising out of and in the course of his employment, and accordingly, on Jan. 10, 1934, I found the appellant liable to the respondents in expenses."

The Sheriff-Substitute added the following note to the case: "I felt that, on the facts, I was entitled to make the inference that the broncho-pneumonia, from which the deceased died, was due to a chill contracted while the deceased was working in the sump. It was argued for the defence that this was purely speculative, and that the deceased might have caught the chill on his way home, or as a result of the hot bath which he took after he got home. And some endeavour was made in the medical evidence for the defence to suggest that the hot bath was the cause of the whole trouble. I did not, however, find that evidence at all convincing, and much preferred the medical evidence for the pursuer which was very thorough. The incident of the bath did not come out in time to allow the pursuer's medical witnesses to be examined on it, but it did not appear to me that what evidence was led about it would materially affect the conclusions arrived at by them. On the other hand, I found very considerable difficulty in regard to the question whether the deceased's death was caused by accident. The puzzle to me was to find anything which could be described as the accident, unless the actual catching of a chill when working in cold water can be so described. The pursuer's agent founded on the nature of the work, maintaining that it was extraordinary work, that because the deceased held the position of underground fireman, extraordinary people were required to do it, and that an extraordinary price was paid for it. But I could not follow this. At any rate the only meaning in which the work can be described as extraordinary is that it was not the work which anyone ordinarily did, because it was only required at intervals. There was certainly nothing fortuitous or abnormal about it. And I could find no evidence to justify a finding that any particular qualifications were required for the work. No doubt it was well paid—as compared with the other work in the pit—but I do not know what inference to make from this, unless it is that the wage was to tempt people to do work which was wet and dirty. An attempt was made to show that it was risky work, but the witnesses other than the medical ones would not accept this. No doubt, however, it seemed to follow from the medical evidence that the work is of a kind that involves more than the ordinary risk of catching a chill. Does it follow from this that the catching of a chill in such an employment is an accident? On the contrary, the view would rather seem to be that, where a risk of some disease is a necessary incident of the occupation, the catching of that disease is not an accident, whereas if the disease were a rare one, it might be (*Raeburn* v. *Lochgelly Iron and Coal Co.* (1). I was referred to two cases (*Treloar* v. *Falmouth Docks and Engineering Co. Ltd.* (2), and *Partridge Jones and John Paton Ltd.* v. *James* (3), which illustrate how little is necessary nowadays to satisfy the requirement of an 'accident.' But these cases scarcely seem to me to be yet applicable to the case of a disease caught as the result of the nature of the work. I was also, of course, referred to the well-known cases of *Drylie* v. *Alloa Coal Co.* (4) and *Brown* v. *John Watson Ltd.* (5), but I have found nothing in the present case which would put it on a par with these. The cleaning of the sump seems to have been carried out in the usual way and nothing of any kind unusual or abnormal seems to have happened. It was a job that required to be done once every three months and so may be regarded as routine work. There was nothing fortuitous about it having to be done on the day in question by the deceased, because he has been regularly doing this work for years. Accordingly, I felt that, as the authorities do not appear to have yet gone the length of holding that the mere contracting a disease as a result of the nature of the work, is 'accident' within the meaning of the Act, I was bound to decide this question in the defenders' favour."

The question for the opinion of the court was: "On the foregoing facts was I entitled to hold that Walker's death was not caused by accident arising out of and in the course of his employment?"

The Second Division held, following *Treloar* v. *Falmouth Docks and Engineering Co., Ltd.* (2) and *Partridge Jones and Paton, Ltd.* v. *James* (3), that, since it was established that the chill which caused the disease had arisen out of and in the course of his employment, the workman's death from the disease was the result of an "injury by accident" within the meaning of s. 1 (1), of the Workmen's Compensation Act, 1925. The employers appealed.

James Keith, K.C., and *C. J. D. Shaw* for the appellants.

W. D. Patrick, K.C., and *John Cameron* for the respondent were not called upon to argue.

The House took time for consideration.

June 3. **LORD TOMLIN.**—In this case your Lordships are invited by the appellants, the employers of a deceased workman named Walker, to reverse an interlocutor of the judges of the Second Division of the Court of Session in Scotland, pronounced in a stated Case under the Workmen's Compensation Act, 1925, from the Sheriff Court of Ayrshire at Ayr. The respondent before your Lordships is the pursuer claiming compensation in respect of the death of her husband the deceased workman.

The Sheriff-Substitute, on the facts found, held that Walker's death was not caused by accident arising out of and in the course of his employment, and in the stated Case raised for the opinion of the court the question of law whether upon the facts stated in the Case he was entitled to hold that the death of Walker was not caused by accident arising out of and in the course of his employment. Their Lordships of the Second Division answered the question of law stated in the Case in the negative, sustained the appeal, reversed the determination of the Sheriff-Substitute and made to him the necessary consequential remit of the case.

The facts found in the stated Case included in effect the following: In the afternoon of March 24, 1933, Walker, who was an underground fireman in the employment of the appellants, was engaged in cleaning out the sludge or dirt in a sump of water in the workings of the colliery. This was extra work which he voluntarily undertook for special pay and which he had done from time to time for several years. Walker put on oilskins supplied for the work. The oilskins did not protect their wearer from wet when he was standing in the water. Walker entered the sump and while working in the sump stood, as was usual in doing this work, waist-deep in water. He was in the water not less than thirty-five minutes. The water was not unusually cold. Between 2 and 4 o'clock next morning Walker became unwell, suffering from rigor and shivering and vomiting, and during the day developed symptoms of broncho-pneumonia, from which he died on March 30, 1933.

The five concluding paragraphs of the findings of fact in the stated Case were as follows:—

> "26. The appearance of coldness and shivering which the deceased had when he left the sump, was a symptom that he was suffering from a chill caused by the exposure to cold and water while he was cleaning the sump. 27. The rigor, shivering, and vomiting from which he suffered between two and four o'clock next

morning were symptoms that he was suffering from a chill. 28. Broncho-pneumonia is an infection due to organisms causing the infection, which are commonly present in the nose and throat of an apparently healthy person, invading the lungs, the invasion being made possible either by the inhalation of foreign particles or by a chill, involving congestion of the lining membranes of the respiratory tract. 29. Broncho-pneumonia so caused by a chill may not develop immediately, but may appear in any time from three to forty-eight hours after the chill. 30. As an inference from the foregoing facts, that the broncho-pneumonia from which the deceased died was caused by a chill which he contracted through exposure to cold and water while cleaning the sump."

It may well be doubted whether when there first appeared upon the statute book the words "personal injury by accident arising out of and in the course of the employment," the mind of that elusive personality sometimes called "the plain man" would have supposed that these words covered such a case as the present, but your Lordships have to-day to consider the words with the advantage and in the light of the expositions of their meaning which have from time to time been made in your Lordships' House. The ascertainment of that meaning has been a progressive process, certainly a broadening down from precedent to precedent. It may be that in this case the extreme frontier of the area covered by the words has been reached, but that the findings of fact bring the present case within that area, cannot, in my opinion, be open to serious question having regard to the previous decisions.

Some thirty-two years ago in *Fenton* v. *Thorley & Co.* (6) a workman employed to turn the wheel of a machine ruptured himself by an act of over-exertion and was held by your Lordships' House to be entitled to compensation. In the course of his speech in that case LORD MACNAGHTEN said ([1903] A. C. at p. 448):

> "Now the expression 'injury by accident' seems to me to be a compound expression. The words 'by accident' are, I think, introduced parenthetically as it were to qualify the word 'injury' confining it to a certain class of injuries, and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design."

Later on the noble Lord adds:

> "The truth is that in the Act," (he is referring to the Act of 1897) "which does not seem to have had the benefit of careful revision, 'accident' and 'injury,' that is, injury by accident, appear to be used as convertible terms . . ., I come, therefore, to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked for mishap or an untoward event which is not expected or designed."

Five years later, in *Ismay, Imrie, & Co.* v. *Williamson* (7), a claim was made in respect of the death of a workman who, when in a weak and emaciated condition, received a heat-stroke while raking out ashes from under the boiler in the stokehole of a steamship and died from the effects of it. Your Lordships' House (LORD MACNAGHTEN dissenting) held that the case fell within the Act. LORD LOREBURN said ([1908] A. C. at p. 439):

> "In my view the man died from an accident. What killed him was a heat-stroke coming suddenly and unexpectedly upon him while at work. Such a stroke is an unusual effect of a known cause, often, no doubt threatened, but generally averted by precautions which experience, in this instance, had not taught. It was an unlooked for mishap in the course of his employment. In common language, it was a case of accidental death."

LORD ASHBOURNE ([1908] A.C. at p. 441) observed:

> "Although a heat-stroke may be called a disease, it is in this case, in my opinion, a disease directly caused by an accident arising out of or in the course of an employment, particularly dangerous to Williamson, in consequence of his weak state of health. Its not being scheduled as an industrial disease in the Act of 1906 does not

> affect the question, for the Act expressly provides that 'nothing shall affect the rights of a workman to recover compensation in respect of a disease to which the section does not apply, if the disease is a personal injury by accident within the meaning of the Act.' I do not at all say that all diseases arising out of or in the course of employment should be regarded as a personal injury by accident, but I am of opinion that under the circumstances of this case and its facts Williamson was killed by a personal injury by accident."

Lord Macnaghten ([1908] A.C. at p. 441) dissented, saying:

> "That the illness by which the deceased lost his life was one arising out of and in the course of his employment cannot be disputed. But I agree with Holmes, L.J., that it does not come under the description of a 'personal injury by accident.' That expression, as it seems to me, would be equally applicable or equally inapposite in the case of an attack of bronchitis or pneumonia brought on by a sudden and violent chill disregarded or neglected at the outset."

Lord Macnaghten, in the passage which I have last quoted, appears to have anticipated such a case of death by disease as is now before your Lordships, and it is not to be doubted that upon the basis of the principles enunciated by the majority of your Lordships' House on that occasion he would have accepted the view that such a case might fall within the Act, or, in other words, that a disease causing death may in certain circumstances be within the meaning of the Act "personal injury by accident."

At a later stage, in *Clover, Clayton & Co.* v. *Hughes* (8), your Lordships' House held that where a workman suffering from a serious aneurism fell down dead from a rupture of the aneurism while tightening a nut with a spanner it was a case of "personal injury by accident arising out of and in the course of the employment" within the Workmen's Compensation Act of 1906. In that case Lord Macnaghten said ([1910] A.C. at p. 249):

> "The real question, as it seems to me, is this, 'Did it arise out of his employment?' On this point the evidence before the county court judge was undoubtedly conflicting. But he has held that it did, and I think there was sufficient evidence to support that finding, though I do not say I should have come to the same conclusion myself. The death, the learned judge says, was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal. The fact that the man's condition predisposed him to such an accident seems to me to be immaterial. The work was ordinary work, but it was too heavy for him. It must be taken on the finding of the learned county court judge that the accident was unexpected by the workman. It can hardly be supposed that he intended to kill himself. The fact that the result would have been expected, or indeed contemplated as a certainty, by a medical man of ordinary skill if he had diagnosed the case is, I think, nothing to the purpose."

This case seems to me to establish that there may be personal injury by accident even though the employee's work has proceeded in the normal way and even though the injury is due to the presence of a special condition in the employee's body.

In *Brown* v. *John Watson, Ltd.* (5), where a miner died from pneumonia brought on by a chill due to exposure consequent on a wreck in one of the shafts of the mine, the finding of the arbitrator that the deceased sustained an injury by accident arising out of and in the course of his employment was supported. In that case it is true that some emphasis seems to have been put on the fact that the exposure followed upon the accidental wreck in the shaft, but this element was not present in the next case which I shall mention.

In *Welsh* v. *Glasgow Coal Co., Ltd.* (9), a workman claimed compensation for incapacity from rheumatism occasioned by standing up to his chest in water for some hours doing work which was not his ordinary job. It was held in this House that the arbitrator was entitled to hold that the workman had met with a personal injury by accident within the meaning of the Act. Lord Haldane thought that Lord Macnaghten's definition of an accident in *Fenton* v. *Thorley & Co.* (6) of

> "an unlooked for mishap or an untoward event which is not expected or designed"

A covered the case. LORD KINNEAR explained that the argument that there must be some distinct event or occurrence which taken by itself can be recognised as an accident had been already rejected by your Lordships in *Fenton* v. *Thorley & Co.* (6). His Lordship also explained that there was no inconsistency between *Brown* v. *John Watson, Ltd.* (5) and *Fenton* v. *Thorley & Co.* (6).

The latest stage in the progression was reached in *Treloar* v. *Falmouth Docks and* B *Engineering Co., Ltd.* (2); and *Partridge Jones and Paton, Ltd.* v. *James* (3). In each of these cases a man with heart disease died at his work which he was or had been doing in the ordinary way, this work being found to have contributed to his death. There was in neither case any distinct event or occurrence which taken by itself could be recognised as an accident. Each case was held to be within the Act.

These decisions inescapably drive, or, perhaps, I should say lead, me to the conclusion C that upon the findings of fact in the present case the Sheriff-Substitute was bound to hold that Walker's death was caused by personal injury by accident arising out of and in the course of his employment. The disease resulted from the sudden and unexpected onset of a chill contracted in conditions normal in carrying out the workman's job in the accustomed manner and frequently experienced by him on previous occasions without ill results. The onset of the chill, the direct result of doing the work, was "an un- D toward event" and not "expected" or "designed."

In my view, based upon the previous pronouncements of your Lordships' House, the disease which was the injury was in these circumstances the result of accident, and it is not questioned that the injury by accident (if such it be within the meaning of the Act) arose out of and in the course of the employment. But it was said in argument that there are other decisions of your Lordships' House which are inconsistent with this E conclusion, and reference was made to *Lyons* (*or Docherty*) v. *Woodilee Coal and Coke Co., Ltd.* (10) and *Dennis* v. *Midland Rail. Co.* (11). It is, of course, obvious that, having regard to the nature of the principles which have been laid down by your Lordships' House and to the varied circumstances of particular cases, it may sometimes not be easy from a perusal of the report to appreciate why a case has fallen upon one side rather than upon the other side of the dividing line, but each of the cases to which I have F just referred seems to have been determined upon the basis that the injury did not arise out of or in the course of the employment. In the first case the matter was treated as concluded by the arbitrator's finding to that effect, and in the second case the majority of the House held that the real cause was the workman leaving his house without food or proper clothing, and, therefore, that the injury did not arise out of and in the course of the employment. LORD SUMNER's view that the element of accident could not be G present in such a case seems to me difficult to reconcile with the earlier decisions of your Lordships' House. Moreover, in the latter case there was something in the nature of an added peril though no reference to this element appears to have been made in the judgments. At any rate, I find nothing in those two cases to lead me to think that I have wrongly interpreted the views of your Lordships' House as exemplified in the other cases to which I have referred.

H The opinion expressed by LORD DUNEDIN when Lord President in *M'Millan* v. *Singer Sewing Machine Co., Ltd.* (12) is illustrative of a stage in the progressive process to which I have called attention. Notwithstanding LORD DUNEDIN's protests, your Lordships have, in my view, since advanced a further stage, and because of that advance I reach the conclusion that, having regard to the findings of fact in this case, there was personal injury by accident arising out of and in the course of the employment, and I accordingly that the appeal fails and should be dismissed with costs.

LORD THANKERTON.—It appears from the facts stated by the arbitrator that the deceased workman died from broncho-pneumonia caused by a chill which he contracted through exposure to cold and water while cleaning the sump in the pit. This was part of his normal work, though paid for as extra work, and was being done by him in the normal way; there was nothing abnormal in the workman's health at the time, or in the conditions of cold and exposure under which he was working.

The learned arbitrator found in law that the death of Walker was not caused by accident, on the ground that the authorities had not yet gone the length of holding that the mere contracting of a disease as a result of the nature of the work is "accident" within the meaning of the Act. The Second Division felt bound to take a different view, because of certain decisions of this House. In view of the findings of the arbitrator in the present case, there can be little doubt that, if there was "personal injury by accident" caused to the workman, such injury arose out of and was in course of his employment.

The meaning of the words "injury by accident" have been the subject of consideration in this House in a series of cases which have been so fully reviewed by my noble and learned friend on the Woolsack, that it is unnecessary for me to do so again. It is sometimes the case that the reasons expressed for dissent in a case provide a useful index for the effect of the principles approved of by the majority of the court, and such an index is to be found in the passage from the dissenting speech of Lord Macnaghten in *Ismay, Imrie & Co.* v. *Williamson* (7), which has been quoted by the noble and learned Lord. When that case was followed by the decision of this House in *Clover, Clayton & Co.* v. *Hughes* (8) the subsequent decisions of this House appear to me to have been an inevitable sequel. In my opinion the present case necessarily falls within the principles laid down in *Clover, Clayton & Co.* v. *Hughes* (8). I agree with the reasons and the conclusions expressed by my noble and learned friend.

LORD WRIGHT.—I also agree. I think the question raised in this appeal is clearly covered by the line of authorities in this House to which my noble and learned friend on the Woolsack has referred.

LORD ALNESS.—I have considered and re-considered with care all the decisions which were cited to your Lordships in the course of the excellent argument which we were privileged to hear. In the result, I feel constrained to hold that the Second Division of the Court of Session were right in the conclusion at which they arrived. I must own that personally I feel much sympathy with the views expressed by Lord Dunedin in the case of *M'Millan* v. *Singer Sewing Machine Co., Ltd.* (12). But much water has flowed beneath the bridges since 1913, and many cases under the Workmen's Compensation Act have since been decided. In particular, the cases of the *Falmouth Docks and Engineering Co., Ltd.* v. *Treloar* (2), and *Partridge Jones and Paton, Ltd.* v. *James* (3) seem to me to leave no option but to hold that they cover the decision of this case. There appears to me to be no material distinction in the principle upon which these cases were decided and the principle upon which this case falls to be decided. The reasoning of my noble and learned friend on the Woolsack, regarding that matter, appears to me, if I may respectfully say so, to be irrefragable. I feel that I cannot usefully add to what he has said, and I therefore content myself by saying that I concur in the motion which he has moved.

LORD TOMLIN.—My Lords, I am asked to say that my noble and learned friend **Lord Macmillan** concurs in the opinion which I have delivered.

Appeal dismissed.

Solicitors: *Torr & Co.*, for *Bonar, Hunter, & Johnstone*, W.S., Edinburgh, and *Leonard C. Boyd & Cochrane*, Ayr; *John Kennedy & Co.*, for *Macpherson* and *Mackay*, W.S., Edinburgh, and *McMillan & Howie*, Ayr.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

Re HODGSON. NOWELL *v.* FLANNERY

[Chancery Division (Farwell, J.), November 13, 1935]

[Reported [1936] Ch. 203; 105 L.J.Ch. 51; 154 L.T. 338; 52 T.L.R. 88; 79 Sol. Jo. 880]

Will—"Money"—National savings certificates—War stock—Extrinsic evidence—Admissibility of.

A testatrix by her will bequeathed "my money" to two named persons equally. At the date of her will and also at the date of her death her property consisted of (i) national savings certificates, (ii) war stock, and (iii) cash.

Held: the expression "my money" must, in the absence of any context to the contrary in the will, be given its primary meaning, namely, actual ready money, and money at call or on deposit at a bank, and, therefore, did not include the national savings certificates or the war stock, with regard to which there was an intestacy.

Observations as to the circumstances in which extrinsic evidence is permissible.

Notes. Referred to: *Perrin* v. *Morgan*, [1943] 1 All E.R. 187.

As to the admissibility of extrinsic evidence of a testators' intentions, see 34 Halsbury's Laws (2nd Edn.), 165, para. 217, and for cases on the subject see 44 Digest 614–615, *4409–4425.*

As to the construction of "money" in a will, see 34 Halsbury's Laws (2nd Edn.) 253, para. 307, and for cases on the subject see 44 Digest 721–725, *5710–5764.*

Construction Summons

The testatrix by her will dated July 19, 1934, bequeathed "my money to John Derek Fortescue Flannery and John Stewart Nowell equally divided." She died on July 21, 1934, without leaving any known relatives.

Her property was worth about £1,438 13s. 11d., consisting of National Savings Certificates of the value of £621 13s. 1d., £31 11s. 3½d. War Stock, and the remainder cash.

Letters of administration with will annexed were granted to the plaintiffs, of whom one was J. D. S. Nowell. The defendant was J. D. F. Flannery, who was an infant.

A summons was taken out by the plaintiffs to determine the question whether the National Savings Certificates and the War Stock passed under the will and were included in the expression "my money."

Raymond Jennings for the plaintiffs, the administrators.
J. F. Bowyer for the infant defendant.
Andrewes-Uthwatt for the Attorney-General.

FARWELL, J.—This summons raises a short point on a very short will. It is not without interest: and the conclusion at which I have arrived is one to which I confess I come with some little regret.

The facts are these. The testatrix was a lady who had been a nurse to two families. She had been the nurse of the infant defendant, and also of the plaintiff, John Douglas Stewart Nowell. She was removed to hospital in a very serious state of health: and she was asked by one of her friends whether she would make a will. She was not very willing to do so, but she was pressed to make one, because, as was pointed out to her, if she had no relations, as seemed to be the fact, on her death her property would go to the Crown. In those circumstances, she rather unwillingly did make a will. She apparently had at the hospital with her the whole of her worldly wealth. That consisted of certain National Savings Certificates, a certain amount of War Stock, and a certain amount of money. They were contained in an attaché case, which went with her to the hospital, and were looked after there by the authorities, and were there at the time of her death.

[His Lordship stated the date of the will and the death of the testatrix, and read the will, and continued:] I am entitled to know the surrounding circumstances at the time when the will was made, and at the time of the death. I have already stated how the lady came to be in the hospital; and her position at the time when she made her will. But further, I am entitled to know what her property consisted of at her death. It appears from the evidence before me that [His Lordship stated the facts relating to the estate set out above, and continued:] In construing this will, I have to start with this: that I am bound to give the word "money" its primary meaning, unless I can find something which justifies me in giving it a more extended meaning. What exactly is the meaning of the word "money" in its strict sense I will state in a moment. A B

I desire, however, to say what in my view is the way in which evidence is admissible in a case of this kind: and the use to which it can be put. VICE-CHANCELLOR WIGRAM in his invaluable book states the general conclusion on this matter in the third edition on p. 183 (1) (p. 198, 5th edit.) and I accept as accurate that statement of the law. I think that it comes to this: the duty of the court in the first place is to read the will itself. The court is bound in the first instance to read it, giving the words used their primary and proper meaning. The court is then entitled to look at the surrounding circumstances. If the surrounding circumstances are such that the words of the will, if construed in accordance with their primary meaning, are not apt to apply to any of the circumstances, then the court is entitled, having regard to the surrounding circumstances, to see whether the language used is capable of some meaning other than its ordinary meaning, not for the purpose of giving effect to what the court may think was the intention of the testator, but for the purpose of giving effect to what the intention of the testator is shown to be from the language used, having regard to the surrounding circumstances. In other words, the court is not entitled to disregard the language which the testator has used in order to give effect to what the court may think to have been the intention, but the court is entitled to say that the words which the testator has used were not intended to have their primary meaning if the surrounding circumstances are such as to lead inevitably to that conclusion. C D E

Here I am faced with this. There is nothing in the will but the words "my money." That, by itself, is clearly not sufficient to pass anything but cash, that is to say, actual ready money, money at a bank at call and, having regard to the decisions, money on deposit at a bank, and I have to look at the surrounding circumstances to see whether I ought to give to the word "money" any meaning other than its primary meaning. This lady did possess money, that is to say, cash, and the words "my money" are apt as applied to that—that is to say, she had cash, and the words "my money" are exactly apt to pass that. Am I, then, entitled to say that it was used in some wider meaning? In my judgment the answer to that must be in the negative. Can I, then, say that the National Savings Certificates are money in the strict meaning of that word? It is said that I can on the ground that those certificates are in the same category as money on deposit at a bank, which has been held to be included in the term "money." I regret I am bound to come to the conclusion that the word "money" is not apt to include securities of this nature. It is true that, by giving notice, the money which has been lent to the Government is repaid to the lender; but none the less in my judgment the certificates are not money in any proper sense of the word at all. National Savings Certificates are transferable inter vivos, and can be passed at death. It seems to me impossible to treat them on the same footing as money on deposit at the bank. F G H

On the whole, I have come to the conclusion that this lady died intestate as to the whole of her estate, except what was actually cash, and that neither the National Savings Certificates nor the War Stock pass under this will. I

Solicitors: *Duffield, Bruty & Co.*; *Waltons & Co.*; *The Treasury Solicitor.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

MONROE BROS., LTD. *v.* RYAN

[COURT OF APPEAL (Greer, Maugham and Roche, L.JJ.), March 8, 1935]

[Reported [1935] 2 K.B. 28; 104 L.J.K.B. 450; 153 L.T. 31; 51 T.L.R. 361; 79 Sol. Jo. 320; 40 Com. Cas. 193]

Shipping—Charter-party—Construction—Ship "expected to load about"—Future fixed date—Exceptions—Unavoidable hindrance beyond owners' control—Intermediate charter with other charterers—Delay in loading on second charter due to weather during period of intermediate charter—Consequent delay in proceeding to and arriving at loading port under first charter—Carriage of Goods by Sea Act, 1924 (14 & 15 *Geo.* 5. *c.* 22), *p.* 2, *p.* 5, *Sched. art. IV.*

By a charter-party dated Aug. 2, 1933, shipowners contracted with charterers, that the W. (or substitute at owners' option) "expected ready to load about Sept. 11, 1933," should with all convenient speed proceed to Hamburg and there load from the charterers a cargo. The charter-party provided, inter alia: "10. Charterers or owners not to incur liability for loss arising from frosts, floods, strikes . . . and any other unavoidable accident or hindrances of what kind soever, beyond charterers' or owners' control . . . 13. Should the steamer not be in Hamburg and ready to load within six days after [Sept. 11, 1933] charterers to have the option of cancelling this agreement." By cl. 3 the owners in all matters arising under the contract were to be entitled to the like privileges, rights, and immunities as are contained in ss. 2 and 5 of the Carriage of Goods by Sea Act, 1924, and in art. IV of the Schedule thereto. On Aug. 31, 1933, the shipowners made an intermediate charter with other charterers that the W., then trading and expected ready to load on or about Sept. 6 or 7, should load a cargo of stone at Porthoustock, Cornwall, and deliver it at Felixstowe. The W. arrived at Porthoustock on Sept. 7, but by reason of gales was unable to commence loading until Sept. 11, and so did not reach Hamburg till Sept. 17. On a claim by the charterers under the charter-party of Aug. 2, for, inter alia, demurrage of barges at Hamburg.

Held: the shipowners were liable in damages for the late arrival of the W. at Hamburg because the exceptions in cl. 10 for unavoidable hindrances beyond owners' control, and also (per ROCHE, L.J.) the incorporated provisions of the Act of 1924, applied, not from Aug. 2, the date of the charter-party, but from the time the W. proceeded with all convenient speed to arrive at Hamburg.

Notes. As to the construction of charter-parties see 30 HALSBURY'S LAWS (2nd Edn.) 365, para. 542, and for cases on the subject see 41 DIGEST 332–333, *1872–1875.*

For the Carriage of Goods by Sea Act, 1924, see 23 HALSBURY'S STATUTES (2nd Edn.) 885 et seq.

Cases referred to:

(1) *Samuel Sanday & Co.* v. *Keighley Maxted & Co.* (1922), 91 L.J.K.B. 624; 127 L.T. 327; 38 T.L.R. 561; 66 Sol. Jo. 437; 15 Asp. M.L.C. 596; 27 Com. Cas. 296, C.A.; 39 Digest 554, *1619.*

(2) *Thomas Nelson & Sons* v. *The Dundee East Coast Shipping Co. Ltd.*, 1907 S.C. 927; 44 S.L.R. 661; 15 S.L.T. 38; 41 Digest 451, m.

(3) *Harrison* v. *Garthorne* (1872), 26 L.T. 508; 20 W.R. 722; 1 Asp. M.L.C. 303; 41 Digest 332, *1873.*

(4) *Barker* v. *M'Andrew* (1865), 18 C.B.N.S. 759; 6 New Rep. 227; 34 L.J.C.P. 191; 12 L.T. 459; 11 Jur. N.S. 637; 13 W.R. 779; 2 Mar. L.C. 205; 144 E.R. 643; 41 Digest 332, *1872.*

Appeal from a decision of ATKINSON, J.

Monroe Brothers Limited, owners of the steamship *Wythburn* agreed with Messrs. A. Ryan and Son, charterers, by charter-party dated Aug. 2, 1933 ("Merseycon" form), that the *Wythburn* (or substitute at owners' option) "expected ready to load about Sept. 11, 1933," "being tight, staunch, strong, and every way fitted for the voyage, shall with all convenient speed proceed to Hamburg or so near thereunto as she may safely get, and there load from the said charterers a full and complete cargo" of sugar and salt, and so loaded should proceed to Merchant's Quay, Kilrush, or so near thereto as she might safely get.

By cl. 3 of the charter-party:

> "The owners in all matters arising under this contract shall also be entitled to the like privileges and rights and immunities as are contained in ss. 2 and 5 of the Carriage of Goods by Sea Act, 1924, and in Art. IV of the Schedule thereto."

By cl. 10:

> "Charterers or owners not to incur liability for loss arising from frosts, floods, strikes, lock-outs of seamen, workpeople, or other persons necessary for the performance of this charter-party, disputes between masters and men, and any other unavoidable accident or hindrances of what kind soever, beyond charterers' or owners' control."

By cl. 13:

> "Should the steamer not be in Hamburg and ready to load within six days after the date stated above, charterers to have the option of cancelling this agreement."

By another charter-party, dated Aug. 31, 1933, the shipowners agreed with other charterers that the *Wythburn*, then trading and expected ready to load on or about Sept. 6 or 7, but not before, should load a cargo of stone at Porthoustock (near Falmouth) for Felixstowe. There were exceptions in this charter-party (inter alia) of "perils of the sea" and "all other hindrances whatsoever beyond owners' control." The *Wythburn* arrived at Porthoustock on Sept. 7, 1933, but by reason of gales was unable to load till Sept. 11, so that after discharging her cargo of stone at Felixstowe she did not arrive at Hamburg till Sunday, Sept. 17. She commenced to load on Sept. 18. The shipowners' agent in Hamburg had given to the shippers of the salt and of the sugar notice of readiness to load on Sept. 14. All parties, as appeared from the correspondence, accepted the position that under the charter of Aug. 2 the ship would not be ready to load at Hamburg until about Sept. 14.

On a claim by the shipowners for the balance of freight, which was admitted, the charterers counter-claimed for (*a*) demurrage of barges at Hamburg, £45; (*b*) lighterage at Kilrush, £15 11s. 6d. (the vessel was late for the spring tides); and (*c*) loss on resale of sugar, £60. Atkinson, J., held that the shipowners, by making the second charter on Aug. 31, committed a breach of the warranty—"expected ready to load about Sept. 11"—in the charter of Aug. 2. The shipowners could not avail themselves of the exceptions in that charter, and he gave judgment for the charterers on the counter-claim in respect of claims (*a*) and (*b*), holding that claim (*c*) was too remote.

The shipowners appealed.

Le Quesne, K.C., and *H. I. Nelson* for the shipowners.

R. K. Chappell, K.C., and *F. A. Sellers, K.C.*, for the charterers.

GREER, L.J.—In this appeal we are concerned only with the counter-claim. The action was brought by shipowners to recover a balance of freight of the sum of £61 1s. 6d. There was no defence to the claim, but a counter-claim was allowed by the learned judge for £60 11s. 6d. damages for breach by the shipowners of the charter-party. The charter-party was dated Aug. 2, 1933, and its provisions are in terms which I can quite understand might create considerable difficulties in the mind of a tribunal accustomed to the precision of statements in documents which are usually drawn up by conveyancers. It is, however, a matter of common knowledge among those who deal with commercial documents that difficulties often arise in their construction, because of the way in which such documents are prepared, and because those who use them fail to give sufficient consideration to the exact meaning of the words that are used. Many commercial contracts are done by the nod, that is to say, brokers meet in the market, one mentions a price and the other nods his head in assent, and both understand and believe that the usual form of contract will apply to the transaction. Very often it is a form of contract which is quite unsuited to the particular kind of transaction. One instance of that is the use of old mediæval forms at Lloyd's for insurance. It is quite common for the name of a ship to be inserted where there is no ship in the transaction at all, and although there is no voyage to be performed by any ship, and no insurance of any goods at sea. As a rule, they do not even strike out the exceptions to perils of the sea, but they leave them there to be applied, if they can be applied, to a voyage which has nothing to do with carriage by sea.

Here we are concerned with a charter-party, in which it has been found convenient to put, instead of a definite date, the words "expected ready to load," by a given date. The charter-party provided that it was mutually agreed between the shipowners, managers of the good steamship called the *Wythburn* (and then they describe her register) "expected ready to load about Sept. 11, 1933," and the charterers, and then followed the provisions of the charter-party. It has been found in the experience of shipowners that it is a little difficult for them to undertake an exact date when the vessel will be ready to load, and this clause was invented to meet that situation. The meaning of these words has been explained in one or two cases, especially in *Samuel Sanday & Co.* v. *Keighley Maxted & Co.* (1) by LORD STERNDALE, M.R., when he said (127 L.T. at p. 328):

> "I think that the second is the right view that it is to be interpreted as meaning that in view of the facts, as known to the seller at the time of his making the contract and making the statement 'expected ready to load' the expectation was one which was made, as BAILHACHE, J., says in one of the cases, honestly and upon reasonable grounds."

Now it has been said in that and other cases that this statement is not a mere representation, but is a contractual statement, part of the contract between the parties; but that it only means they contract that the statement is honestly made upon reasonable grounds. That does not help very much in determining what is the date on which the ship ought to be there ready to load. It is not the only relevant provision in the charter-party, because the charter-party also provides:

> "The said steamer being tight, staunch, strong, and every way fitted for the voyage shall, with all convenient speed, proceed to Hamburg or so near thereunto as she may safely get, and there load from the said charterers a full and complete cargo"

of 330 tons of sugar and 140 tons of salt. That, I take it, means that the vessel will proceed at a time when it is reasonably certain that she will arrive at the loading port on or about the expected date, and the expected date in this case is on or about Sept. 11. In the absence of evidence it is difficult to determine what the exact effect of the word "about" is. The parties in this case, in the correspondence, have treated the 14th as within the area of the expected date, and I do not think we are entitled to differ from them in that respect. The charterers' complaint is: We do not say we suffered any damage by reason of a breach of contract because the vessel did not arrive before the 14th, but we do say we suffered damage by reason of a breach committed by the vessel arriving at a later date.

The dates are these: Aug. 31, the shipowners entered into another charter-party with the West of England Road-Metal Co. Ltd. to carry stone from a place called Porthoustock to Felixstowe, and it is said that by doing so they broke their contract. I do not accept that argument. It must have been within the contemplation of the parties that between Aug. 2 and Sept. 14 the shipowners would, in fact, be using their vessel for such remunerative purposes as they could. I also think that the taking of that charter did not in any way relieve, or, indeed, affect, the obligations of the shipowners under the charter of Aug. 2, and by entering into that second charter they took upon themselves the risk that by doing so they might be prevented from fulfilling the contract which they had made as early as Aug. 2. In this connection I refer to the observations of LORD PEARSON in *Thomas Nelson & Sons* v. *The Dundee East Coast Shipping Co. Ltd.* (2) which I think are correct. He said (1907 S.C. at p. 935):

> "The defenders dwell on the expression 'expected ready to load about March 3' as if it left everything open, with the result that the charter is absolutely indefinite as to time in the important matter of the commencement of loading. I do not say that the words amount to an undertaking that she will be ready to load on March 3, or even about March 3. But touching as they do a matter within the shipowners' own knowledge and control, they at least import, in my opinion, an assurance that the vessel was at the time in such a position that she might reasonably be expected to be in Leith ready to load by the day named. Now, although that assurance was well founded at the time it was made, and although the ship might with all convenient speed have proceeded to Leith in ample time, the defenders deliberately put it out of their power to fulfil the contract. If for any reason the *Alice* was not available, they had the option of substituting a sister ship. But as regards each of them it appears that the defenders interposed a new charter in such a way as to make it impossible for them to fulfil their contract with the pursuers with either ship. That of itself seems to me sufficient to infer liability in damages."

Although the shipowners in this case did not make a contract which by itself would bring about that result, they made a contract which did, in fact, bring about the result that the vessel could not proceed with due diligence to the port of loading so as to arrive on or about the expected date. The only question is whether or not the shipowners were excused, by reason of the exceptions in the charter-party, from performing that obligation.

I am satisfied that there is no authority which carries the area of the exceptions beyond the time when the ship starts on the agreed voyage. It is not confined to the time when she loads under the charter-party; it does include the period of time when she is steaming with all convenient speed to arrive at the loading port. I agree with the view expressed in Carver's Carriage by Sea (7th Edn.), s. 148, at p. 228, which is:

> "But it seems that the exceptions do not apply to matters which may happen before the ship has entered upon the voyage dealt with by the charter-party."

These are words used by Lord Blackburn in *Harrison* v. *Garthorne* (3) (26 L.T. at p. 509) which appear to support that proposition, although there is no actual decision to that effect, but it seems to me sound sense that when you make an agreement for a particular voyage the whole of the terms of that agreement relate to that voyage, and not to something which may happen before that voyage began. It is an unfortunate result that people who have to make engagements in advance necessarily run the risk of the engagements clashing with one another so as to prevent the performance of one or other of their contracts, and they have to take the consequences by paying damages to the party whose contract they have failed to perform.

For these reasons this appeal fails, and must be dismissed with costs.

MAUGHAM, L.J.—I am of the same opinion, and I will only add very few words. This action relates to a Chamber of Shipping Coasting Charter-party, dated Aug. 2, 1933, entered into with regard to the steamship *Wythburn*. The contract was in reference to a ship which was "expected ready to load about Sept. 11, 1933," and there was consequently a period of six weeks between the date of the charter-party and the date when the ship was to be or expected to be at Hamburg. It is perfectly clear that in the case of a contract such as this, it was open to the shipowners to enter into another charter-party, and they did, in fact, enter into another charter-party on Aug. 31, 1933, that being a Chamber of Shipping Stone Charter-party with reference to the loading of certain stone at a port called Porthoustock in Cornwall. I agree entirely with my Lord that the exception of losses arising from inter alia, unavoidable accidents or hindrances, namely, the exception in cl. 10 of the charter-party of Aug. 2, 1933, does not apply to accidents and preventions and so forth, incurred in the performance by the shipowners of the subsidiary or intermediate charter-party, that being a document and a contract which has nothing whatever to do with the charterers under the charter-party of Aug. 2, 1933, and one with regard to which they have no interest.

If that conclusion is arrived at, there remains nothing but the question of dates, and with regard to that I do not think it necessary to add anything to what my Lord has said. The conclusion I have arrived at seems to me to be supported by the decision in *Barker* v. *M'Andrew* (4), where there is a remarkably clear judgment of WILLES, J., and we find his view supported by BLACKBURN, J., and MELLOR, J., in the subsequent case of *Harrison* v. *Garthorne* (3) to which my Lord has referred. The vital part of the judgment of WILLES, J., in *Barker* v. *M'Andrew* (4), for the present purpose is where he said (18 C.B. (N.S.) at p. 772):

> "The commencement of the voyage is the commencing to do that for which the shipowner is to be paid freight,"

and there is no case contrary to that view. That accords with all the reported decisions except one, which I think has been doubted, and it applies to a case such as *Harrison* v. *Garthorne* (4), where there is no definition of the voyage, but where you have to collect from the terms of the charter-party what the voyage is contemplated as being. In all other respects, I agree entirely with what my Lord has said.

ROCHE, L.J.—I also agree. This case is for a small amount of money, but it raises some questions of nicety, which have been very well argued, as to the construction of this charter-party; as to the date on which this ship ought to have been ready to load; and as to the effect upon the contract of the intermediate charter-party which led to the result that the ship was not ready at the proper date. I agree so entirely with the reasoning of my Lord that I have nothing to add, except to make a few additional observations as to the scope and effect of the exceptions clause. I make these additional observations, but I desire that my judgment should not be understood to relate to any case but the present.

The question is this: The shipowners having very properly entered into intermediate engagements for their ship, and particularly the intermediate engagement which arose out of the charter-party of Aug. 31, did the fact that the voyaging of the vessel, in which I include the loading under that intermediate charter, was prolonged by reason of bad weather excuse the shipowners in respect of the non-arrival of their ship under the antecedent charter of Aug. 2, which is now in question? In my opinion, it did not, and for this reason. The argument for the shipowners is based upon the principle that the voyage in question, and the period in question under the exceptions, began from the time the charter of Aug. 2 was made, and from the time the vessel began to act upon and fulfil intermediate engagements. I have no doubt there are charter-parties in existence which do so provide, and I have no doubt there will be charter-parties in the future which will so provide, but I am satisfied that this charter-party did not so provide. The trouble arose because the parties applied a printed form of charter-party applicable to the case where the ship was about to enter upon the engagements covered by that charter-party, to a case where she was not going to enter upon them for six weeks, and was to perform an intermediate voyage. That charter-party required an alteration if it was to give the protection which was desired. I arrive at my conclusion from a brief examination of the clauses. As to cl. 1, it is apparent that the obligation to proceed with all convenient speed and the correlative obligation that the vessel should be tight, staunch and strong, that is to say, seaworthy for the voyage, arises at the same time, and, in my judgment, there was such an engagement with the charterers on the date, Aug. 2. The next clause that is material is cl. 3, which applies to this charter-party by reference certain provisions of the Carriage of Goods by Sea Act, 1924. Those provisions relate merely to the specific voyage which is to be made under the particular freight engagements in question; they do not refer to what I may call antecedent voyages. The next and last clause is cl. 10; that is what is called a mutual clause protecting both charterers and owners. I am satisfied that the charterers would not be protected under that clause if they could not prove that, by reason of the hindrances mentioned in the clause, they were hindered from bringing that vessel to the place of loading, and equally, in my opinion, the owners have a correlative and similar protection and no more; that is to say they are protected from that which may happen during the performance of the particular voyage which is stipulated for and regulated by that particular charter-party.

For those reasons I think this appeal fails as to liability, and I have nothing to add on the question of damages.

Appeal dismissed.

Solicitors: *Lightbounds, Jones, & Bryan,* for *T. O. Ward,* Liverpool; *Pritchard, Sons, Holland, & Partington,* for *Buckley, Watson, & Blackwood,* Liverpool.

[*Reported by* C. G. Moran, Esq., *Barrister-at-Law.*]

NICHOLSON *v.* SOUTHERN RAIL. CO. and CHEAM U.D.C.

[King's Bench Division (Branson, J.), January 21, 22, 1935]

[Reported [1935] 1 K.B. 558; 104 L.J.K.B. 265; 152 L.T. 349; 99 J.P. 141; 51 T.L.R. 216; 79 Sol. Jo. 87; 33 L.G.R. 140]

Highway—Negligence—Adjoining land unfenced—Reconstruction of highway making level of adjoining land lower than kerb—Dangerous drop—No liability on owner of adjoining land—Liability of highway authority.

When works have been done on a highway which render that highway dangerous, there is no obligation on the owner of adjoining land to fence his land or alter it in such a way as to remove the danger. His only obligation is not to allow his land to be used in such a manner as to constitute a nuisance to the highway or persons using it. A highway authority is liable for so altering the level of the highway in relation to the adjoining land as to create a danger to users of the highway.

Notes. As to the liability of the owner of land adjoining the highway for fencing, see 16 Halsbury's Laws (2nd Edn.) 313, para. 409. As to the liability of a highway authority for work done as such, see 16 Halsbury's Laws (2nd Edn.) 332–335, para. 455, and for cases on the subject see 26 Digest 404 et seq., *1267–1290.*

Cases referred to:

(1) *Barnes* v. *Ward* (1850), 9 C.B. 392; 19 L.J.C.P. 195; 14 Jur. 334; 137 E.R. 945; 36 Digest (Repl.) 209, *1100.*

(2) *Fisher* v. *Prowse, Cooper* v. *Walker* (1862), 2 B. & S. 770; 31 L.J.Q.B. 212; 6 L.T. 711; 26 J.P. 613; 8 Jur. N.S. 1208; 121 E.R. 1258; 7 Digest 283, *138.*

(3) *A.-G.* v. *Tod Heatley,* [1897] 1 Ch. 560; 66 L.J.Ch. 275; 76 L.T. 174; 45 W.R. 394; 13 T.L.R. 220; 41 Sol. Jo. 311; 61 J.P. Jo. 164, C.A.; 36 Digest (Repl.) 271, *236.*

(4) *Robbins* v. *Jones* (1863), 15 C.B.N.S. 221; 3 New Rep. 85; 33 L.J.C.P. 1; 9 L.T. 523; 12 W.R. 248; 143 E.R. 768; 10 Jur. N.S. 239.

Action tried before Branson, J., without a jury.

The plaintiff, Miss Nicholson, while walking along Station-road, Cheam, Surrey, at night, fell from the highway on to adjoining land belonging to the defendant landowner, the Southern Railway Company, which was unfenced, and broke her leg. She contended that the second defendants, the Sutton and Cheam Urban District Council, the highway authority, made up the road with the kerbing, and that thereafter the landowners, and (or) the highway authority negligently caused the level of the adjoining unfenced land to be and remain about 6 in. lower than the level of the edge or kerb of the highway. The landowners denied that they were guilty of any negligence. They did not admit that they were the owners of the land in question, but said that, if they were, they were not the occupiers of it, and were not responsible for its condition. They further denied that it was their duty to take care to see that there was fencing or lighting, or that warning was given to persons using the highway, or that they were responsible for the alleged or any danger or nuisance. The highway authority denied that they had committed any breach of duty to the plaintiff, or were guilty of any negligence, or that they had caused or permitted a nuisance. They pleaded that any injuries, loss, or damage sustained by the plaintiff were caused by the negligence of the landowners. Alternatively, they alleged that the plaintiff was guilty of contributory negligence. [Since the date of the accident the urban district council has become a municipal borough.]

Robert Fortune and *Wingate* for the plaintiff.
The Hon. S. O. Henn Collins, K.C., and *A. T. Denning* for the defendant landowners.
C. Doughty, K.C., and *N. Fox-Andrews* for the defendant highway authority.

BRANSON, J.—This is an action in which the plaintiff, Miss Florence Mary Jane Nicholson, sues two defendants, the Southern Railway Company, the landowners, and the Sutton and Cheam Urban District Council, the highway authority, for damages for certain injuries which she sustained whilst walking along a road called Station-road, formerly Burdon-lane, at Cheam.

According to the evidence, which upon this point is undisputed, this particular bit of road consists of a pavement running outside and past a public-house called the Railway Hotel, and the pavement is a triangular piece, fairly wide, just by the public-house and running away to nothing where a privet hedge comes to meet the line of the outer kerb of the pavement. At that point there are, or there were at the time of the accident, three steps down to a steep path leading from the road down into a disused chalk pit; further on there was a kerb standing about 5½ in. above the soil on the path side of it and gradually coming nearer and nearer to the level of that soil until the levels became the same. The plaintiff was walking past the hotel, and continued on the pavement which gradually narrowed away to nothing; she stepped out into the road, but, assuming that the pavement continued on the other side of the privet bush which stood at the end of this little triangular bit of pavement, stepped back and fell down the slope and broke her leg. It is not, in my view, material to decide whether she fell actually on the steps, or whether she fell where there was a slope due to the kerb, which was set upon a haunching of concrete, which fell away down to the gravel of the path leading down into the pit. She herself cannot tell us whether she fell on the steps or just beyond. The gentleman who picked her up said she was lying just beyond. I think in all probability she must have missed the steps because there was nothing to make her turn so sharply round the privet hedge as to bring her to the top of the steps. I think it is much more probable that she had passed the 2 ft. or 2 ft. 6 in. of the width of the steps and come to the point where the kerb stood up upon its haunching some 5 in. or so above the beginning of the gravel path, and fell there. She suffered considerable injury, her leg was very badly broken, and she sustained severe bruising and shock. She was in a nursing home for some days, and had to have attention in her own house, which was given to her by a friend to save employing a nurse, and she had a variety of expenses to incur, as well as a considerable amount of pain to endure. As the result she puts in a claim for special damages amounting to £290. That includes a claim for loss of profits for taking guests in a guest-house, but it appeared quite plain from her own evidence that she was not to share the profits which might arise from the keeping of these guests, and therefore the £63 which she claims in respect of that loss of profit must come off her claim, which makes her special damages some £230. I think that, taking those damages and the pain and suffering and disability to which she has been put, the proper sum of compensation which she ought to receive from whomsover is liable is £500.

Now the question is whether she can recover from either or both of these defendants. The first defendants, the landowners, take up the position that they are not the owners of the land adjoining the highway at the point where the accident happened, and they say, secondly, that, if they are, they are still not liable to the plaintiff because they have done nothing, and nothing has been done, on their land to create a nuisance beside the highway, and consequently that, whatever may be the rights of the plaintiff against the urban district council, she has none against them.

The highway authority contend that the plaintiff is not entitled to recover against them because of her contributory negligence, and they say that she ought to have seen that there was no pavement and that there was a hole down which she might fall; and they say, thirdly, that even if they are responsible, they are not solely responsible, but that the landowners are also responsible, because they have allowed their land adjoining the highway at this point to be in a condition which caused it to be a nuisance.

First of all, with regard to the defence of contributory negligence, I think that fails. Here was a place in which the plaintiff was invited by the presence of a properly made-up pavement to walk on that side of the road. It appears from the photographs and plans that to anyone coming along the road there would be presented the vista of a pavement continuing on the other side of the gap which went down to the pit, which was hidden by the privet hedge and the big privet bush at the point where the triangular piece terminated. It seems to me that a person might well consider in circumstances of this sort that it would be perfectly safe, having stepped out in the road to go round this bush, to ease in to the left expecting to find a continuance of the pavement upon that side. Therefore, the defence of contributory negligence fails, and it only remains to deal with the other defences raised.

I do not see that there is really any other defence for the highway authority. The history of the matter, so far as they are concerned, is this: Before 1930 this was a small country road with a tar-sprayed surface; the place where the pavement now is in the angle between the hedge and the hotel was rough gravel; the path down to the pit was rough gravel, and I have no doubt that the surface of the road fell away and joined the path which led down to the pit in a gradual slope without any kind of sudden drop, except perhaps where the steps are now. It is plain, I think, with regard to the steps that what is now the top step is a concrete kerb put in by the highway authority. The next step, which is of a similar concrete, was, I think, also either put in or replaced by them at the time when they made up the road and put in the kerb. The bottom step is obviously much older, and existed before 1930, though to what extent it was always apparent I am not clear. Some of the plans which have been produced to me show steps existing, others equally detailed do not show them, and Mr. Pinfold, who is the assistant estates agent to the landowners, and has many years of personal acquaintance with this position, says that he does not recollect their existence. I think that one of these steps was undoubtedly there and that at some time it was visible, though it may be at other times it was not. However, that does not appear to me to be material, because, until the work was done by the highway authority in 1930, I am satisfied that there was nothing which constituted a danger or a nuisance to the highway at this point. The highway joined the path down into the pit by an ordinary reasonable slope. I think that must have been so, because this was the only exit from the pit, and there is evidence that it was used by wheeled vehicles down at all events to quite recent times just before 1930.

In 1930 the highway authority was minded to turn the little country lane into a big thoroughfare, and plan No. 6 which has been produced shows what was done in that behalf. The road was widened to a very large extent and the level of it was raised by some 5 or 6 inches at about the point with which this case deals. The result was that the edge of the raised road where the road joins the path which went down into the pit stood up some 5½ in. Plan 12a, although its accuracy has been challenged in other respects, contains a section through the road and shows the drop. I have been told, and I accept it, that it shows with sufficient accuracy for the purpose of this case the nature of the drop. By doing that work the highway authority converted what was a perfectly safe bit of road into a road which was dangerous. This drop, coming as it did just behind this hedge and at the apex of the pavement, when that pavement was put in in 1933, made what appears to me to be a regular trap for pedestrians using that side of the road. I think it is not uninteresting to observe that down to 1930 there seems to have been no danger or difficulty at all. There is evidence on one side that wheeled vehicles used the road. At that time there was a footpath on the other side of the Burdon-lane, or Station-road, and no temptation for pedestrians to walk upon the pit side of the road. In 1933 the pavement was erected, and immediately accidents began to occur, through people doing just what the plaintiff in this case did, walking on the west side of the road past the public-house, expecting to find the condition of things which existed before the pavement came to a point to continue on the other side, and

A finding instead this sharp declivity, be it no more than 5 or 6 inches, which would be quite sufficient to cause an unsuspecting person to fall. That, in my opinion, gives a right to the plaintiff to claim against the highway authority. To make up a road like that without protection and to couple with it the invitation presented by this bit of triangular pavement was a misfeasance, which gives to the plaintiff, who has suffered injury by reason of it, a right to recover damages from the highway authority.

B That leaves the position of the landowners to be considered. I think that the case against the landowners may be summed up in the following way. It is said that they are the occupiers or owners of the land right up to the highway at this point, and that there is a common law obligation upon owners or occupiers of land adjoining a highway to prevent their land from ever becoming a nuisance, and that, therefore, as soon as the highway authority had raised the height of the highway so as to make a dangerous C drop between the highway and the landowners' land, it became the common law duty of the landowners either to fence their land, or to build it up so that this dangerous drop should cease to be. It seems to me that that is putting a new and intolerable burden upon the occupiers of land adjoining highways. No doubt the common law is very strict to ensure that land adjoining a highway should never be so used or allowed to get into such a condition as to make it a nuisance to the highway. It is not necessary to D refer in detail to a number of the well-known cases which have been cited in support of that proposition. I think it is enough to refer to *Barnes* v. *Ward* (1). Wherever one looks in order to see what is the obligation of an adjoining owner in respect of a highway, one finds this, that his obligation is not to allow his land to be used in such a way as to constitute a nuisance to the highway, or to those using the highway. What is sought to be said here is something entirely different, namely, that, when something has been E done, not upon the adjoining land at all, but upon a highway which makes that highway dangerous, some obligation is put upon the occupier of the adjoining land to alter his land, and to do away with the danger which has not been created by anything done upon his land at all, but by something which has been done on the highway. This is a completely new proposition of law so far as I am concerned, and one which does not seem to me to be supported by or to be deducible from any of the authorities which have F been cited. On the contrary, it seems to me that there are expressions in *Fisher* v. *Prowse* and *Cooper* v. *Walker* (2), which really tend in the opposite direction. It is true they are only dicta, but BLACKBURN, J., in delivering the judgment of the court (2 B. & S. at p. 780), deals with the presumption which arises where a nuisance and a highway are shown to have existed side by side beyond the memory of man, that the highway was dedicated subject to the nuisance. Having said that, he continues:

> G "If the use of the soil as a way is offered by the owner to the public under given conditions and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of H circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention. More especially would this be the case when public rights of way have been acquired by mere user. For instance, the owner of the bank of a canal or sewer may, without considering the effect of what he is doing, permit passengers to pass along until the public have acquired a right of way there. It is often hard upon him that the public right I should have been thus acquired; it would be doubly so if the consequence were that he was bound to fill up or fence off his canal."

I am, of course, conscious that that is not dealing with the precise point with which I have to deal, but I think it is a fortiori a hardship if, as is suggested here, the authorities concerned with the maintenance of the highway can, by altering the highway in such a way as to constitute it dangerous, throw upon the owner of adjoining land or the occupier of adjoining land an obligation to make it safe. All the cases which have been cited, or of which I know, relating to the obligations of the occupier of adjoining land to prevent a nuisance to a highway from arising upon that land turn upon something which A has been done upon that land. Instances are *A.-G.* v. *Tod-Heatley* (3), *Robbins* v. *Jones* (4), and a number of other cases. To push that principle to the extent of saying that, if the highway is made unsafe by those who have charge of it, adjoining owners have got to take steps to do away with the danger by works done upon their own land would be to put a new and intolerable burden upon the occupiers of land adjoining highways.

The result is that the plaintiff is entitled to recover judgment against the highway B authority for £500 and that her action against the landowners fails. In the circumstances of this case, as she first of all applied to the highway authority, and they said they were not responsible, but the landowners were, and she then applied to the landowners, and they said it was nothing to do with them, but with the highway authority, she is entitled to the "Bullock" order in respect of the costs which she must pay to the landowners, in whose favour I propose to enter judgment in this case. C

It has been suggested that it may be material to decide whether or not the landowners are really the owners of this land up to the point where the accident took place, and it may be well that I should express my opinion upon it, though it is not material to my judgment. I think, having considered the maps and plans which have been produced, it is quite clear that this land was never conveyed to the landowners. I think, on the other hand, that they have used it, and that, at all events to the extent of claiming to D exercise a right of way themselves and to be in a position to grant a right of way to others, they have asserted an occupier's title over the land upon which the plaintiff fell off the edge of the kerb. I do not think the point is material to my judgment, because I hold that, even if they did own that land, they are not responsible.

Judgment for plaintiff against the highway authority.
Judgment for the landowners against the plaintiff. E

Solicitors: *Henry T. Nicholson*; *W. Bishop*; *James Turner & Son.*

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

R. v. PECKHAM

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Lord Humphreys and Lord Singleton, L.JJ.), November 11, 1935]

[Reported 154 L.T. 275; 100 J.P. 59; 52 T.L.R. 159; 79 Sol. Jo. 989; 25 Cr. App. Rep. 125; 34 L.G.R. 1; 30 Cox C.C. 353]

Criminal Law—Indictment—Duty of prosecuting counsel—Character of accused—Prejudicial statement by witness—Application for trial to be started afresh—Duty of court.

It is the duty of prosecuting counsel, before opening the case, to acquaint himself with the terms of the indictment.

Where a prejudicial statement relating to a prisoner's antecedents has been made to the jury and defending counsel applies for the trial to be begun again, the court ought to begin the trial again before a fresh jury.

Where the accused is being tried on only one of two indictments, misreception of evidence which would be relevant only at a trial on the other indictment is a ground for quashing the conviction; it does not merely make the trial a nullity.

Notes. This case is to be contrasted with *R.* v. *McDonnel* (1928), 20 Cr. App. Rep. 163, in which it was held that the simultaneous trial of two indictments is a nullity. The principle laid down in this case as to prejudicial statements was re-affirmed in *R.* v. *Firth*, [1938] 3 All E.R. 783, and in *R.* v. *Wattam*, [1942] 1 All E.R. 178. In both these cases it was stated that it is essential for the objection to be made at the hearing and not reserved for an appeal against conviction. As to opening the case for the prosecution, see 10 HALSBURY'S LAWS (3rd Edn.) 416, para. 761, and for cases on the subject see 14 DIGEST (Repl.) 304, *2864–2871*.

As to reasons for beginning a trial again before a fresh jury, see 10 HALSBURY'S LAWS (3rd Edn.) 426, para. 787, and for cases on the subject see 14 DIGEST (Repl.) 636–640, *6441–6508*.

As to the admissibility of evidence of bad character, see 10 HALSBURY'S LAWS (3rd Edn.) 447, para. 823, and for cases on the subject see 14 DIGEST (Repl.) 410–412, *4008–4025*.

Case referred to:

(1) *R.* v. *Wright* (1934), 78 Sol. Jo. 879; 25 Cr. App. Rep. 35, C.C.A.; 14 Digest (Repl.) 670, *6785*.

Appeal against conviction.

The appellant was convicted at Dorset Quarter Sessions on an indictment which charged him and another person with stealing, and alternatively with receiving, certain fowls, and was sentenced to eighteen months' imprisonment with hard labour. Owing to a general misunderstanding, evidence was admitted at the trial which was relevant not to the indictment being tried, but to another indictment, on which also the appellant had been arraigned at the same time, and to which also he had pleaded not guilty. During the trial a witness for the prosecution, in reply to a question put to him in cross-examination whether he had ever been into the appellant's house, said that he had been there while the appellant was away in prison. Defending counsel applied for the trial to be begun again before a fresh jury, but the application was refused. No warning with regard to the above statement was made in the summing up.

F. E. Hodgson, for the appellant.—At the trial evidence which was relevant only to the indictment on which the appellant was not being tried was wrongly admitted. Further, after the prejudicial statement with regard to the appellant's record had been made by the witness, the jury were never warned to disregard it. Application was made for the trial to be begun again with a fresh jury, and the court should have granted this.

W. Maitland Walker, for the Crown.—The irregularities complained of may have rendered the trial a nullity. It may have been the best course for the deputy-chairman to make no further reference to the unfortunate disclosure about the appellant's record, to avoid impressing it further on the jury. [He referred to *R.* v. *Wright* (1).]

The judgment of the court was delivered by

LORD HEWART, C.J.—It is clear from the transcript as well as from what has been said in this court that this trial proceeded when neither the deputy-chairman, nor the clerk of the peace, nor any of the three counsel who appeared from time to time on behalf of the Crown, nor counsel for the defence, knew with what the appellant was really charged. The appellant was first called upon to plead to both indictments, but he was given in charge to the jury on one indictment only. Nevertheless, the case was opened on behalf of the Crown, on all the materials of both indictments, and, as the trial on one indictment proceeded, evidence was given which was relevant only to the other indictment. Counsel for the Crown had not looked at the indictments. After the trial had gone a certain length on the footing that all the witnesses who could give evidence on one indictment only were available to give evidence on the other indictment, there was an adjournment, and then, the attention of the court being directed to the real state of affairs, the deputy-chairman told the jury to "wash out of their minds" the evidence which had been given before the adjournment.

Another matter which is complained of is that a certain witness for the prosecution, in reply to a question put to him in cross-examination whether he had been to the appellant's house, said that he had been in that house when the appellant was away in prison. The appellant's counsel raised an objection, and asked that the trial should be begun again with a new jury, but his objection was overruled. Moreover, no warning was afterwards given to the jury as to the admission of this statement. It may be that in particular cases and on particular facts it is not necessary for a reference to be made in the summing-up to a prejudicial statement of this kind inadvertently made by a witness. But there is a great difference between those cases and the present case in that here there was an application by counsel for the appellant that the trial should be started afresh. It was in those circumstances that the deputy-chairman refrained even from alluding to the topic when he came to sum up. In the opinion of this court, where a statement with regard to a prisoner's previous record is inadvertently made from the witness box to his prejudice, and his counsel applies for the trial to be begun again before another jury, the court ought to begin the trial again.

It is enough for the purposes of this appeal that there was misreception of evidence which was relevant only to the other indictment. Such misreception is fatal, and the effect is not merely to make the trial a nullity. But the irregularities in this case do not end there. The indictments are before the court. To one the appellant pleaded not guilty, and on that he was not tried; to the other he also pleaded not guilty, but on that he was tried and convicted. These indictments, however, are worth no more than waste paper. There is nothing on either of them to show that anything took place at all. Until the Evidence Act, 1851, the only evidence of the conviction of an accused person would have been the indictment itself, but by s. 13 of that Act it is provided that it is sufficient if it is certified under the hand of the clerk of the court or other officer having the custody of the records of the court where the conviction took place that the paper produced is a copy of the record of the indictment, trial, conviction and judgment, omitting the formal parts thereof. Here, if the indictment itself, or a true copy of it, were produced, it would have no more value than a piece of blank paper. There is no statement that the appellant has been convicted at all. Further, it may be observed that it was not necessary that there should have been two indictments: there need only have been one.

For the purposes of this appeal, however, it is enough to say that evidence was wrongly admitted, and the conviction must, therefore, be quashed and the appeal allowed.

Two things, however, clearly follow. First, counsel for the prosecution should always before opening acquaint themselves with the contents of the indictment; and secondly, where a prejudicial statement as to a prisoner's previous record is made to the jury, and counsel for the defence applies for the trial to be started afresh, the court should begin the trial afresh before another jury.

Conviction quashed

Solicitors: Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

A.-G. *v.* VALLE-JONES

[KING'S BENCH DIVISION (MacKinnon, J.), February 7, 1935]

[Reported [1935] 2 K.B. 209; 104 L.J.K.B. 358; 152 L.T. 513; 51 T.L.R. 239; 79 Sol. Jo. 126]

Master and Servant—Loss of service—Injury to servant through negligence of third person—Servant of Crown—Right of Crown to recover damages.

A master who, by the tortious act of a third person, has been deprived of the service of his servant is entitled to damages from the third person in respect of the deprivation.

Where, therefore, two men in the service of the Crown as members of the Royal Air Force sustained personal injuries through the negligent driving of a vehicle by the defendant's servant, and during the period of their incapacity the Crown continued to pay their wages and provided them with hospital treatment free of charge.

Held: the Crown were entitled to recover as damages from the defendant the amount of the wages and hospital expenses.

Admiralty Commissioners v. *Owners of Steamship Amerika* (1), [1917] A.C. 38, distinguished.

Notes. Latin informations were abolished by the Crown Proceedings Act, 1947: see Sched. I, para. 1. For civil proceedings by the Crown, see s. 23 of the Act.

In the present case the persons injured were persons in the service of the Crown. In *A.-G. for New South Wales* v. *Perpetual Trustee Co., Ltd.*, [1955|) 1 All E.R. 846, the view was expressed that the relationship of master and servant did not exist between the Crown and a member of the armed forces, and, therefore, the present decision must be limited to cases where the person injured is a servant of the Crown in the ordinary sense of the relationship.

Not followed: *I. R. Comrs.* v. *Hambrook*, [1956] 1 All E.R. 807. Referred to: *Metropolitan Police District Receiver* v. *Tatum*, [1948] 1 All E.R. 612.

As to the right of a master to be compensated for the loss of service of his servant through the wrongful act of a third person see 22 HALSBURY'S LAWS (2nd Edn.) 251 et seq., and for cases see 34 DIGEST 180 et seq. For Crown Proceedings Act, 1947, see 6 HALSBURY'S STATUTES (2nd Edn.) 46.

Cases referred to:

(1) *Admiralty Commissioners* v. *Owners of S.S. Amerika*, [1917] A.C. 38; 86 L.J.P. 58; sub nom. *The Amerika* 116 L.T. 34; 33 T.L.R. 135; 61 Sol. Jo. 158; 13 Asp. M.L.C. 558, H.L.; 36 Digest (Repl.) 207, *1084*.

(2) *Hall* v. *Hollander* (1825), 4 B. & C. 660; 7 Dow & Ry. K.B. 133; 4 L.J.O.S. K.B. 39; 107 E.R. 1206; 34 Digest 181, *1470*.

(3) *Evans* v. *Walton* (1867), L.R. 2 C.P. 615; 36 L.J.C.P. 307; 17 L.T. 92; 15 W.R. 1062; 34 Digest 169, *1315*.

Latin Information by the Attorney-General, on behalf of His Majesty, claiming to recover from the defendant the sum of £306 16s. 8d. for (*a*) loss of services, and (*b*) hospital expenses incurred, as the result of injuries sustained by two airmen through the negligent driving of a lorry by the defendant's servant. The claim was based on the loss of the services of the injured men during their incapacity, whereby the Crown had lost the amount of their pay and allowances, and on the cost of their hospital treatment.

The defendant contended that the Crown could not recover payments which were unnecessary, or which could have been avoided. Payment of the wages could have been avoided by dismissing the injured men from the service, for they were employed at pleasure; and the hospital expenses were incurred voluntarily and not by reason of any contractual obligation.

The *Solicitor-General* (*Sir Donald Somervell, K.C.*) and *Wilfrid Lewis* for the Attorney-General.

J. Alan Bell for the defendant.

MACKINNON, J.—This case is a sequel to an accident on Dec. 5, 1930, when a motor lorry, driven by the servant of the present defendant, ran into two individuals who were riding a motor cycle. That collision caused injury to those two individuals, worse in the case of one than in the case of the other, and their condition was brought about owing to the negligence of the servant of the defendant. As the result of that, the two individuals would have a claim against the defendant for damages, and their claim in the ordinary course, as part of those damages, would include any loss of earning power, or loss of wages, during the period when the victims of the accident were incapacitated from working. The claim would include also any expenses for a nursing home or doctors which either of them had reasonably incurred. The two individuals did make a claim against the defendant, and did recover damages, but those damages cannot have included anything in respect of loss of earnings during the period of their incapacity, because, in fact, during their incapacity, they did not lose any earnings, but they were paid throughout the period of their incapacity by their employer, who is His Majesty, the two men being members of the Royal Air Force. Further they did not become liable to make payments to a nursing home, or a hospital, or medical attendants, because they did not incur expenses of that nature, and, therefore, they did not recover, and could not have recovered, damages in respect of such a liability from the defendant. They did not incur those expenses because those benefits were provided for them by their employers, His Majesty's Air Force.

This proceeding, which is by way of information, is now brought by the Attorney-General, on behalf of His Majesty, claiming damages against the defendant in respect of those two matters to which I have referred, namely, the wages paid to the two aircraftsmen during the period of their incapacity, and hospital and medical expenses provided for them by reason of this accident. It is a claim based upon the old common law principle that a master who has, by the tortious act of a third person, been deprived of the services of his servant, may claim damages in respect of that deprivation against the third person who has brought it about.

The information sets out the facts of the accident and goes on to say:

> "Whereby His Majesty lost the services of the said Jesse Donaldson Hull and the said Noel William Verney and all advantage which would otherwise have accrued to His Majesty from such services on and between the aforesaid respective dates, and His Majesty was put to other expense in and about the premises,"

and thereupon there is a claim for the wages paid during the men's incapacity, and for hospital and medical expenses.

There is not, I think, any doubt that a right of action by a master for the loss of the services of his servant exists, and has been recognised from quite early times. Curiously enough, it has been, perhaps, emphasised, and kept in activity more as a fictitious basis by which the seducer of a woman may be made to pay the penalty of his wrongdoing. It has been, and is, the only basis of a claim for seduction, and in that respect the fiction of service has been carried to extreme lengths, but in regard to the nature of the cause of action there is no doubt. The Solicitor-General referred me to several cases based upon that principle beginning with *Hall* v. *Hollander* (2) in 1825, which is most noticeably exemplified in *Evans* v. *Walton* (3). There is no doubt that when, by the tort of a third party, a master has lost the services of his servant he can recover damages in respect of that loss of service. The amount of those damages is, of course, dependent on the facts of the particular case. If he has got a substitute to do the work of the servant his damages may be the extra cost to which he has been put over and above the payment that he would otherwise be making to the servant who is incapacitated. If he has put an end to the services temporarily, and pays nothing to the injured servant, his damages would be the extra amount that he would have to pay to the substitute. The payment that he does make, if he makes it, to the injured servant by way of wages may be equivalent to, or more than, or less than, the actual damages, but in a case where the master does continue to pay the wages to the servant and does not employ a substitute, he has clearly lost any benefit arising from the payment of wages to the servant, because he is paying him wages and getting nothing in return for them. Therefore where he goes on paying the wages of the injured man, who is doing no work, primâ facie his damage is the wages that he has thus paid for nothing. In the present case that is the claim in regard to the wages that is made on behalf of His Majesty. There is nothing to show that any extra men were recruited to take the place of these men, or that any payment was made to anybody else when the men were, in fact, being paid during their incapacity, and they were, because of that incapacity, doing no work. Therefore, primâ facie, damage has been suffered to the extent of the wages thus paid to them for nothing. So much as regards the claim in respect of their wages.

In regard to medical expenses, or hospital treatment, the claim for damages is even more simple. It is put upon this ground: "I have, in fact, expended this amount, and, therefore, I have been put to that expense, which I ought to be compensated for," and that is the basis on which the claim for hospital and medical expenses is put in this case.

That being primâ facie the damages to which His Majesty would be entitled, the suggested answer in this case is: "This is simply a claim by a master for damages for the loss of his servant's services, and it must be treated, and decided on the common law principles applicable to that relationship. You cannot claim either of these types of expenses, because the incurring of them was not essential or necessary. They might have been avoided. The payment of wages to the men could have been avoided because they could have been dismissed the service directly they became incapable of doing their work, and that would have happened, because any servant of the Crown holds his office or employment solely at pleasure, and it can be determined at the will of the Crown at any moment. Therefore, by not retaining them in your service you could have avoided not merely any liability, because you were under no liability, but you could have avoided any expenditure in regard to payment of wages in fact. As regards the hospital and medical expenses, they were not incurred by reason of any obligation enforceable against the Royal Air Force, or His Majesty. They were incurred purely voluntarily. For those two reasons these pecuniary outlays have not been necessarily incurred, and therefore cannot be a ground of damage recoverable upon this cause of action."

It at once becomes apparent that this result, if the reasoning there suggested is sound, and if the action there suggested had been followed, namely, that these men had been dismissed, or their pay suspended during the period of their incapacity, would at once have increased the amount of damages which the men, as individuals, could have claimed against the defendant. As I have pointed out, if a man is incapacitated from doing any manual work owing to the negligent act of another person, his most obvious claim for damages is for loss of earnings by reason of the incapacity so created. In this case no such claim has been made by either of the aircraftsmen as an individual because, in fact, he has not lost his wages; they have been paid to him. It is now said, however, that the loss which has been sustained by His Majesty because the men, while doing no work, were paid their remuneration, cannot be recovered by His Majesty because he need not have paid them, although it is quite obvious that, if he had not paid them, the defendant would have been liable for exactly the same amount as an addition to the claim of the individual. The same reasoning applies, and the same result follows, as regards the hospital expenses. If the authorities of the Royal Air Force had refused, as I suppose that they could, to take the man into hospital, or insisted on his paying for being taken into hospital, a claim by the man as an individual would at once have arisen for the necessary expenses of providing himself with hospital accommodation and would have been added to his claim against the defendant.

In those circumstances I think that it is necessary to bear in mind that the real defence in this case is on a suggestion that the plaintiff cannot recover here because he has unnecessarily and unreasonably incurred, or inflated, his damages. It is really the point that was made in quite different circumstances in *Admiralty Commissioners* v. *Owners of Steamship Amerika* (1) ([1917] A.C. at p. 42), where Lord Parker said:

> "No person aggrieved by an injury is, by common law, entitled to increase his claim for damage by any voluntary act."

I think that that is perfectly sound. He is entitled only to those damages which he has incurred, acting reasonably, and if, acting reasonably, he could have avoided, or minimised, or reduced, the damage that he has sustained, it is only the smaller amount that he can recover, but I think that, in considering that proposition in regard to such a case as this, one must estimate the standard of reasonableness having regard to all the circumstances affecting the defendant. It is quite true to say that if by taking a reasonable course the officers of the Royal Air Force could have mitigated the amount of damages sustained by His Majesty in respect of this matter they ought to have done so, but I do not think that it is sound to suggest that it is, or that it must be, reasonable for them to take a course which would not, in truth, have diminished by a penny the real and ultimate liability of the defendant, because it would merely have transferred the claim of His Majesty to the alternative claim of the men themselves against the defendant. The fact that the Crown could have avoided the loss of the men's wages by not paying them would not have relieved the defendant of a liability for damages. It would have merely transferred the nature of that liability in the person who had to claim it. By the negligence of the defendant's servant these men were incapacitated from working for a certain amount of time. In respect of that incapacity, and the loss that it created, the defendant is liable. If the pecuniary loss fell upon the two men because they lost their wages, they would be the claimants. If, because the Crown has paid those wages, the loss falls upon the Crown, I think that the Crown can claim it, and that the defendant is not entitled to say, having regard to all the circumstances, that this is an unreasonable claim now put forward by the Crown. I think that that is a sufficient ground on which to decide this case in favour of the Attorney-General.

I ought, however, to say that reliance in the correspondence that passed before these proceedings was chiefly put by the defendant's advisers upon *The Admiralty Commissioners* v. *Owners of Steamship Amerika* (1). It seems to me that that was a totally different case. It was a claim against the owners of the steamer that had sunk a submarine to recover as part of the damages sustained the capitalised amount of pensions payable by the Admiralty to the relatives of the men who were drowned in the submarine after she sank. Some sentences from the opinion of Lord Sumner have been cited, and merely in their terms might seem to be in favour of the defendant in this case, but I think that it is sufficient to bear in mind the opening of his speech where Lord Sumner says:

> "It is clear that the action was not brought for the loss to a master of the services of his employees."

I think that that is perfectly true. It was not in respect of any loss of services, but it was in respect of suggested liability to his dependants by reason of the death of the employee.

In the present case the action, and the whole essence of the action, is a claim for the loss to a master of the services of the employee. These sums of money, unless it can be said that they were unnecessarily incurred, because they were only voluntarily incurred, clearly are damages to the master by reason, and by reason only, of the loss of the services of the servant. The only question is whether it can be said by the defendant that they were not reasonably incurred by the master. I think that, having regard to all the circumstances, and taking into account all the circumstances as judging the standard of reasonableness, they were reasonably incurred, and that, therefore, these damages are properly recoverable. The result is that there will be judgment for the Crown for the sum of £326 16s. 8d.

Solicitors: *Treasury Solicitor*; *Hair & Co.*

[*Reported by* V. R. Aronson, Esq., *Barrister-at-Law.*]

Re PEEL. TATTERSALL *v.* PEEL

[Chancery Division (Eve, J.), November 22, December 10, 1935]

[Reported [1936] Ch. 161; 105 L.J.Ch. 65; 154 L.T. 373; 80 Sol. Jo. 54]

Settlement—Marriage settlement—Trust—Construction—Annuity to widow and thereafter to pay or apply the same for or towards the maintenance, education, or benefit of any infant children as trustees thought fit—Whether a power or a trust—Whether trustees to retain and accumulate income or bound to apply it all for or towards maintenance, etc.—Meaning of "benefit."

A father, on the marriage of his son, covenanted by deed with trustees that if his son died in his lifetime he would pay them an annuity in trust for the wife so long as she should remain the widow of his son, and thereafter upon trust to pay or apply the same for or towards the maintenance, education, or benefit of any of the infant children of the marriage as the trustees might think fit. The marriage having been dissolved and the wife having re-married, the son subsequently died. His father being yet living, the annuity became payable. The only child of the marriage was an infant. The trustees contended that they had a power to accumulate income during the child's infancy and relied on the words "or benefit" in support of this contention.

Held: (i) the settlement created, not a mere power, but a trust, to apply the whole of the annuity for the maintenance, education, or benefit of the infant, and the trustees had no power to accumulate all or any part of the income for the benefit of the infant until he should attain the age of twenty-one years.

(ii) the word "benefit" covered expenditure not coming strictly under the heads of "maintenance" or "education."

Notes. Holding (i) applies only to cases in which the income must in any event be given to some of the infant beneficiaries: where an infant is not entitled to the income or some part of it on accumulation for a named infant may be "for his benefit." *Re Vestey's Settlement*, [1950] 2 All E.R. 891.

Applied: *Re Gourju's Will Trusts*, [1942] 2 All E.R. 605. Distinguished: *Re Vestey's Settlement*, [1950] 2 All E.R. 891.

As to the application of income for the benefit of infants, see 17 Halsbury's Laws (2nd Edn.) 637, para. 1351.

Cases referred to:

(1) *Stocken* v. *Stocken* (1838), 4 My. & Cr. 95; 7 L.J.Ch. 305; 2 Jur. 693; 41 E.R. 38; 28 Digest 228, *855*.

(2) *Meacher* v. *Young* (1834), 2 My. & K. 490; 39 E.R. 1031; 28 Digest 228, *854*.

(3) *Wilson* v. *Turner* (1883), 22 Ch.D. 521; 53 L.J.Ch. 270; 48 L.T. 370; 31 W.R. 438, C.A.; 28 Digest 229, *862*.

(4) *Ransome* v. *Burgess* (1866), L.R. 3 Eq. 773; 36 L.J.Ch. 84; 15 W.R. 189; 28 Digest 228, *857*.

Construction Summons

The facts appear in the judgment of Eve, J.

J. L. Stone, for the trustees, stated the question.

H. A. Rose, for the widow, contended that there was an imperative trust to apply the income for or towards the infant's maintenance. He relied on *Stocken* v. *Stocken* (1), *Meacher* v. *Young* (2), *Wilson* v. *Turner* (3), and Lewin on Trusts, 13th edit., at p. 313.

J. L. Stone, for the trustees, contended that the deed conferred a power to apply the income for the purposes mentioned, and did not create a trust. [He referred to *Ransome* v. *Burgess* (4).]

S. M. Krusin, for the infant, contended that a part of the annuity sufficient for his maintenance and education, should be paid to the widow. Accumulation was not the same as application.

Cur. adv. vult.

Dec. 10. **EVE, J.**—On Nov. 17, 1919, on the occasion of the intermarriage on the day following of the late Lieutenant Owen Peel with the widow, Violet Margaret Florence Drummond, then Margaret Florence Jardine, Major Hugh Peel, the father of the bridegroom, as part of the arrangements entered into on the treaty for the said intended marriage, executed a deed of covenant with the widow that if the intended marriage should take place, and if the said Owen Peel should die in the lifetime of Hugh Peel, then and if and so long as any issue of the intended marriage should be living, but not otherwise, the said Hugh Peel would, during the remainder of his life pay to the trustees for the time being of the deed the clear yearly sum of £1,000 free of all deductions except income tax as from the day of the death of the said Owen Peel by equal quarterly payments on the usual quarter days. And it was thereby agreed and declared that the trustees should hold the said yearly sum payable under the covenant thereinbefore contained upon trust so long as the widow should remain the widow of the said Owen Peel, and should there be issue living of the intended marriage, to pay the same to the widow, and from and after her death or remarriage,

> "upon trust to pay or apply the same in manner thereinafter provided to or for the benefit of the children or child for the time being living of the said intended marriage, and the children or child for the time being living of any deceased child of the said intended marriage and if more than one in equal shares per stirpes."

And by cl. 3 of the deed it was provided that the share of any child or more remote issue of the said intended marriage who should for the time being be an infant, and in the case of a female, a spinster, should be applied by the trustees for or towards his or her maintenance, education, or benefit in such manner as the trustees should think fit, and so that the trustees might either themselves so apply the same or might pay the same to the parent or other the guardians or guardian for the time being of such infant for the purpose aforesaid without seeing to the application thereof.

The infant defendant is the only issue of the marriage. He was born on Oct. 7, 1920. The marriage was dissolved on the wife's petition in September, 1927, and in 1929, she married again, and is now the wife of Captain Drummond. Her former husband, Mr. Owen Peel, died on March 25, 1935, and as from that date, Major Hugh Peel's covenant has come into operation.

On the dissolution of the marriage of the infant's parents, the custody of the infant was remitted to the widow, his mother, and the cost of his maintenance and education, first at a preparatory school and, at the present time, at Stowe, has been wholly defrayed by her. The infant, in due course, will succeed to property, the income of which will be available for his enjoyment, but there may be delay in getting possession, and duties will have to be provided for.

The trustees maintain that, according to the true construction of the deed of covenant, they are at liberty in the circumstances to accumulate the whole or any part of the said yearly sum, and to hold such accumulations for the benefit of the infant after he has come of age. The widow takes a different view, and contends that the deed is not to be construed as a mere power but as creating a trust under which the trustees are bound to apply the fund for the purposes therein named. She admits that the manner in which the money is to be divided between the several purposes is left to the discretion of the trustees, and that the court will not control that discretion so long as it is exercised in good faith and in accordance with the trust.

In my opinion, this latter view is the correct one. I think the trust is a compulsory one to apply the whole fund for the maintenance, education, and benefit of the infant or for any one or more of such purposes, and that the trustees have no power to retain any part of the fund for the purposes they suggest. Such a procedure would involve retention, not application, and be a breach of trust. I am not overlooking the words "or benefit" to which attention was directed in the argument in support of the construction for which the trustees contended. I do not see that they carry the weight attributed to them in support of that contention. In the bringing up of the infant there must occasionally arise doubts whether any particular expenditure comes under "maintenance" or "education," and the words in question relieve the trustees from the burden of solving such a question if they are satisfied that the expenditure is for his benefit.

Solicitors: *Rooper* and *Whateley*; *Anstey & Co.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

SOCIEDAD ANONIMA COMMERCIAL DE ESPORTACION E IMPORTACION (LOUIS DREYFUS & CO.) *v.* NATIONAL S.S. CO.

[King's Bench Division (Branson, J.), May 22, 1935]

[Reported [1935] 2 K.B. 313; 104 L.J.K.B. 529; 153 L.T. 180; 51 T.L.R. 451; 79 Sol. Jo. 454; 40 Com. Cas. 302]

Shipping—Charterparty—Construction—Charter not a demise—Charterers to have the full reach and burthen of the steamer, including . . . decks, etc. (provided same are not occupied by bunker coals and (or) stores)—Right of shipowners to carry passengers.

A charterparty, which was not a demise of the ship, provided that a steamer should carry a cargo of grain from the River Plate to ports in Europe. By cl. 6 thereof: "The charterers are to have the full reach and burthen of the steamer, including the 'tween and shelter decks, bridges, poops, etc. (provided same are not occupied by bunker coals and (or) stores)." The charterers claimed that the shipowners were not entitled to carry passengers.

Held: cl. 6 did not exclude the right of the shipowners to carry passengers on the voyage from the River Plate to Europe, in so far as to do so was not inconsistent with the other obligations they had undertaken towards the charterers.

Shaw Savill & Co. v. *Aitken, Lilburn & Co.* (1) (1883), Cab. and El. 195 and *Weir* v. *Union S.S. Co. Ltd.* (4), [1900] A.C. 525, applied.

Notes. Referred to: *Noemijulia S.S. Co.* v. *Ministry of Food*, [1950] 2 All E.R. 699.

As to the right of a shipowner to carry passengers when the ship is chartered see 30 Halsbury's Laws (2nd Edn.) 619, para. 778, and for cases on the subject see 41 Digest 342, *1929–1934*.

Cases referred to:

(1) *Shaw, Savill & Co.* v. *Aitken, Lilburn & Co.* (1883), Cab. & El. 195; 41 Digest 342, *1933*.

(2) *Glynn* v. *Margetson & Co.*, [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; 9 T.L.R. 437; 7 Asp. M.L.C. 366; 1 R. 193, H.L.; 41 Digest, 311, *1715*.

(3) *A.-G.* v. *Benjamin Smith & Co.* (1918), 87 L.J.K.B. 1045; 119 L.T. 252; 34 T.L.R. 566; 62 Sol. Jo. 701; 14 Asp. M.L.C. 334, H.L.; 41 Digest 992, *8764*.

(4) *Weir* v. *Union S.S. Co. Ltd.*, [1900] A.C. 525; 69 L.J.Q.B. 809; 83 L.T. 91; 9 Asp. M.L.C. 111; 5 Com. Cas. 363, H.L.; 41 Digest 317, *1763*.

Action claiming a declaration that under the terms of two charterparties in the form known as "Centrocon," the defendant shipowners were not entitled to carry passengers in either of the chartered ships. The two ships, the *Harpasa* and the *Harcalo*, had been chartered by the plaintiff charterers to load and carry cargoes of grain from the River Plate to European ports. One of the ships was lying in that river loaded and ready to sail when the action was heard, and the owners proposed to carry passengers in her on the voyage to Europe.

The charterparties, which were not demises of the ships, each contained the following clause (cl. 6):

> "The charterers are to have the full reach and burthen of the steamer, including the 'tween and shelter decks, bridges, poops, etc. (provided same are not occupied by bunker coals and (or) stores)."

The other material parts of the charterparty are set out in his Lordship's judgment.

The charterers contended that the shipowners were not entitled to carry passengers. The charterparty was silent on the point, but it placed at the disposal of the charterers the whole of the vessel for the carriage of their goods, and that, it was submitted, was inconsistent with the owners using any part of her to carry passengers. The point was novel, but in *Shaw, Savill & Co.* v. *Aitken, Lilburn & Co.* (1) it had been held conversely that, under a similar charter, the charterers might not carry passengers. The presence on board of passengers might be injurious to the plaintiffs, since the ship might be detained in quarantine.

The shipowners contended that, as the charters were not demises, the owners remained in possession and control of the ships and were entitled to use them as they pleased, provided that such use did not prevent them from fulfilling their obligations to the charterers. The carriage of passengers would not interfere with the fulfilment of those obligations.

Cyril Miller for the charterers.
W. L. McNair for the shipowners.

BRANSON, J.—This action raises a short point in the following way. The plaintiffs are the charterers of two steamships, the *Harpasa* and the *Harcalo*. The charterparties are, mutatis mutandis, identical, the one having been entered into on April 11, 1935, and the other on the next day. The *Harpasa* is now loading in the River Plate, and a dispute has arisen between the plaintiffs, the charterers, and the defendants, the owners, whether the owners are entitled or not entitled to take on board certain passengers for the homeward voyage. The way in which the case is put for the charterers is this: it is said that the charterparty is on the face of it the ordinary charterparty for the carriage of goods, as distinguished from passengers, from the River Plate to European ports, and that, if it be held that the owners are entitled to carry passengers, that will so alter the original intention of the parties to the contract as to amount to a deviation such as was discussed in *Glynn* v. *Margetson & Co.* (2) and *A.-G.* v. *Benjamin Smith & Co.* (3). On the other hand, it is said on behalf of the shipowners: This is our ship and, in so far as we have not parted with our right to use it or any portion of it by our contract with the plaintiffs, we are entitled to do with it whatsoever we like. Counsel for the shipowners then goes on to say: If one looks at the charterparty it will be found that the carriage of passengers is not prohibited, because that is not inconsistent with any of the obligations which the shipowners have undertaken to the charterers.

That being the position, I look at the charterparty, by which it is agreed between the owners and the charterers that the steamer shall proceed as ordered by the charterers to one of the under-mentioned ports, and there receive for them a full and complete cargo, except as qualified by cl. 19, of wheat and (or) maize and (or) rye. Then it provides for the ports at which the ship shall load, and cl. 4 states:

> "Being so loaded the steamer shall with all reasonable speed therewith proceed to St. Vincent (Cape Verde) or Las Palmas or Teneriffe (Canary Islands) or Madeira or Dakar, at the master's option, for orders (unless these be given to him by charterers on signing bills of lading) to discharge at Liverpool, Birkenhead, Manchester, Cardiff, Barry, Avonmouth, Swansea, London, Hull, Antwerp, Rotterdam, or Amsterdam (one port)."

Cl. 6 gives an option to the charterers to ship other lawful merchandise instead of wheat, or maize, or rye, which was provided for by cl. 2, and an argument is raised on that clause to which I shall have to refer later. Cl. 19 is a clause which expands the provisions of cl. 2 with regard to the obligation to load a full and complete cargo, and it provides that the ship need not load more than 7,480 tons and is not to load less than 6,120 tons, and, provided that she has loaded her cargo within the above-mentioned limits, it is not incumbent on the master to sail with a full and complete cargo. Cl. 21 provides for the signing of the bills of lading on the form printed on the back of the charterparty, cl. 22 provides for orders as to the port of discharge, and cl. 23 gives the charterers an option of ordering the steamer from the port of call to go to Falmouth for final orders to discharge. Cl. 29 is an exceptions clause which provides among other things, that the steamer is not to be liable for loss or damage caused by quarantine restrictions, and an argument is based on that. It is also provided:

> "The steamer shall have the liberty to call at any port or ports in any order for the purpose of taking bunker coal or other supplies, to sail without pilots, to tow and be towed, to assist vessels in distress and to deviate for the purpose of saving life or property."

That being the charterparty, one thing is perfectly plain—that it does not amount to a demise of the ship. That being so, I must begin the consideration of this case by bearing in mind that the defendants are the owners of the ship, and, in so far as they have not restrained their full rights of ownership by the charterparty, those rights remain in them. Counsel for the charterers contends that the shipowners have restricted their rights by entering into a charterparty which is one for the conveyance of grain from the River Plate to European ports, and which says nothing expressly about passengers. He says that, when one considers the possible effects of carrying passengers, it will be found that to do so is inconsistent with the obligations undertaken. I think that if it could be said that to carry passengers was inconsistent with the obligations undertaken, then the charterers would be right. The question is whether that can be said.

The first way in which it is suggested that the carriage of passengers is inconsistent with those obligations is that to take on passengers increases the risk of the ship being detained in quarantine. The next way in which it is put is that, if the taking on of passengers did lead to delays of the ship, the c.i.f. buyer of the grain which has been shipped might claim to reject for the delay. The third contention is that the c.i.f. buyer, when he got the bill of lading, would expect it to be a bill of lading given by the shippers of one cargo which was to be delivered at one port, and that if he found that there were passengers whose presence had necessitated one of them having to be landed, in order to save his life, because he was ill, that might give rise to a claim arising from delays on the voyage.

Dealing with these points, I think the answer to them is as follows. If the contract contains nothing to prevent the ship from carrying passengers, then neither the charterer nor any holder of a bill of lading given by the charterer could have any claim or right of rejection arising out of any delay which the carriage of the passengers might cause, because ex hypothesi to carry passengers would be one of the rights of the ship which had not been defeated by contract. Unless, therefore, it can be said that the matters which are put forward under this head are such that by reason of them the shipowner must be taken by implication to have agreed not to carry passengers, there is no force in that argument at all. With regard to terms to be implied, in order to imply a term in a contract between two commercial men who are sitting down to make a contract in writing one must be able to conclude that, if the point had been raised when they were discussing the contract, they would both have said: Well, that goes without saying, we need not put it in. If one cannot find that amount of certainty about the matter the court will not imply a term into a written contract. It cannot possibly be said that the rather far-drawn possibilities of trouble which might arise from the carriage of passengers could ever have been treated, if it had occurred to anybody to think of them at all, in the way in which they would have had to be treated before one could imply a term into this charterparty that the shipowners would not carry passengers.

The last way in which it is said that the charterparty has disentitled the shipowners from the carrying of passengers is that under cl. 6 of the charter

> "The charterers are to have the full reach and burthen of the steamer including the 'tween and shelter decks, bridges, poop, etc. (provided same are not occupied by bunker coals and (or) stores)."

Counsel for the charterers quite fairly and frankly admits that in a charterparty the words "full reach and burthen of the steamer" apply primâ facie to cargo spaces only. That was decided by *Weir* v. *Union S.S. Co. Ltd.* (4), and no question can arise on that. It is said, however, that this clause expands the meaning of those earlier words by going on to include the 'tween and shelter decks, bridges, poop, etc., and it is argued that the passenger accommodation which this ship possesses may be held to come within that description so that the right to use that accommodation has been taken from the shipowners and handed over to the charterers. Dealing with the matter first apart from authority, I should hold that, when one looks at this sentence as a whole, one does not get any such extension of the ordinary primâ facie meaning attached to the words "full reach and burthen of the steamer." I cannot think that it was ever intended that any part of the accommodation of the ship which was not cargo space in the ordinary acceptance of that term could be included, in view of the provision "provided the same are not occupied by bunker coals and (or) stores." In other words, the generality of the earlier words has to be controlled by the proviso which indicates that the spaces which are intended to be dealt with in the earlier words are to be spaces which might in the ordinary course be used for bunker coals and (or) stores. I do not think that anybody considering the passenger accommodation which we know that this ship possessed would, with that language before him, conceive the possibility of filling the state rooms or the dining-room with either bunker coals or stores, any more than he would think of filling the captain's cabin or the officers' rooms or the accommodation of the crew. Therefore I think that the argument for the charterers that the shipowners have disentitled themselves from carrying passengers by having entered into this charterparty fails.

I have come to that conclusion apart from authority, but I think that *Shaw, Savill & Co.* v. *Aitken, Lilburn & Co.* (1), properly looked at, is an authority for the view which I am taking of this charterparty. In that case an action was brought by charterers against the shipowners in the following circumstances. The vessel was chartered to go to Wellington, in New Zealand, and there to receive a full and complete cargo in consideration of a lump sum freight. The vessel went to Wellington and there loaded a full and complete cargo of lawful merchandise, the cabin spaces being left unoccupied. The charterers then desired to fill those cabin spaces by carrying passengers to England, and their right to do so was disputed by the shipowners. The charterers and the shipowners thereupon agreed that the space should be used and that the passengers should be carried for the benefit of whom it might concern. This was done, and then both parties sought to adduce evidence to prove a custom, the charterers to prove a custom that in some circumstances they should have the use of the cabins, the shipowners to prove a custom that they should have the use of the cabins. The case came before DENMAN, J., who found that both parties failed altogether to prove any custom at all. He therefore proceeded to decide the case on the construction of the charterparty. The judgment, which is quite short, proceeds as follows (Cab. & El. at p. 196):

> "The attempt to prove a custom utterly failed on both sides; nothing of the sort exists. The matter must therefore be decided on the construction of the charterparty and the authorities bearing on the point. Mr. Cohen contended that the authorities show there is no right to use the cabin space for cargo. Mr. Bigham, while admitting that there was no demise of the ship, contended that, when the whole charterparty was looked at, it amounted to an undertaking that the plaintiffs should have the use of the whole ship, and that although passengers were not cargo, yet the plaintiffs, having the use of the ship, might use the ship for passengers."

Then the learned judge refers to the argument with regard to the tonnage and goes on:

> "Reliance was also placed on the words 'use and hire of the ship.' In my opinion, however, these words are used indifferently; and the meaning is that the charterer should have the use or hire of the ship for the purpose of carrying lawful produce and merchandise only, and not passengers. The ship is at their disposal for a particular purpose only. The defendants are therefore entitled to the freight earned by the carrying of the passengers."

That judgment is not expressly put on the grounds on which I am basing my judgment, but I think that those are the grounds on which that case was decided.

Starting, therefore, from the fact that, unless they have precluded themselves from carrying passengers in their ship, the shipowners are entitled to do so, and holding, as I do hold, that there is nothing in the charterparty which does so preclude them, the net result is that the declaration asked for by the plaintiffs cannot be made, nor can the injunction for which they ask be granted.

Judgment for the shipowners.

Solicitors: *Thomas Cooper & Co.*; *William A. Crump & Son.*

[*Reported by* V. R. Aronson, Esq., *Barrister-at-Law.*]

ALEXANDER *v.* RAYSON

[Court of Appeal (Greer, Romer, and Scott, L.JJ.), October 21, 22, 23, November 25, 1935]

[Reported [1936] 1 K.B. 169; 105 L.J.K.B. 148; 154 L.T. 205; 52 T.L.R. 131; 80 Sol. Jo. 15]

Contract—Illegality—Lease of flat and agreement for services—Intention of landlord fraudulently to use documents to reduce rateable value of flat.

In an action by a landlord against the tenant of a flat for rent under the lease and for payments under a contract for services, evidence was given that the annual rent was £450, and the annual payment under the contract £750—£1,200 in all; that with slight exception the services provided for under the contract were provided for under the lease; and that the execution of the two documents was obtained by the landlord for the purpose of defrauding the rating authority, by deceiving them as to the true rateable value of the flat, inducing them to believe that the only payment received by the landlord in respect of the premises was £450, and concealing from them the terms of the contract. It was also proved that the landlord produced the lease, but not the agreement, to the assessment committee who reduced the valuation of the flat but restored their original assessment when the facts were brought to their notice.

Held: the landlord, by his intention to use the lease and the agreement, though not the flat itself, for an illegal purpose, had placed himself in the same position in law as though he had let the flat intending that it should be used for such a purpose; the fact that he had failed in his attempted fraud and could no longer use the documents for an illegal purpose did not afford him a locus penitentiae, for his illegal purpose had been partially effected; and, therefore, he was not entitled to enforce either the lease or the agreement.

Scott v. *Brown, Doering, McNabb & Co.* (1) [1892] 2 Q.B. 724 applied.

Per curiam: In an action tried by a judge without a jury it is highly inconvenient, at the end of the case of the party having the onus of proof, for the opposing party to ask for the ruling of the judge whether there is any case for him to answer, for in such a case the judge is the judge of fact and it is not right that he should be asked to express any opinion on the evidence until it is completed.

Notes. Applied: *Yuill* v. *Yuill,* [1945] 1 All E.R. 183; *Elder* v. *Auerbach,* [1950] 1 K.B. 359. Referred to: *Mason* v. *Clarke,* [1954] 1 All E.R. 189.

As to illegal contracts see 8 HALSBURY'S LAWS (3rd Edn.) 128 et seq., and for cases see 12 DIGEST (Repl.) 263 et seq.

Cases referred to:

(1) *Scott* v. *Brown, Doering, McNabb & Co.,* [1892] 2 Q.B. 724; 61 L.J.Q.B. 738; 67 L.T. 782; 57 J.P. 213; 41 W.R. 116; 8 T.L.R. 755; 36 Sol. Jo. 698; 4 R. 42, C.A.; 12 Digest (Repl.) 268, *2060.*

(2) *Gas Light and Coke Co.* v. *Turner* (1839), 5 Bing. N.C. 666; affirmed (1840), 6 Bing. N.C. 324; 8 Scott. 609; 9 L.J.Ex. 336; 133 E.R. 127, Ex.Ch.; 12 Digest (Repl.) 309, *2381.*

(3) *Pearce* v. *Brooks* (1866), L.R. 1 Exch. 213; 4 H. & C. 358; 33 L.J.Ex. 134; 14 L.T. 288; 30 J.P. 295; 12 Jur. N.S. 342; 14 W.R. 614; 12 Digest (Repl.) 294, *2264.*

(4) *Cowan* v. *Milbourn* (1867), L.R. 2 Exch. 230; 36 L.J.Ex. 124; 16 L.T. 290; 31 J.P. 423; 15 W.R. 750; 12 Digest (Repl.) 309, *2383.*

(5) *Upfill* v. *Wright,* [1911] 1 K.B. 506; 80 L.J.K.B. 254; 103 L.T. 834; 27 T.L.R. 160; 55 Sol. Jo. 189, D.C.; 12 Digest (Repl.) 309, *2379.*

(6) *Feret* v. *Hill* (1854), 15 C.B. 207; 23 L.J.C.P. 185; 23 L.T.O.S. 158; 18 Jur. 1014; 2 W.R. 493; 2 C.L.R. 1366; 139 E.R. 400; 12 Digest (Repl.) 325, *2509.*

(7) *Ritchie* v. *Smith* (1848), 6 C.B. 462; 3 New Mag. Cas. 56; 18 L.J.C.P. 9; 12 L.T.O.S. 148; 12 J.P. 822; 13 Jur. 63; 136 E.R. 1329; 12 Digest (Repl.) 309, *2382.*

(8) *Taylor* v. *Chester* (1869), L.R. 4 Q.B. 309; 10 B. & S. 237; 38 L.J.Q.B. 225; 21 L.T. 359; 33 J.P. 709; 12 Digest (Repl.) 311, *2401.*

(9) *Scarfe* v. *Morgan* (1838), 4 M. & W. 270; 1 Horn & H. 292; 7 L.J.Ex. 324; 2 Jur. 569; 150 E.R. 1430; 32 Digest 233, *180.*

(10) *Gordon* v. *Chief Commissioner of Police,* [1910] 2 K.B. 1080; 79 L.J.K.B. 957; 103 L.T. 338; 74 J.P. 437; 26 T.L.R. 645; 54 Sol. Jo. 719, C.A.; 12 Digest (Repl.) 313, *2414.*

(11) *Re Thomas, Ex parte Poppleton* (1884), 14 Q.B.D. 379; 54 L.J.Q.B. 336; 51 L.T. 602; 33 W.R. 583; 12 Digest (Repl.) 677, *5218.*

(12) *Taylor* v. *Bowers* (1876), 1 Q.B.D. 291; 46 L.J.Q.B. 39; 34 L.T. 938; 24 W.R. 499, C.A.; 12 Digest (Repl.) 316, *2438.*

Appeal from DU PARCQ, J.

The plaintiff, Mr. Alexander, the leaseholder, let a flat to the defendant, Mrs. Rayson, by an underlease at the rate of £450 a year. By an agreement in writing the plaintiff agreed to render the defendant the usual services for an annual payment of £750 a year. Except for the provision and maintenance under the agreement of a frigidaire, the services to be provided by the underlease and under the agreement were substantially the same. Both the underlease and the agreement were dated Oct. 29, 1929, and the defendant entered into possession of the flat. The defendant paid the plaintiff £1,200 a year up to and including Midsummer, 1934. On Sept. 29, 1934, the defendant tendered to the plaintiff £112 10s., a quarter's rent under the underlease, but refused to pay the £187 10s. claimed under the agreement, alleging that the plaintiff had failed to perform his obligations thereunder. The plaintiff refused the tender and issued his writ for £300. By her defence the defendant pleaded that: (i) there was no consideration for the agreement, and (ii) there was failure by the plaintiff to perform his obligations under both instruments, which he had thereby repudiated. She also pleaded the tender, paying £112 10s. into court, and counter-claimed for damages for failure by the plaintiff to fulfil his obligations under both documents. Later she amended her defence by adding this statement:

> "The defendant will object that the said agreement is void for illegality and that its enforcement would be contrary to public policy in that its execution was obtained by the plaintiff for the purposes of defrauding the Westminster City Council by deceiving them as to the true rateable value of the said premises and by inducing them to believe that the true rent received by the plaintiff in respect of the said premises was £450 and by concealing from them the terms of the said agreement."

At the trial, DU PARCQ, J., holding that the onus was on the defendant, her case was opened on the two issues that the agreement was unenforceable, as (i) there was no consideration for it and (ii) it was void for illegality. Evidence was given for the defendant that the plaintiff had objected to £720, the gross assessment of the flat, and, appearing before the assessment committee, had produced the underlease, but not the agreement, and stated that £450 was the only amount he received for rent, services, and rates; that the gross valuation was reduced to £270; that on inquiry of the defendant the existence of the agreement was discovered and, after hearing the plaintiff, the assessment committee restored the gross assessment of £720.

At the conclusion of the defendant's case, the plaintiff submitted that there was "no evidence in law," and DU PARCQ, J., held (i) that there was consideration for the agreement, and (ii) that, on the assumption the above-mentioned evidence was true, the agreement was not unenforceable for illegality. The defendant appealed.

Pritt, K.C., and *C. Gallop* for the defendant (the tenant).
Micklethwait, K.C., and *Granville Sharp* for the plaintiff (the landlord).

Cur. adv. vult.

Nov. 25. **ROMER, L.J.**, read the following judgment of the court. Mr. Alexander, the respondent to this appeal, is the owner of a leasehold block of flats at 142, Piccadilly, in the city of Westminster. In July, 1929, the appellant, Mrs. Rayson, approached the respondent with a view to taking an underlease of the flat on the second floor of these premises at a rent of £1,200 a year, such rent to cover the provision by the respondent of the services that are usual in such cases. The respondent, accordingly, forwarded to the appellant two documents, one being a draft sub-lease of the flat at a rent of £450 a year, the other being a draft agreement for the rendering by the respondent during the term of the sub-lease of various services in connection with the flat in consideration of the payment by her of the additional sum of £750 a year. It is by no means unusual in the case of a lease of a flat to have the actual lease of the premises in one document and to provide for the rendering of the customary services in another. The strange thing in this case was that the draft lease itself provided for the rendering of such services, or, at any rate, the greater part of them, without any payment by the appellant other than the rent of £450, and that the agreement provided for the rendering of practically the same services with some small additions in consideration of the extra £750 a year. In a later part of this judgment we shall have to compare the services to be provided under the lease with those to be provided under the agreement. For the moment it is sufficient to state that, except for the provision and maintenance under the agreement of a frigidaire, they were substantially the same. In due course the two drafts were approved on behalf of the appellant, and the engrossments were prepared, executed, and exchanged without any suspicion on her part, or on the part of her advisers, that there was anything sinister about the form of the two documents, or that any improper use of them could or was intended to be made. The instruments were both dated Oct. 29, 1929, and the appellant in due course entered into possession of the flat.

The annual sum of £1,200 was paid by the appellant quarterly up to and including the instalment falling due at Midsummer, 1934; but, holding the view somewhat strongly that the respondent had failed to comply with his obligations in respect of the services to be rendered by him under the sub-lease and agreement, she refused to pay him the quarterly instalment of the £750 falling due on Sept. 29 of that year. She tendered to him, however, the sum of £112 10s., being the quarter's rent payable on that day under the sub-lease. This tender was refused by the respondent, and on Oct. 12, 1934, he issued the writ in this action claiming the full sum of £300, being the quarter's instalment payable under the two documents. By her defence as originally delivered, the appellant contended: (i) That there was no consideration for her agreement to pay the £750 a year; and (ii) that the respondent had not performed his obligations under the lease or the agreement and had thereby repudiated them both and was not entitled to maintain the action. In addition she counterclaimed for damages in respect of the respondent's alleged failure to observe the covenants and agreements on his part contained in the two documents. She also pleaded the tender of the £112 10s. and brought that sum into court. The action was in due course set down for trial, but shortly before it came on for hearing the appellant, by leave, amended her defence by adding the following paragraph:

> "2 (a). The defendant will object that the said agreement is void for illegality, and that its enforcement would be contrary to public policy in that its execution was obtained by the plaintiff for the purposes of defrauding the Westminster City Council by deceiving them as to the true rateable value of the said premises and by inducing them to believe that the true rent received by the plaintiff in respect of the said premises was £450 and by concealing from them the terms of the said agreement."

If the facts alleged in this paragraph are true, it obviously raises a question of law of both difficulty and importance. Demurrers have been abolished, but had both parties been willing or had the court or a judge on the application of either party so directed, such question of law could have been decided before the trial of the action under R.S.C. Order XXV, r. 2. Had the decision upon it been adverse to the appellant, that is to say had it been decided that, even assuming the facts alleged in the new paragraph to be true, such facts afforded no defence in law, the expense of calling witnesses as to those facts at the trial would have been avoided. This course was not, however, pursued, and the whole action came on for trial before du Parcq, J., on May 17, 1935. At the hearing it was contended on behalf of the appellant, that is to say, the defendant, that, as the onus was upon her of establishing one or more of her defences, she had the right of opening. This contention was acceded to by the learned judge, and the appellant's counsel thereupon opened her case upon the issues (i) of absence of consideration for the agreement of Oct. 29, 1929, and (ii) of illegal purpose, and then called witnesses upon these two points. Her defence and counterclaim, based upon the alleged repudiation by the respondent of both lease and agreement, was not for the moment embarked upon. These witnesses deposed to the following effect: that in the valuation list for the parish of the city of Westminster, made in or about Jan. 16, 1930, the flat in question had been assessed at £720 gross and £597 net; that on the 9th August following the respondent gave notice of objection to such valuation and assessment; that in support of such notice of objection the respondent appeared before the assessment committee on Oct. 6, 1930; that he then said that the rent of the flat was £450 a year inclusive of rent, taxes and services, and that £450 was the only amount he received in respect of rents, services and rates; that the lease was then produced, but the agreement was not; that thereupon the gross valuation of the flat was reduced in the provisional list from £720 to £270; that inquiry was thereafter made of the appellant on behalf of the valuation authority as to the terms of her tenancy, and that the existence of the agreement of Oct. 29, 1929, was thereupon disclosed by her; that the respondent, accordingly, attended again before the assessment committee on Nov. 12, 1930, when, in response to a request for an explanation, he gave a "rather evasive reply"; that on this occasion he contended that the agreement was confidential and that the committee could not alter their previous decision; and that the committee did, however, alter their previous decision and restored the original figures of £720 gross and £597 net.

If this evidence is to be accepted it is obvious that the respondent attempted to perpetrate a gross fraud upon the rating authorities, and through them upon the Inland Revenue. The attempt, indeed, failed, but only by reason of the disclosure by the appellant, at the instance of the assessment committee of the agreement of Oct. 29, 1929, the existence of which had been concealed by the respondent. The inference is that the respondent, in causing the appellant's tenancy to be created and constituted, by the unusual method that he adopted, intended by means of that device to perpetrate the fraud. In these circumstances one would have expected the respondent to take the earliest opportunity of going into the witness box to repel, if he could, the serious charge that had been made against him. This course was not adopted. At the conclusion of the appellant's evidence the respondent's counsel submitted that there was no case to answer upon the two issues which at that stage had alone been presented to the court, that is to say the issues of no consideration and of illegality. Where an action is being heard by a jury it is, of course, quite usual and often very convenient at the end of the case of the plaintiff, or of the party having onus of proof, as the appellant, the defendant, had here, for the opposing party to ask for the ruling of the judge whether there is any case to go to the jury who are the only judges of fact. It also seems to be not unusual in the King's Bench Division to ask for a similar ruling in actions tried by a judge alone. We think, however, that this is highly inconvenient. For the judge in such cases is also the judge of fact, and we cannot think it right that the judge of fact should be asked to express any opinion upon the evidence until the evidence is completed. Certainly no one would ever dream of asking a jury at the end of a plaintiff's case to say what verdict they would be prepared to give if the defendant called no evidence, and we fail to see why a judge should be asked such a question in cases where he and not a jury is the judge that has to determine the facts. In such cases we venture to think that the responsibility for not calling rebutting evidence should be upon the other party's counsel and upon no one else.

This, however, is by the way; for no one can suggest that, when the appellant's case upon the two issues has been concluded, she did not establish a primâ facie case as to the facts on the second issue. Nor, of course, did the respondent's counsel make any such suggestion. What he did ask the learned judge to rule was that, accepting the evidence given on the appellant's behalf, there was no case to answer in law. We cannot help regarding this as not only an irregular but also as a most inconvenient procedure. The witnesses of the respondent were presumably in court, and the expense of their attendance had already been incurred. We gather that the learned judge had not or might not have had sufficient time at his disposal to proceed with the issue of repudiation; but we cannot find that there would have been any difficulty in completing the evidence upon the other two issues. The learned judge, however, acceded to the request of the respondent's counsel and gave a ruling of law upon the evidence as it then stood, deciding the two issues of want of consideration and want of legality in favour of the respondent. As the appellant's counsel desired to challenge this decision or ruling in the Court of Appeal, and considered that such an appeal would be one from an interlocutory order, he asked for and obtained from the learned judge leave to appeal.

The question not unnaturally arose as to the procedure to be followed after the appeal had been disposed of, and, as we understand, both parties agreed that, if the appeal should succeed, the hearing of the action should be resumed before the learned judge himself in order that the respondent's evidence upon the two issues might be given. It seems also to have been agreed that the hearing of the counterclaim should be postponed until after the decision of the Court of Appeal, and that matter will presumably have to be dealt with by the learned judge whatever may be the decision of this court. A formal order was drawn up in due course and, so far as is material, is in these terms:

> "The judge having held that the evidence before the court discloses no defence on the issue of true consideration for the supplemental agreement made between the parties and dated Oct. 29, 1929, or on the issue raised by the defendant in par.

> 2A of the amended defence and counterclaim hereon, it is ordered that the costs of such issues be taxed and paid by the defendant to the plaintiff. And it is further ordered that there be liberty to appeal and in that event the costs when taxed are to be paid by the defendant to the plaintiff's solicitor within fourteen days of the Taxing Master's certificate on the personal undertaking to return the same if the appeal be successful. And it is further ordered that the trial of the counterclaim do stand over and that if notice of appeal be given and entered then there be liberty to apply after the hearing of such appeal." A B

The money in court was by the order directed to be paid out to the respondent or his solicitor. The order, appropriately enough, is headed by the words "New Procedure." So new, indeed, and so irregular did the procedure seem to us that when the appeal came on for hearing we thought at first that we ought not to deal with it unless and until the evidence relating to the second of the two issues had been completed. Both parties, however, urged us to hear and dispose of the appeal upon the material before us in order to save expense, and this we ultimately consented to do. The consequences may, however, be unfortunate for the respondent. If we allow the appeal, he will of course be given the opportunity of proving himself innocent; on the other hand, should we dismiss the appeal, he will be in the position of having been proved in a court of justice by uncontradicted evidence to be a fraudulent rascal. It is in such circumstances—and we sincerely trust that the like may never occur again—that we proceed to deal with the two issues that are before us. C D

The first of these is the question whether there was any consideration for the agreement of Oct. 29, 1929. The appellant contends that there was not, inasmuch as the agreement merely provided for services to be rendered by the respondent that he was already bound to render under the sub-lease of the same date, such sub-lease having in fact been executed before the execution of the agreement. Turning to the agreement it will be found that the respondent thereby expressly agreed: (i) To provide the appellant with a sufficient continuous supply of hot water; (ii) to cause the flat to be sufficiently heated from a central heating plant installed in the building by means of radiators installed in the flat from approximately Sept. 1 until about May 1, dependent upon the outside temperature; (iii) to provide a resident porter on the premises for the convenience of the appellant in common with other tenants, the duties of such porter to include removal of all refuse from the flat and the delivery of coal to the flat from the cellar; (iv) to install in the flat and during the tenancy to maintain a frigidaire for the use of the tenant. The respondent also impliedly agreed to pay all rates, taxes, assessments, water, tithes, and other payments in respect of the flat, to maintain and keep up the said building and the working of the electric passenger and trade lifts, and the lighting of the halls, corridors, and staircases of the respondent's premises. E F G

By the sub-lease the respondent covenanted expressly (i) to pay the ground rent and all rates, taxes, and assessments whatsoever imposed or charged on the demised premises; (ii) to maintain and keep the roof, drains, sewers, main walls, timbers and structure of the building and the entrance hall, passenger lifts, staircases and landings and other parts of the premises intended for the common use of all tenants and occupiers of the said building in good repair and condition and to keep the said entrance hall and staircase and landings well lighted and cleaned; (iii) to provide an adequate supply of hot water for the use of the appellant, her family, guests, and servants at all reasonable times, and also to keep the demised premises suitably and properly heated by means of the central heating apparatus installed therein, and to keep the hot water and central heating apparatus in good and sufficient repair. The respondent also impliedly covenanted to employ a porter (though possibly not a resident porter), inasmuch as one of the appellant's covenants required her to have H I

> "all coals required brought up from the cellars and all refuse taken down to the dustbin by the porter employed by the lessor."

It will be observed that in some respects the obligations undertaken by the lessor under the agreement differed slightly from those undertaken by him under the sub-lease.

A Why this should have been so we do not know. The respondent may have had some reason for it, but he has not yet been into the witness box to explain the mystery. But it is plain that, except for the provision and maintenance of the frigidaire, the services to be rendered under the agreement are substantially the same as those to be rendered under the sub-lease. If it were not for the frigidaire, therefore, it might well be contended that there was no consideration for the agreement by the appellant to pay the B £750 a year in addition to the £450 payable under the sub-lease. The provision and maintenance of the frigidaire does, however, constitute some consideration for the agreement. It certainly would seem to be a somewhat inadequate one, but the court is not concerned with the adequacy of consideration, if consideration there be. In our opinion, the learned judge was plainly right in deciding the first of the two issues in favour of the respondent.

C The second issue raises a question of much greater difficulty. It is settled law that an agreement to do an act that is illegal or immoral or contrary to public policy, or to do any act for a consideration that is illegal, immoral, or contrary to public policy, is unlawful and therefore void. But it often happens that an agreement which, in itself, is not unlawful, is made with the intention of one or both parties to make use of the subject-matter for an unlawful purpose, that is to say, a purpose that is illegal, im-D moral, or contrary to public policy. The most common instance of this is an agreement for the sale or letting of an object, where the agreement is unobjectionable on the face of it, but where the intention of both or one of the parties is that the object shall be used by the purchaser or hirer for an unlawful purpose. In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it. Ex turpi causa non oritur actio. The action does not lie because the court will not lend its help E to such a plaintiff. Many instances of this are to be found in the books.

In *Gas Light and Coke Co.* v. *Turner* (2), affirmed, the plaintiffs had demised certain premises to the defendant to be used by him for an unlawful purpose. It was held that the plaintiffs were not entitled to sue the defendant upon the covenant for rent in the lease. We shall have to refer to this case later upon another point. In *Pearce* v. *Brooks* (3), a coach-builder had let out a brougham on hire to a prostitute for the purpose F of enabling her (to use the words of Pollock, C.B.), "to make a display favourable to her immoral purposes." The coach-builder subsequently sued the prostitute for moneys payable under the agreement. It was held by the Court of Exchequer that he could not recover. The Chief Baron said (L.R. 1 Exch. at p. 217):

> "I have always considered it as settled law that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going G to be used for that purpose cannot recover the price of the thing so supplied."

He added

> "nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, ex turpi causa non oritur actio, and whether it is an immoral or an illegal purpose in which the plaintiff has participated, H it comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other."

In *Cowan* v. *Milbourn* (4), the defendant, who had agreed to let rooms to the plaintiff, discovered subsequently that the plaintiff intended to use them for an unlawful purpose. The defendant thereupon refused to carry out the agreement, and it was held that he I was justified in so doing. It was further stated by Bramwell, B., that if the defendant had carried out the agreement with knowledge of the plaintiff's unlawful intention and let the plaintiff into possession of the rooms, he could not have recovered the price for their letting. This dictum of the learned baron was, of course, abundantly justified by the decision of the Court of Common Pleas in the *Gas Light and Coke Co.* case (2), and by the decision of the Court of Exchequer in *Pearce* v. *Brooks* (3), where the brougham had been delivered to the defendant. To the same effect was a decision of the King's Bench Division in *Upfill* v. *Wright* (5). The plaintiff in that case had let a flat to the defendant, whose intention was to use it for an immoral purpose, and this intention was known to the plaintiff. The plaintiff sued for the rent, and it was held that he could not A maintain the action.

It will be observed that in all these cases the plaintiff was endeavouring to enforce by action an agreement, or a clause in an agreement, which was tainted by the unlawful intention of the plaintiff, or the unlawful intention of the defendant known to the plaintiff, as to the purpose for which the subject-matter of the agreement was to be used. To such an action the maxim ex turpi causa non oritur actio applies. But B the maxim does not require, nor does the language of it suggest, that a completely executed transfer of property, or of an interest in property, made in pursuance of such an agreement must be regarded as being invalid. This is laid down in clear terms in the well-known case of *Feret* v. *Hill* (6). In that case, A. procured B. to grant him a lease of premises by means of a false representation that he intended to carry on a certain lawful trade therein. Having obtained possession, A. converted the premises C into a brothel, whereupon B. forcibly expelled him. It was held that A. might maintain ejectment—the fraudulent misrepresentation and the subsequent illegal use of the premises not being sufficient at law to avoid the lease. As the lease had been obtained by fraudulent misrepresentation, it could have been set aside in equity, and since the Judicature Act, in any Division of the High Court. With that aspect of the matter we are not now concerned. The importance of the case lies in the fact that the lease was D held to be a valid one, notwithstanding the intention of A. to use the demised premises for an unlawful purpose. On this question, MAULE, J., expressed himself as follows (15 C.B. at p. 224):

> "The plaintiff is not calling upon the court to enforce any agreement at all. The agreement was an agreement on the part of the defendant to demise certain premises E to the plaintiff for a given term. When the instrument was executed, and possession was given under it, it received its full effect; no aid of a court of justice was required to enforce it. This action of ejectment is brought, not for the purpose of enforcing the agreement, but the plaintiff asks the court to afford him a remedy against one who has extruded him from a lawful possession. There is, therefore, a manifest distinction between this case and those where the court was called upon F to assist the plaintiff in enforcing an agreement the object of which was to do an illegal act, as in *Ritchie* v. *Smith* (7). In that case both plaintiff and defendant were parties to an agreement, the very object and intention of which was to enable one of them to commit an infraction of the law. If the court there had refused to listen to the defence, they would have been helping the plaintiff to enforce something which lay in contract, namely, the payment of rent, when both parties to the G agreement were intending to apply the premises to an illegal purpose; the plaintiff was seeking to enforce the performance of an illegal agreement. Such, also was *Gas Light and Coke Co.* v. *Turner* (2)."

CROWDER, J., said much the same thing (15 C.B. at p. 227):

> "He"—(that is the plaintiff)—"is not calling upon the court to aid him in en- H forcing or carrying into effect an illegal agreement; all he seeks is to recover the possession of premises to which he is lawfully entitled."

This distinction between an action brought to enforce an unlawful agreement and one brought to assert a right of property already acquired under such an agreement is further illustrated by *Taylor* v. *Chester* (8). The defendant in that case was the keeper of a brothel, and as such had supplied wine and supper to the plaintiff "for the purpose I of being consumed there by the plaintiff and divers prostitutes in a debauch to incite them to riotous disorderly and immoral conduct." When the debauch was over there followed in due course the reckoning. Being unable, or unwilling, to pay it at once, the plaintiff deposited with the defendant the half of a £50 note as security. He subsequently repented of this action and instituted proceedings against the defendant for the purpose of obtaining the return of the half bank-note. It was held that he was not entitled to recover. The property in the half note had passed to the defendant, and in spite of the illegality of the agreement under which it had passed, the defendant was entitled to keep it. As was said by Parke, B., in *Scarfe* v. *Morgan* (9) (4 M. & W. at p. 281), in a passage quoted by Hannen, J., in the course of the argument:

> "If an illegal contract is executed, and a property either special or general has passed thereby, the property must remain."

The plaintiff, on the other hand, could not maintain his action without asserting and relying upon the unlawful agreement. He could not, to use the language of Mellor, J., in delivering the judgment of the court (L.R. 4 Q.B. at p. 315), recover without showing the true character of the deposit; and, that being upon an illegal consideration, to which he himself was a party, he was precluded from obtaining "the assistance of the law" to recover it back. Much to the same effect is *Gordon* v. *Chief Commissioner of Police* (10). The money that the plaintiff was claiming in that action had been earned by him in carrying on an illegal business. But the money had become his property, and he was held entitled to recover it. He was not asking the court to enforce any illegal contract or to grant relief dependent in any way on any illegal transaction on his part, but solely on the unjustifiable detention of his money by the defendant.

In view of these various authorities it seems plain that, if the respondent had let the flat to the appellant to be used by her for an illegal purpose, he could not have successfully sued her for the rent, but the leasehold interest in the flat purporting to be granted by the sub-lease would nevertheless have been legally vested in her. The result would have been that the appellant would be entitled to remain in possession of the flat without payment of rent until and unless the respondent could eject her without having to rely upon the lease or agreement. This curious aspect of the matter was alluded to by Tindal, C.J., in *Gas Light and Coke Co.* v. *Turner* (2) (5 Bing. N.C. at p. 677):

> "It was observed in the course of argument for the plaintiffs, that, as they had granted a lease for twenty-one years, such term was vested in the defendant, and that he would be able to hold himself in for the remainder of it without payment of any rent. That point is not now before us; but without giving any opinion how far the position is maintainable, it is obvious that, if an ejectment should be brought upon the breach of any condition in the lease, the action of ejectment would at all events be free from the objection that the court was lending its aid to enforce a contract in violation of law."

In the present case the appellant does not, as a matter of fact, desire to remain in possession of the flat. She is, and has for some time been, anxious to leave it. But if the respondent has, by his conduct, placed himself in the same position in law as though he had let the flat with the intention of its being used for an illegal purpose, he has no one but himself to thank for any loss that he may suffer in consequence.

That brings us to the real crux of this case. Has the respondent placed himself in that position? Now in the cases to which we have referred there was an intention to use the subject-matter of the agreement for an unlawful purpose. In the present case, on the other hand, the respondent's intention was merely to make use of the lease and agreement—that is, the documents themselves—for an unlawful purpose. Does that make any difference? In our opinion, it does not. It seems to us, and it is here that we respectfully disagree with du Parcq, J., that the principles applicable to the two cases are identical. That this is so seems to be established by the decision of this court in *Scott* v. *Brown, Doering, McNabb & Co.* (1). In that case the plaintiff brought an action against some stockbrokers, through whom he had purchased shares in a certain company, to obtain rescission of the purchase contract and repayment of the purchase money on the ground that the defendants, while acting as the plaintiff's brokers, had delivered their own shares to him instead of purchasing them upon the Stock Exchange. At the trial it appeared from the plaintiff's own evidence that the money sought to be recovered had been paid by the plaintiff in pursuance of an agreement between him and one of the defendants by which such defendant was, with the money, to purchase upon the Stock Exchange a number of shares in the company at a premium with the sole object of inducing the public to believe that there was a real market for the shares and that they were at a real premium. The object, in other words, was "to rig the market." It was held by this court, applying the principle ex turpi causa non oritur actio, that the action was based upon an illegal contract and that the money could not be recovered. It will be observed that there was no intention on the part of the plaintiff in that case to use the shares in an unlawful way. The intention was merely to make use of the existence of the share contract in order to defraud the public by inducing them to believe that it recorded a genuine transaction. In delivering judgment, LINDLEY, L.J., as he then was, said ([1892] 2 Q.B. at p. 729):

> " The plaintiff's purchase was an actual purchase, not a sham purchase; that is true, but it is also true that the sole object of the purchase was to cheat and mislead the public. Under these circumstances, the plaintiff must look elsewhere than to a court of justice for such assistance as he may require against the persons he employed to assist him in his fraud, if the claim to such assistance is based on his illegal contract. Any rights which he may have irrespective of his illegal contract will, of course, be recognised and enforced. But his illegal contract confers no rights on him: (see *Pearce* v. *Brooks* (3))."

It was the transaction of purchase on the market at a particular price and not the thing purchased of which an illegal use was to be made. So in the present case it was the formulation of the transaction in a particular way by means of the sub-lease and agreement and not the subject-matter of the transaction of which an illegal use was to be made. In one sense, no doubt, it may be said that the plaintiff intended to use only the sub-lease for an unlawful purpose, and not to use, but to conceal, the agreement; in reality there was only one transaction between the parties. The splitting up of it into two documents was a device essential for the success of the plaintiff's fraud and both documents must be regarded as equally fraudulent in purpose.

For these reasons we are of opinion that the respondent is not entitled to seek the assistance of a court of justice in enforcing either the lease or the agreement. DU PARCQ, J. (who came to a different conclusion) considered that the present case was much the same as one in which a party to an agreement enters into it with the intention of altering it at a later date, and using the document so altered for his own fraudulent purposes. The learned judge said:

> " I cannot think that if a man says, ' when I have got this agreement I am going by forgery to alter it,' he is thereby precluded from getting his rights against the other party to the agreement under the agreement in fact made."

He thought that in such a case it was something altogether too remote from the contract itself to say that the contract was illegal. In that we respectfully agree with him. But, with all deference, it seems to us that the case he supposed is fundamentally different from the case now before us. In the former case the document is a harmless one, and can only be rendered dangerous by a subsequent act. We see no reason why before the commission of that act the document should not be used for an innocent purpose. The intention was mental only and no overt step in carrying out the fraudulent intention was taken in the transaction itself. In the present case, however, the documents themselves were dangerous in the sense that they could be and were intended to be used for a fraudulent purpose, without alteration, and the splitting of the transaction into the two documents was an overt step in carrying out the fraud. We cannot think that the respondent is entitled to bring these documents into a court of justice and ask the court to assist him in carrying them into effect. The respondent's counsel contended that this view is inconsistent with the decision in *Re Thomas* (11). But there is no such inconsistency. In that case one Jaquess had handed over money to Thomas, who was a solicitor, to be used by Thomas in conducting certain litigation. Jaquess subsequently sought to obtain from Thomas an account of the money so handed over to him and a taxation of his bill of costs. Thomas sought to resist the claim on the ground that the money in question had been subscribed by various persons under a champertous, and, therefore, illegal agreement. It is not surprising that he failed in his defence, for, apart altogether from the fact that Thomas was an officer of the court, a fact upon which the court commented with some vigour, Thomas could not justify misappropriating the money of Jaquess merely because it had come to Jaquess from a tainted source.

Nor, of course, was Jaquess in any way asking the court to enforce the champertous agreement. In these respects the case is not unlike that of *Gordon* v. *Chief Commissioner of Police* (10).

The respondent's counsel further contended that, inasmuch as the respondent had failed in his attempted fraud, and could, therefore, no longer use the documents for an illegal purpose, he was now entitled to sue upon them. The law, it was said, would allow to the respondent a locus penitentiæ. So, perhaps, it would have done, had the respondent repented before attempting to carry his fraud into effect: (see *Taylor* v. *Bowers* (12)). But, as it is, the respondent's repentance came too late, namely, after he had been found out. Where the illegal purpose has been wholly or partially effected, the law allows no locus penitentiæ: (see Salmond and Winfield's Law of Contracts at p. 152). It will not be any the readier to do so when the repentance, as in the present case, is merely due to the frustration by others of the respondent's fraudulent purpose.

In our opinion, the appeal as to the second issue must be allowed and the order directing payment by the appellant of the costs of that issue should be discharged. It is true that this issue (being the issue raised in par. 2a of the defence) goes only to the validity of the agreement. But this, in our opinion, is immaterial. The moment that the attention of the court is drawn to the illegality attending the execution of the sub-lease, it is bound to take notice of it, whether such illegality be pleaded or not. It had not been pleaded in *Scott* v. *Brown, Doering, McNabb & Co.* (1). See, too, the observations of Vaughan Williams, L.J., in *Gordon* v. *Chief Commissioner of Police* (10); ([1910] 2 K.B. at p. 1086).

If, therefore, when the trial is resumed before du Parcq, J., the respondent should fail to disprove the charge of fraud made against him, his action, so far as it is based on the lease and the agreement, should be dismissed. It will, however, apparently still be open to the respondent to ask for leave to amend his statement of claim by alleging an oral agreement and claiming relief based upon it. His application for this purpose was ordered by du Parcq, J., to stand over until after the hearing of this appeal. But we do not intend to suggest that if and when the application is made it should be granted. It should be added that the appellant seems not unwilling to pay the rent accrued due under the lease. Should she do so, the respondent is, of course, entitled to retain it. But if he seeks the assistance of the court to recover it, such assistance must be refused. On the other hand, if the respondent succeeds in clearing himself, the issue of repudiation raised in the defence will have to be decided. In either case the counterclaim will have to be proceeded with. The order of du Parcq, J., as to the costs of the issue of want of consideration will, of course, stand. All the other costs of the action and the costs of the counterclaim will be dealt with as the learned judge may direct when the trial is resumed. As to the appeal, the appellant has succeeded upon the more important of the two issues and failed upon the other. In these circumstances we think that the right order to make is that the respondent shall pay the appellant three-quarters of the costs of the appeal.

Appeal allowed upon one issue.

Solicitors: *Lazarus, Son, & L. A. Hart*; *S. Thornhill Tracey.*

[*Reported by* C. G. Moran, Esq., *Barrister-at-Law.*]

NORTH-WESTERN UTILITIES, LTD. *v.* LONDON GUARANTEE AND ACCIDENT CO., LTD.

[PRIVY COUNCIL (Lord Hailsham, L.C., Lord Blanesburgh, and Lord Wright), July 25, 26, 29, 30, August 1, October 24, 1935]

[Reported [1936] A.C. 108; 105 L.J.P.C. 18; 154 L.T. 89; 52 T.L.R. 93; 79 Sol. Jo. 902]

Negligence—Gas—Escape from main—Damage to property—Damage caused by adjacent works of third party—Duty of undertakers to know of operations of third party.

Gas is a dangerous thing within the rules applicable to things dangerous in themselves. The rule in *Rylands* v. *Fletcher* (1) (1868), L.R. 3 H.L. 330, is not limited to cases where the defendant has been carrying or accumulating a dangerous thing on his land. It applies equally where, in exercise of a franchise to do so, an undertaker has been carrying gas in mains laid in the soil of another person, and, therefore, he is liable to pay for damage caused by the gas if it escapes, even though there is no negligence on his part. The rule has, however, been modified by the admission of the defence (among others) that the mischief which happened was brought about, not by any negligence on the part of the undertaker, but by the negligence of a third party. The undertaker may still be liable in negligence if he fails to foresee and guard against the consequences to his works of the third party's act.

Under a franchise granted to the appellants' predecessors in title by the city of Edmonton, the appellants laid gas-pipes under the streets of the city for the purpose of supplying natural gas to consumers. In 1923 the appellants laid a 12-in. intermediate pressure gas-main at a depth of 3 ft. 6 in. In the pipe were three welded joints. In 1931 the local authority constructed a storm sewer system beneath the appellants' main. In 1932 gas from the appellants' system escaped into an hotel. It ignited, and the hotel was burned down. It was ascertained that the cause of the escape was a break in a welded joint in the gas main through which the gas percolated into the hotel basement, and that that break was caused by the operations of the local authority which had resulted in a general subsidence of the ground. In an action brought by the respondents as owners of the hotel and their insurers,

Held: the appellants were put on inquiry as to the operations which the local authority were conducting in the vicinity of their mains, and their failure to know of them was not consistent with due care on their part in the interests of members of the public likely to be affected, and, therefore, they were liable to the respondents for the damage suffered by them.

Notes. Distinguished: *Makin* v. *London North Eastern Rail Co.*, [1943] 1 All E.R. 645. Considered: *Paris* v. *Stepney Borough Council*, [1951] 1 All E.R. 42. Referred to: *Collingwood* v. *Home and Colonial Stores*, [1936] 3 All E.R. 200.

As to special circumstances increasing the duty to take care, see 23 HALSBURY'S LAWS (2nd Edn.) 574 et seq. and 629 et seq., and for cases see 36 DIGEST (Repl.) 79 et seq.

Cases referred to:

(1) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 283, *334*.

(2) *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.*, [1914] 3 K.B. 772; 83 L.J.K.B. 352; 111 L.T. 198; 78 J.P. 305; 30 T.L.R. 441; 58 Sol. Jo. 577; 12 L.G.R. 807, C.A.; 36 Digest (Repl.) 284, *338*.

(3) *Green* v. *Chelsea Waterworks Co.* (1894), 70 L.T. 547; 10 T.L.R. 259, C.A.; 38 Digest 23, *124*.

(4) *Box* v. *Jubb* (1879), 4 Ex. D. 76; 48 L.J.Q.B. 417; 41 L.T. 97; 27 W.R. 415; 36 Digest (Repl.) 298, *424*.

(5) *Rickards* v. *Lothian*, [1913] A.C. 263; 82 L.J.P.C. 42; 108 L.T. 225; 29 T.L.R. 281; 57 Sol. Jo. 281, P.C.; 36 Digest (Repl.) 37, *177*.

(6) *Dominion Natural Gas Co., Ltd.* v. *Collins & Perkins*, [1909] A.C. 640; 79 L.J.P.C. 13; 101 L.T. 359; 25 T.L.R. 831, P.C.; 36 Digest (Repl.) 36, *176*.

(7) *Midwood & Co.* v. *Manchester Corpn.*, [1905] 2 K.B. 597; 74 L.J.K.B. 884; 93 L.T. 525; 69 J.P. 348; 54 W.R. 37; 21 T.L.R. 667; 3 L.G.R. 1136, C.A.; 38 Digest 50, *288*.

(8) *Hammond* v. *St. Pancras Vestry* (1874), L.R. 9 C.P. 316; 43 L.J.C.P. 157; 30 L.T. 296; 38 J.P. 456; 22 W.R. 826; 38 Digest 25, *135*.

(9) *Stretton's Derby Brewery Co., Ltd.* v. *Mayor of Derby*, [1894] 1 Ch. 431; 63 L.J.Ch. 135; 69 L.T. 791; 42 W.R. 583; 10 T.L.R. 94; 8 R. 608; 38 Digest 26, *140*.

(10) *Raffan* v. *Canadian Western Natural Gas Co.* (1914), 29 W.L.R. 161; 6 W.W.R. 1295; 18 D.L.R. 13; 7 Alta. L.R. 459; 8 W.W.R. 676; 36 Digest (Repl.) 296, **140*.

(11) *Farnworth* v. *Manchester Corpn.*, [1930] A.C. 171; 99 L.J.K.B. 83; 46 T.L.R. 85; 73 Sol. Jo. 818; 94 J.P. 62; 142 L.T. 145; 27 L.G.R. 709, H.L.; Digest Supp.

(12) *Hardaker* v. *Idle District Council*, [1896] 1 Q.B. 335; 65 L.J.Q.B. 363; 74 L.T. 69; 60 J.P. 196; 44 W.R. 323; 12 T.L.R. 207; 40 Sol. Jo. 273, C.A.; 25 Digest 480, *62*.

Appeal from a judgment of the Supreme Court of Alberta (Appellate Division).

The action was brought by the respondents, as representing owners of property in the city of Edmonton, Alberta, and their insurers, against the appellants, who were a public utility company incorporated under the Dominion Companies Act, claiming $320,278.64 as damages which they alleged they had suffered as the result of a fire which occurred on the night of Feb. 21, 1932, and burnt down the Corona Hotel in Jasper-avenue, Edmonton, causing damage to adjoining property. The question was whether the appellants, who distributed natural gas to the inhabitants of Edmonton, were responsible for damage resulting from a fire due to an escape of natural gas from their gas-main. The main defence of the appellants was that the breaking of the pipe was solely due to the ground beneath it being let down by new sewerage works constructed by the city in 1931. The respondents contended that the original construction of the pipe was improper, and that the damage was solely caused thereby. The trial judge found that the cause of the break in a welded joint through which the gas leaked were the operations of the city of Edmonton, and gave judgment dismissing the respondents' action. That judgment was reversed by the Supreme Court of Alberta (Appellate Division) (HARVEY, C.J.A., CLARKE and McGILLIVRAY, JJ.A., MITCHELL and LUNNEY, JJ.A. dissenting). The appellants appealed.

Wilfrid Greene, K.C., and *G. H. Steer, K.C.* (of the Canadian Bar), for the appellants.

W. N. Tilley, K.C., *S. B. Woods, K.C.* (both of the Canadian Bar), and *Frank Gahan* for the respondents.

Oct. 24. **LORD WRIGHT.**—The action out of which this appeal arises was brought by the respondents as owners of property in the city of Edmonton in Alberta and their insurers; they claimed that the property had been destroyed or damaged by a fire due to an escape of gas from the gas-main of the appellants for which the appellants are liable. The damages claimed amounted to $320,278.64, but all questions of amount were reserved. On the question of liability before FORD, J., the appellants succeeded, but his decision was reversed by a judgment of the Supreme Court of Alberta (Appellate Division) by a majority (LUNNEY, J.A., and MITCHELL, J.A., dissenting), who ordered judgment to be entered for damages to be assessed. From that judgment, the present appeal is brought.

The appellants are a public utility company incorporated under the Dominion Companies Act; they distribute natural gas under a franchise granted to their predecessors in title the Northern Alberta Natural Gas Development Company Limited (hereinafter called "the company") by the city of Edmonton (hereinafter called "the city") in November, 1915, and confirmed by statute (Alberta Statutes, 1916, c. 29). The franchise was assigned to the appellants by deed, dated May 29, 1923.

Under this franchise, the city granted to the company the full power to pull down, take up, repair, maintain, or operate its gas-pipe lines along, through, or under the streets and other public places within the city for the purpose of supplying natural gas to consumers, with power to break up the surface and make necessary excavations for that purpose. By cl. 11 it was provided that the company should indemnify the city against any damage arising out of the construction and operation of its works owing to the negligence of the company, its servants, and employees, and that the city should be liable for all damage to the plant of the company caused by the negligence of the city, its workmen, and employees. The company was bound to supply natural gas as required to consumers within the city limits at the property line when their land or premises were situated along the company's main line. The franchise was subject to the provisions of the Water, Gas, Electric, and Telephone Companies Act of Alberta, which, by amendment made in 1924, was applied to companies incorporated or licensed under any statute of the Dominion or of Alberta. It is convenient to recite here ss. 11 and 13 of that act. Section 11 was in these terms:

> "The company shall make satisfaction to the owners or proprietors of any building or other property or to the municipality or minister of public works as the case may be for all damage caused in or by the execution of all or any of the said powers."

By s. 13 it was provided as follows:

> "The company shall locate and construct its gas or water works or electric or telephone system and all apparatus and appurtenances thereto belonging or appertaining or therewith connected and wheresoever situated so as not to endanger the public health or safety."

The appellants, in August, 1923, laid a 12-in. intermediate pressure gas-main along a lane in Edmonton south of Jasper-avenue, and running at right angles into 107th-street. The lane was unpaved, but where the main went across and under the street an open trench could not be cut; the width of the street was 77 ft., and three excavations were made, one at each end about 7 ft. from the side pavement and one in the middle, spaces of about 11 ft. being left in the street for the traffic, the two intervening spaces being tunnelled. Each excavation was about 15 ft. wide. The main was laid at a depth of 3 ft. 6 in.; in the pipe were three welded joints, the one in the centre being in the space of the middle excavation; the pipe was pushed or pulled through the length of the tunnelled and excavated spaces, the earth being back-filled. Not far from this main and about the same level below the ground the appellants also laid a low pressure 10-in. main. There was also a wooden conduit laid by the city to contain the cables for the street railway. In 1907, the city built, as part of its sewerage system in 107th-street, a manhole called manhole A; the manhole was 16 ft. deep and was close to the appellants' two mains. Later, between February and April, 1931, the city proceeded to construct a storm sewer system in the same region. For this purpose they excavated a manhole called manhole B to the north-east of manhole A, and about 20 ft. away, and they dug a trench further to the north or north-east, and there they laid a 15-in. storm sewer; in addition they drove a tunnel underground for the 20 ft. from manhole B to manhole A, and laid a storm sewer in the tunnel; in order to join that sewer with manhole A they built a weir chamber roughly about 4 ft. cube, at the bottom of manhole A, the wall of which at the bottom they had broken, so as to build the chamber and join up the storm sewer. These underground building operations were immediately beneath the appellants' main and in the way of the centre welded joint. They were carried out from manhole A. In February, 1932, it was discovered that gas from the appellants' system was escaping into the Corona Hotel, which belonged to one of the respondents; the gas ignited and the hotel was burned down and adjoining property was damaged. It was ascertained on examination that the centre welded joint of the pipe-line of the appellants' 12-in. main had given way; the pipe in that vicinity had sagged 6½ in. Hence the escape of gas which had percolated through the soil and penetrated into the hotel basement.

The claim was in respect of the loss and damage through the fire. The claim against the appellants was based in the pleadings on various causes of action: (i) for permitting gas, a dangerous substance, to escape; (ii) for breach of s. 13 of the Water, Gas, &c., Act; (iii) for nuisance, public or private; (iv) for negligence in construction and maintenance of the system, or in failing to have an inspection system, or in failing to odorise their gas, or in failing to locate their pipes below the frost line, or to repair and maintain their pipes. The main defence of the appellants was that the breaking of the joint in the pipe was solely due to the action of the city in letting down the soil under the pipe by the negligent and improper way in which they excavated the weir chamber and tunnel under the appellants' main, without providing adequate support. The respondents' case originally was that the city's work had been properly designed and carried out, so that there could be no reason at any time, either while it was being carried on or at any subsequent period, to anticipate that it could cause any mischief, but in the course of the trial there was alleged, as a new and alternative ground of negligence or breach of absolute duty against the appellants, that the appellants either knew or ought to have known what work the city was doing, and failed to take, as they could and should have done, all proper precautions to prevent the escape of the dangerous gas which they were carrying in their mains. No amendment has ever been made of the pleadings, nor have any precise particulars been given of this head of claim. Their Lordships must observe that it is pessimi exempli to admit a new head of claim without a proper amendment of the pleadings. But this ground of claim has been considered by the trial judge and by the Appellate Division and must now be regarded as a relevant issue in the case. The trial judge decided against the contentions of the respondents, but the Appellate Division allowed the appeal solely on the new ground of claim.

Before discussing the facts in the case, it is desirable to explain the principles of law which in their Lordships' judgment are applicable.

That gas is a dangerous thing within the rules applicable to things dangerous in themselves is beyond question. Thus the appellants, who are carrying in their mains the inflammable and explosive gas, are primâ facie within the principle of *Rylands* v. *Fletcher* (1); that is to say, that, though they are doing nothing wrongful in carrying the dangerous thing so long as they keep it in their pipes, they come primâ facie within the rule of strict liability if the gas escapes; the gas constitutes an extraordinary danger created by the appellants for their own purposes, and the rule established by *Rylands* v. *Fletcher* (1) requires that they act at their peril and must pay for damage caused by the gas if it escapes, even without any negligence on their part. The rule is not limited to cases where the defendant has been carrying or accumulating the dangerous thing on his own land; it applies equally in a case like the present where the appellants were carrying the gas in mains laid in the property of the city—that is, in the subsoil—in exercise of a franchise to do so: *Charing Cross, West End, and City Electricity Supply Co., Ltd.* v. *London Hydraulic Power Co.* (2).

This form of liability is in many ways analogous to a liability for nuisance, though nuisance is not only different in its historical origin, but in its legal character and many of its incidents and applications. But the two causes of action often overlap, and in respect of each of these causes of action the rule of strict liability has been modified by admitting as a defence that what was being done was properly done in pursuance of statutory powers, and the mischief that has happened has not been brought about by any negligence on the part of the undertakers. As an illustration of this well-known doctrine, reference may be made to *Green* v. *The Chelsea Waterworks Co.* (3) (70 L.T. at p. 549), where Lindley, L.J., said of *Rylands* v. *Fletcher*:

> "That case is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision."

By the same reasoning the rule has been held inapplicable where the casualty is due to the act of God; or to the independent or conscious volition of a third party, as in *Box* v. *Jubb* (4), which was approved by the Judicial Committee in *Rickards* v. *Lothian* (5), and not to any negligence of the defendants. In *Box* v. *Jubb* (4) the act which caused the escape of the water from the reservoir was a malicious—which their Lordships think means no more than conscious or deliberate—act of a third person. It was said by Kelly, C.B. (4 Ex. D. at p. 79):

> "I think the defendants could not possibly have been expected to anticipate that which happened here, and the law does not require them to construct their reservoir

> and the sluices and gates leading to it to meet any amount of pressure which the wrongful act of a third party may impose."

Lord Moulton in *Rickards' Case* (5) states the matter in these words ([1913] A.C. at p. 278):

> " A defendant cannot, in their Lordships' opinion, be properly said to have caused or allowed the water to escape, if the malicious act of a third person was the real cause of its escaping without any fault on the part of the defendant."

And in *Dominion Natural Gas Co.* v. *Collins* (6) ([1909] A.C. at p. 647), in a case for this purpose not dissimilar, the question was put:

> " Have the defendants been able to show affirmatively that the true cause of the accident was the conscious act of another volition, *i.e.*, the tampering with the machines by the railway company's workmen? "

It is not here intended to enumerate all the defences which might be available to a defendant in this class of action; but the two defences mentioned are both material in this case. Reference was made to a further possible defence based on the contention that the appellants and the owners of the properties destroyed had a common interest in maintaining the potentially dangerous installation, or that these owners had consented to the danger. It is true that in proper cases such may be good defences, but they do not seem to have any application to a case like the present, where the appellants are a commercial undertaking, though, no doubt, they are acting under statutory powers, while those whose property has been destroyed are merely individual consumers who avail themselves of the supply of gas which is offered. These facts do not constitute a common interest or consent in any relevant sense.

Where undertakers are acting under statutory powers it is a question of construction, depending on the language of the statute, whether they are only liable for negligence, or whether they remain subject to the strict and unqualified rule of *Rylands* v. *Fletcher* (1). Thus in the *Charing Cross Electricity Supply* case (2) cited above it was held—following the previous decision in *Midwood* v. *Manchester Corpn.* (7)—that the defence of statutory authority was limited by a clause in the statutory order providing that nothing therein should exonerate the corporation from liability for nuisance. In *Hammond* v. *St. Pancras Vestry* (8), where the Act imposed on the vestry the duty of properly cleansing their sewers, it was held that, as these words were susceptible of meaning either that an absolute duty was imposed or that the duty was only to exercise due and reasonable care, the latter meaning was to be preferred, since the absolute duty could not be held to be imposed save by clear words. That case was followed in *Stretton's Derby Brewery* v. *Mayor of Derby* (9).

It, accordingly, now becomes necessary to consider the meaning of ss. 11 and 13 of the Alberta Water, Gas, Electric, and Telephone Companies Act, cited above. Section 13 of the Act—which was then numbered s. 11—was considered by the Supreme Court of Canada in *Raffan* v. *Canadian Western Natural Gas Light Heat and Power Co.* (10), affirming a decision of the Appellate Division in Alberta (7 Alb. L.R. 459), where it was held that the section imposed an absolute duty on the company not only during the location and construction of the works but also during their operation. Their Lordships cannot agree with that decision in so far as it is sought to read into s. 13 some such words as " maintain " in addition to the words actually expressed which are " locate and construct." Nor does it seem legitimate to read " locate and construct " as including something entirely different—that is, " maintain ": " locate and construct " are words apt only to refer to the initial location or construction or to some new works: once the works are located and constructed, the process of maintaining or keeping and repairing seems to involve a new and different idea and to involve different considerations. Their Lordships, accordingly, think that, so far as s. 13 goes, the appellants are in regard to maintenance not within the section, and are entitled to the benefit of the statutory authority, and are subject only to the obligation to use reasonable care in the same way as in *Farnworth* v. *Manchester Corpn.* (11). It is, accordingly, not necessary for their Lordships to decide whether s. 13 imposes in matters to which it applies

A an absolute duty. But, in any case, the question is not eventually material in this case. For, even if the section applies to maintenance, and is absolute in its terms, the duty it imposes is still no more than the duty under the rule in *Rylands* v. *Fletcher* (1), according to which the appellants would not be liable for damage caused, without default on their part, by the independent act of a third party. Then, whether or not s. 13 applies to maintenance, and whether or not it imposes, where it does apply, a B liability unqualified in terms, the position is the same for purposes of this case. The appellants' real defence was that the damage was caused by the act of the city, for which they were not responsible and which they could not control, and that they were guilty of no negligence in the matter. That defence could be equally good on any view of the effect of s. 13: and the same reasoning applies to s. 11, if, indeed, that section is open at all to the respondents in this case.

C It, accordingly, becomes necessary to consider the issues of fact which have occupied the greater part of the hearing of this appeal, as they seem to have done in the courts below. The respondents have contended that the original construction of the pipe line was improper, and that the damage was solely caused thereby: the appellants have contended that not only was their original construction proper, but the breaking of the pipe was solely due to the ground beneath it being let down by the new sewerage works D constructed by the city in 1931. The further issue which was raised if that were established, namely, whether the appellants were still in default because they ought to have foreseen and provided against the risk of damage through the city's underground work, will be dealt with later.

Counsel for the appellants and counsel for the respondents have most exhaustively and ably laid before their Lordships the arguments on the one side and the other as E to what caused the breaking of the 12-in. pipe from which the gas escaped. In the result their Lordships are in agreement with the finding of the trial judge that

> "the cause of the break in the welded joint through which the gas leaked were the operations of the city of Edmonton in constructing the 15-in. tile overflow sewer between manhole A and manhole B and the weir chamber at manhole A in the year F 1931."

It is only necessary here very briefly to summarise why their Lordships so decide.

On the side of 107th Street in close proximity were three mains, all about 3 ft. below the pavement; they were the 12-in. pipe and the 10-in. pipe belonging to the appellants, and a wooden conduit which the city had laid for their electric cables serving the street railway. Close to that position was manhole A, the bottom of which was about 16 ft. G below the surface; through manhole A and under the three mains went a 12-in. sewer, constructed in 1907, and similarly there ran into manhole A a 6-in. tile sewer constructed in 1913 and leading to a catch basin. In February and March, 1931, the city built manhole B in a position about 20 ft. north of manhole A. It was excavated from the ground and an open trench was made to the north from manhole B in which a sewer was laid. But also from manhole B, a new 15-in. overflow sewer was laid to manhole A, H into which it was opened by way of a well chamber, which was built for that purpose by opening up the side of manhole A. All this work was underground; the tunnel for the new overflow sewer was dug from manhole B, but the new weir chamber, which was built of brick, with a concrete filling on top, was constructed from manhole A. In building the weir chamber, earth was excavated apart from the excavation to make the tunnel to a width of about 52 in., a height of about 5 ft. 6 in., and a depth of about 3 ft. I This excavation for the weir chamber was almost directly beneath the three mains. The work was finished early in April, 1931; it was in February, 1932, that the 12-in. pipe broke and leaked. When the place was opened up, it was found that the pipe had sagged at the spot above the weir chamber about 6½ in.; the 10-in. pipe and the wooden conduit had also sagged very considerably. These coincidences of time and place would point very strongly to the conclusion that the excavation was the cause, the ground beneath having in consequence been disturbed and having then subsided. This inference is strengthened by the observations made when the ground by the weir chamber was opened up after the accident. Examinations were made on two successive days, July 7 and 8, 1932; experts on both sides were present. There was much conflict of evidence, but the trial judge on a pure question of fact as to what was seen, must have accepted the evidence given on behalf of the appellants, which was that when a hole was broken in the wall of manhole A above the weir chamber, a cavity in the earth, extending 12 in. long by 12 in. wide and 2 in. deep, was found above the roof of the chamber, which the appellants' experts stated indicated a failure to give proper support and involved some disturbance of the adjacent soil. On the other hand, the evidence given on behalf of the respondents to show that there was original imperfect construction of the appellants' 12-in. main seems quite unsatisfactory. The 12-in. pipe was about 77 ft. long and was made into a single length by means of three welded joints, the centre one of which gave way. It was said that the welding was not properly done, but that allegation failed; it was said that the pipe was not properly laid because it must have been laid on loose earth composed of backfilling material; when it was opened up it was 6½ in. out of line, and the settlement was ascribed to backfilling being squeezed out by the effects of freezing in the winter, the pipe having in fact been laid within the frost area. But that was all inference based on the view that the bottom of the tunnel had not been properly levelled off, and it was assumed that the whole 77 ft. had been tunnelled. In fact, the part in which the centre welded joint was laid was in an open excavation; only two portions of the width of the street of about 12 ft. each had been tunnelled, between the three portions of about 15 ft. each which had been excavated from the street level. The settlement of the 12-in. main and of the two adjacent pipes was much more consistent with a general subsidence of the ground than with any defect in the manner the pipe was laid; there was no substantial evidence to justify the conclusion that the laying was defective.

Their Lordships, accordingly, agree with the finding of the trial judge on this point, which is not expressly dissented from, though not affirmatively accepted, by the majority in the Appellate Division, who did not feel it necessary to give any opinion.

There remains the further point, which is, that, assuming that the city in fact let down the ground and caused the pipe to break, still the appellants should have foreseen and guarded against the risk of their pipes being affected. This alternative plea of negligence was, as has been said, not pleaded, but it was dealt with by the trial judge and by the Appellate Division without the pleadings being amended and without any demand by the appellants for leave to adduce further evidence. As it has been dealt with in the court below, their Lordships do not feel able to exclude it. But it certainly calls for most critical consideration, and the respondents are not relieved, by failing to plead properly, from proving their case properly.

The authorities already cited herein show that, though the act of a third party may be relied on by way of defence in cases of this type, the defendant may still be held liable in negligence if he failed in foreseeing and guarding against the consequences to his works of that third party's act. The trial judge on this issue found that

> "in the absence of notice, the defendant ought to have known, even if he did not, that the operations were going on, because of the length of time they were carried on, and the conspicuous and public nature thereof":

the trial judge, however, went on to hold

> "that the defendant had the right to rely upon the city engineer, with whose department it had been in close contact when it constructed its distribution system in 1923, seeing that the work was done in such a way that such a result as has happened would not occur."

Harvey, C.J.A., came to a different conclusion, and on that ground allowed the appeal and gave judgment against the appellants. He said ((1934) 3 W.W.R. at p. 647):

> "What we are concerned with here is not the city's obligation to the defendant, but the defendant's obligation to the public who may be affected by its operations. I cannot think that the defendant performed its full duty to them when it failed to inspect city operations which might affect the security of its pipes, and to take such steps as might be necessary to protect them. It would have meant extra trouble and expense no doubt, but there would have been no difficulty in ascertain-

ing from the city where such operations were taking place and seeing that all proper safeguards were taken as provided."

The question here is between the respondents and the appellants. It may be that the respondents, treating them all as property owners, have or had a claim against the city on the facts as found by their Lordships: such a claim would primâ facie be within the principle of such a case as *Hardaker* v. *Idle District Council* (12), where a district council in making, by their contractors, a sewer, negligently broke a gas main, the gas from which escaped into the plaintiff's house and caused damage: it was held that the defendants were liable in tort to the plaintiff. This is not a matter on which their Lordships can properly express an opinion, since it is a question between parties who are not before them. It may also be that the city are liable to the appellants if they have let down the ground in which the appellants' pipes were laid; primâ facie they are not entitled to derogate from the franchise they have granted, and in addition they may be liable under the provision quoted above contained in the agreement granting the franchise. Their Lordships here again have no desire to pass on matters not before them. The question in these proceedings is between the respondents as or representing property owners and the appellants as undertakers, who are carrying an element, gas, in their mains close to the owners' premises; the gas is carried at high pressure, is very dangerous if it escapes, and calculated if it does escape to damage, as it did, the owners' property. The appellants accordingly owe a duty to the respondents, even though the case falls outside the rule of strict or absolute liability, to exercise all care and skill that these owners should not be damaged. The degree of care which that duty involves must be proportioned to the degree of risk involved if the duty should not be fulfilled. It has been found, both by the trial judge and by the Appellate Division, that the appellants were put on inquiry, at least, as to the operations which the city were conducting in the vicinity of their mains, in particular of the 12-in. intermediate pressure main, where the pressure of the gas was 40 lb. to the inch. Even if the operations at manhole B were, so far as above ground, in a direction opposite to manhole A and even though the tunnel from manhole B to manhole A was underground, still manhole B was only 20 ft. from manhole A: but of particular moment was the fact that the building of the weir chamber, which involved men working on it and carrying down bricks and cement, cannot but have been obvious to the appellants' employees if they were taking any interest in what the city did in the vicinity of the appellants' mains. In ordinary course, the city might at any time be conducting operations in connection with their sewers in the vicinity of the appellants' mains, and it was the appellants' duty to watch such operations. This particular operation was, as both courts have held, from its public nature and conspicuous character and from the time during which it went on, such that a failure by the appellants to know of it as is plainly not consistent with due care on their part in the interests of members of the public likely to be affected. The appellants have strenuously contended that they are embarrassed because they have had no particulars of what is complained of and no opportunity of calling evidence in answer. But if that were a grievance, it might have been, but was not, availed of in the courts below.

In truth the gravamen of the charge against the appellants in this matter is that though they had the tremendous responsibility of carrying this highly inflammable gas under the streets of a city, they did nothing at all in all the facts of this case. If they did not know of the city works, their system of inspection must have been very deficient. If they did know, they should have been on their guard: they might have ascertained what work was being done and carefully investigated the position, or they might have examined the pipes likely to be affected so as to satisfy themselves that the bed on which they lay was not being disturbed. Their duty to the respondents was, at the lowest, to be on the watch and to be vigilant: they do not even pretend to have done as much as that. In fact, so far as appears, they gave no thought to the matter. They left it all to chance. It is, in their Lordships' judgment, impossible now for them to protest that they could have done nothing effective to prevent the accident: and in any case their Lordships cannot accept that as the true view.

In the result, their Lordships agree with the decision on this point of the Appellate Division, and are of opinion that the appeal should be dismissed. The respondents, however, have failed on the issue which has bulked so largely, whether the breaking of the pipe was due to the fault of the city or of the appellants, and succeed on an issue not raised in the pleadings, and the costs to be paid by the appellants ought to be reduced accordingly. The order of the Appellate Division ought therefore to be varied by reducing by one-third the amount of costs payable under that order by the appellants to the respondents, and the appellants ought to pay to the respondents two-thirds only of their costs of this appeal.

Their Lordships will humbly so advise His Majesty.

Appeal dismissed.

Solicitors: *Charles Russell & Co.*; *Blake & Redden.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

COTTERILL *v.* PENN

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory, and Humphreys, JJ.), May 16, 17, 1935]

[Reported [1936] 1 K.B. 53; 105 L.J.K.B. 1; 153 L.T. 377; 99 J.P. 276; 51 T.L.R. 459; 79 Sol. Jo. 383; 33 L.G.R. 307; 30 Cox C.C. 258]

Criminal Law—Killing—Pigeon—Killing in mistaken, but honest, belief bird wild—Apprehension of possible future danger to crops—Larceny Act, 1861 (24 *&* 25 *Vict., c.* 96), *s.* 23.

The defendant shot at and killed a house pigeon, honestly believing that it was a wild bird and under a genuine apprehension that it might damage his crops.

Held: he was guilty of "unlawfully and wilfully" killing a pigeon, contrary to s. 23 of the Larceny Act, 1861, as he had shot at the particular bird which he killed, intending to kill it, and a mere apprehension of possible future danger which the bird might cause to his crops was insufficient to afford a lawful excuse.

Horton v. *Gwynne* (1), [1921] 2 K.B. 661, followed.

Taylor v. *Newman* (2) (1863), 8 L.T. 424, and *Farey* v. *Welch* (3), [1929] 1 K.B. 388, distinguished.

Notes. In a civil action (and apparently in a prosecution under s. 23 too) a defendant who intentionally shoots another person's pigeon must, in order to escape liability, show either (a) that there was no other practicable means of protecting the defendant's property or (b) that the defendant reasonably thought there were no such means: see *Hamps* v. *Darby*, [1948] 2 All E.R. 474. Section 23 does not apply in the case of pigeons destroyed in certain circumstances by a sanitary authority in London: see the Public Health (London) Act, 1936, s. 121.

Referred to: *Cresswell* v. *Sirl*, [1947] 2 All E.R. 730; *Hamps* v. *Darby*, [1948] 2 All E.R. 474.

As to mens rea in statutory offences generally, see 10 HALSBURY'S LAWS (3rd Edn.) 273, para. 508.

As to mens rea in pigeon shooting see 1 HALSBURY'S LAWS (3rd Edn.) 660, para. 1261 notes (u)–(b), and for cases on the subject see 14 DIGEST (Repl.) 38, 79–81.

For the Larceny Act, 1861, s. 23, see 5 HALSBURY'S STATUTES (2nd Edn.) 733, and for the Public Health (London) Act, 1936, see 15 HALSBURY'S STATUTES (2nd Edn.) 958.

Cases referred to:

(1) *Horton* v. *Gwynne*, [1921] 2 K.B. 661; 90 L.J.K.B. 1151; 125 L.T. 309; 85 J.P. 210; 26 Cox C.C. 744; 19 L.G.R. 351, D.C.; 14 Digest (Repl.) 38, *79*.

(2) *Taylor* v. *Newman* (1863), 4 B. & S. 89; 2 New Rep. 275; 32 L.J.M.C. 186; 8 L.T. 424; 27 J.P. 502; 11 W.R. 752; 9 Cox C.C. 314; 122 E.R. 393; 2 Digest 216, *119*.

(3) *Farey* v. *Welch*, [1929] 1 K.B. 388; 98 L.J.K.B. 318; 140 L.T. 560; 93 J.P. 70; 45 T.L.R. 277; 27 L.G.R. 153; 28 Cox C.C. 604, D.C.; Digest Supp.

(4) *R.* v. *Glover* (1814), Russ. & Ry. 269, C.C.R.; 25 Digest 381, *299*.

(5) *Hudson* v. *MacRae* (1863), 4 B. & S. 585; 3 New Rep. 76; 33 L.J.M.C. 65; 9 L.T. 678; 28 J.P. 436; 12 W.R. 80; 122 E.R. 579; 25 Digest 10, *64*.

(6) *Miles* v. *Hutchings*, [1903] 2 K.B. 714; 72 L.J.K.B. 775; 89 L.T. 420; 52 W.R. 284; 20 Cox, C.C. 555, D.C.; 25 Digest 385, *354*.

Case Stated by Worcestershire justices.

An information was preferred before the Worcestershire justices by Cotterill (the prosecutor), under s. 23 of the Larceny Act, 1861, against Penn (the defendant) charging him that he on June 11, 1934, at Pedmore, Worcestershire, unlawfully and wilfully killed a pigeon in such circumstances as did not amount to larceny at common law.

On the hearing of the information the following facts were proved or admitted: On June 11, 1934, about 6 p.m., Mr. Stanley Millward released a number of homing pigeons in a road near the defendant's garden attached to his private house. The pigeon which was the subject of the charge was released some seconds before the remaining pigeons. Almost immediately after it had been released it was shot by the defendant, who was in his garden for the purpose of shooting wood pigeons and magpies, which had materially damaged his crops. The defendant was not able to see Mr. Millward, and did not know that he was in the road releasing pigeons. There was brilliant sunshine at the time. The pigeon flew between the defendant and the sun, so that he had but little opportunity of judging what kind of pigeon was there. He did not see the pigeon for more than about five yards.

The pigeon was different both in size and colour from a wood pigeon. Owing to the defendant being partly dazzled by the sun and the short space for which he saw the bird he could not have distinguished between a wood pigeon and this homing pigeon. The defendant honestly thought that he was shooting a wood pigeon. He picked up the bird and handed it to Mr. Millward very soon after it was shot, and said to him that he was very sorry, and that he had mistaken it for a wood pigeon. He then and there offered to pay its value, but the offer was not accepted.

It was contended for the prosecutor that the honest belief that the pigeon was a wild pigeon was no defence to the information, and that the defendant would be justified in shooting the pigeon only if it was actually doing damage to his crops; and that there was no obligation on the prosecutor to prove felonious intent on a charge of shooting a pigeon, but only where the charge was one of taking, reliance being placed on *Horton* v. *Gwynne* (1).

It was contended for the defendant that it was necessary for the prosecutor to prove that the pigeon was taken or killed with felonious intent, and that the defendant was entitled to kill the pigeon if he thought that it was a wood pigeon which might damage his crops.

The justices held that the defendant, momentarily seeing one bird by itself flying low, honestly believed that it was a wild bird, and was therefore exempt from liability, and that he killed it really and honestly thinking he was exercising his right of protecting his crops. They accordingly dismissed the information.

The prosecutor appealed to the Divisional Court.

Wilfrid Lewis, for the prosecutor.—On the facts found the justices should have held that the offence charged was proved. To establish the offence, it was only necessary to prove that the defendant shot at the bird which he killed intending to kill, and it was not necessary further to prove that he knew it to be a tame pigeon: *Horton* v. *Gwynne* (1). Tame pigeons have long been specially protected by law as a valuable species of property. At first sight some difficulty appears to be created by the fact that in *Farey* v. *Welch* (3) it seems to have been held that on a charge of taking a pigeon under the said section a felonious intention of stealing must be proved, but it is to be observed that in that case the charge was one of taking, not one of killing. Section 23 is one of a group (ss. 17–24) dealing with the taking of birds, beasts and fishes, and s. 21 made the stealing of a pigeon away from its dovecot an offence, the stealing of a pigeon in its dovecot being already larceny at common law. If s. 23 was intended to deal with the stealing of pigeons, its enactment appears to have been unnecessary. "Take" in that section must mean "catch" not "take steal and carry away" and some light is thrown on the matter by *R.* v. *Glover* (4), a decision under s. 17 which deals with the taking of rabbits, in which it was held that taking meant not stealing but catching, and by *Hudson* v. *MacRae* (5), a decision under s. 24, dealing with the taking of fish, in which it was held that it was not necessary to prove mens rea.

Theodore Turner, for the defendant.—To establish the offence charged, it was necessary to prove a felonious intention: *Taylor* v. *Newman* (2) and *Farey* v. *Welch* (3). Even, however, if s. 23 contains the absolute prohibition which is contended for on behalf of the defendant, a reasonable apprehension of damage to the defendant's crops constituted a good defence.

By the Larceny Act, 1861, s. 23:

> "Whosoever shall unlawfully and wilfully kill, wound, or take any house dove or pigeon under such circumstances as shall not amount to larceny at common law shall, on conviction before a justice of the peace, forfeit and pay, over and above the value of the bird, any sum not exceeding £2."

LORD HEWART, C.J., stated the facts and continued: In my opinion, although s. 23 uses the words "unlawfully and wilfully," the element of mens rea is not required beyond the point that the facts must show an intention on the part of the person accused to do the act forbidden—in the present case the shooting. It seems to me quite immaterial that he thought that he was shooting a bird different from the kind which he in fact did shoot. If the section had used the word "maliciously," which is found in so many statutes, the frame of mind of the person accused would have been relevant to the issue, but this section says "unlawfully and wilfully." It seems to me that those words mean that the person accused intended to shoot and that he was shooting without lawful excuse. It appears an undue straining of the authorities to hold that an apprehension of danger, which may or may not turn out to be real, is enough to provide a lawful excuse. The contention on the part of the defendant was that he was entitled to kill the pigeon if he thought that it might damage his crops—an event which was quite conditional and hypothetical. If that kind of extension were to be permitted, one wonders where it would end. Here the defendant was shooting the pigeon not because of something which was happening but because of something which he thought might or would happen.

On the main point of the case our attention has been directed to passages in decided cases in which there appears to be some dissonance of view, but all those cases were not dealing with the same subject-matter.

It may be said, first, that this case is sufficiently covered by *Horton* v. *Gwynne* (1) and in particular, by the judgment of AVORY, J., therein. Secondly, with regard to *Taylor* v. *Newman* (2), it is fairly obvious that the judgment of BLACKBURN, J., has been misreported. Both in that case and in another reported in the same volume and dealing with much the same subject-matter there are manifest errors. I am more disposed to think that the passage in the judgment of BLACKBURN, J., which has been referred to was misreported than to think that he contradicted himself.

I am by no means sure, when I look again at the terms of s. 23, that it means what has so often been thought. The three words "kill, wound, or take" are followed by the words "under such circumstances as shall not amount to larceny at common law." Those words are obviously ungrammatical. Circumstances cannot amount to larceny. The words must mean that the act done does not amount to larceny. The words "under such circumstances as shall not amount to larceny at common law" are apt in reference to the word "take," which is ambiguous and sometimes means "snare" and sometimes "carry away," but they do not aptly refer to the words "kill" or "wound."

It is hard to understand how wounding could be done in circumstances which would cause the act not to amount to larceny any more than to forgery or uttering. If the words are read as qualifying words after the word "take," the meaning is obvious enough.

However that may be, I am satisfied, in view of the cases as they are reported, and particularly in view of *Horton* v. *Gwynne* (1), that the appeal ought to succeed, that the justices were wrong in point of law in each of the two limbs of their opinion, and that the case must be remitted to them with a direction to find that the offence which was charged was proved.

AVORY, J.—I am of the same opinion. I think that in this case we ought to follow the decision in *Horton* v. *Gwynne* (1) where DARLING, J., said, with reference to the circumstances of that case, which was concerned with the shooting of a pigeon in the belief that it was a wild pigeon ([1921] 2 K.B. at p. 662):

> "In those circumstances I think that his act was both wilful and unlawful. It was not accidental. It was not as if he had shot at a crow and killed a pigeon unintentionally. The pigeon was not his property, and it was not in fact a wild one. From a very early date house pigeons were specially protected by law, as being valuable species of property. In my opinion, s. 23 was intended to protect house pigeons against being killed, not only by persons who killed them knowing them to be house pigeons, but also by persons who did not know that. A person who shoots a pigeon which turns out to be a house pigeon must take the consequences of his act."

In my opinion, none of the other cases which have been referred to are really inconsistent with that decision. I myself pointed out in *Horton* v. *Gwynne* (1) that, in my view, *Taylor* v. *Newman* (2) was not inconsistent, but that, on the contrary, had it not been for the fact that in *Taylor* v. *Newman* (2) the appellant was found to have been acting in defence of his own property, the court would have held that the mere act of killing a house pigeon was an offence if the defendant had killed the bird at which he was shooting. In *Taylor* v. *Newman* (2), quite apart from one other point to which I will call attention, the birds were actually at the time feeding on the defendant's crops. It was not a case like the present, where the defendant acted under a mere apprehension of possible future danger to his crops. If such apprehension were held to be a sufficient excuse under this section for killing a house pigeon, a man might be justified in going on to somebody else's land and killing his pigeons because he feared that they might come on to his own property and damage his crops. The mere apprehension of such a danger is not, in my opinion, a sufficient excuse, and *Taylor* v. *Newman* (2) certainly does not decide that it is.

Quite apart from that matter, the report of the case is most unsatisfactory. The defendant was charged, as appears from the report, with unlawfully and wilfully killing a pigeon. BLACKBURN, J., is reported to have said (4 B. & S. at p. 94):

> "In the present case the appellant did nothing in the nature of taking property belonging to his neighbour so as to make his act a larceny."

I cannot believe that that is a correct report of what he said. On the other hand, MELLOR, J., said (4 B. & S. at p. 94):

> "There may be cases of pigeons being killed without any claim of right or colour of justification, though under circumstances not amounting to larceny; and s. 2 (sic) was probably introduced to make such an unlawful and wanton act punishable."

Because of that last passage I said in *Horton* v. *Gwynne* (1) that I thought the decision in *Taylor* v. *Newman* (2) supported the view which we were then taking.

I wish to add a few words about *Farey* v. *Welch* (3), which it has been suggested is inconsistent with *Horton* v. *Gwynne* (1). It must be observed that *Farey* v. *Welch* (3) was a case where the charge was that of unlawfully and wilfully taking a pigeon, not that of killing a pigeon, and, speaking for myself, I think that the real ground of the decision was that there was no taking within the meaning of s. 23, and my judgment was expressly based on that ground. If the facts are looked at, it appears that the defendant and prosecutors concerned were in the habit of keeping pigeons on neighbouring premises, that they had been from time to time on each other's premises to recover straying pigeons, that on a certain day the defendant was admitted by the prosecutors to their premises, that he claimed that the pigeon, the subject-matter of the charge, was his property, that it was handed to him for examination, that, in spite of repeated asseverations of ownership by the prosecutors, he attempted to take it away, and that a constable was then called and the defendant given into custody. The case was, in my opinion, one where there was in fact no taking, and it is not in any sense inconsistent with the view which we are now adopting. We have not to determine what may be the true view where a person is charged with taking a pigeon which does not belong to him. A B

Miles v. *Hutchings* (6) clearly has no application to the present case. That was a case which turned on the meaning of "unlawfully and maliciously" killing a dog, and it was held that the justices had not directed their minds properly to the question whether there was a malicious intention. It is worthy of notice that WILLS, J., said ([1903] 2 K.B. at p. 716): C

> "It is, in my judgment, not enough that he should be under the impression, right or wrong, that he is justified in protecting his premises from trespass or (as in the present case) his master's property from injury; if he knows that much less violent measures would attain his object, he is not justified in resorting to such means as killing or wounding the animal." D

It is quite clear that in the present case much less violent measures would have attained the defendant's object, because the defendant instead of shooting had only to walk into his garden to prevent the bird alighting on his crops. E

For these reasons I agree that the case ought to be remitted to the justices with the direction that the offence charged was proved.

HUMPHREYS, J.—I am of the same opinion. It appears to me that *Horton* v. *Gwynne* (1) is a direct authority in favour of the contention of the prosecutor, and I agree with the views already expressed that *Taylor* v. *Newman* (2) is not inconsistent with that decision. I have greater difficulty in deciding that *Horton* v. *Gwynne* (1) is not inconsistent with *Farey* v. *Welch* (3), but I think that the distinction already referred to by AVORY, J., is sufficient to enable this court to say, without expressing any further opinion on *Farey* v. *Welch* (3) that it follows *Horton* v. *Gwynne* (1), which is directly in point. *Farey* v. *Welch* (3) was a decision on the meaning of the word "take," whereas the present case and *Horton* v. *Gwynne* (1) deal with the expression "unlawfully and wilfully kill." Having regard to those last two cases, decided under s. 23, I think that this court is at liberty to construe the section for itself and, in my view, looking at the matter without reference to previous decisions, its meaning is clear. Considerable assistance is to be derived from s. 21, which brought under the law of larceny the stealing of F G

> "any bird, beast, or other animal ordinarily kept in a state of confinement or for any domestic purpose, not being the subject of larceny at common law." H

Therefore, if any person is found stealing or attempting to steal a house pigeon, that case is dealt with under s. 21. In s. 23 the Legislature, for some reason or other, deals specifically with pigeons as distinct from all other birds. In my view, the words "under such circumstances as shall not amount to larceny at common law," are an indication that the unlawful and wilful killing, &c., of a pigeon is to be an offence, although the act does not contain the elements necessary to constitute larceny at common law. I

I think that the probable explanation of the words which, as they appear in the section, are very inapt, is that suggested by LORD HEWART, C.J., namely, that the words "under such circumstances as shall not amount to larceny at common law" were really intended to apply only to the word "take" and have no reference to the words "kill" or "wound." I think that there was no need for the introduction of s. 23 unless it was intended to make any unlawful interference with a pigeon an offence

A without any consideration of what is necessary to constitute the offence of larceny. I think that that was the meaning given to the section in *Horton* v. *Gwynne* (1) which I am glad to follow. I agree that the appeal must be allowed.

Appeal allowed.

Case remitted with direction to find offence proved.

B Solicitors: *Robbins, Olivey, & Lake*, for *Sharpe & Millichip*, West Bromwich; *Hatchett Jones & Co.*, for *William Waldron & Son*, Brierley Hill.

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

C

GRANT v. AUSTRALIAN KNITTING MILLS, LTD.

[PRIVY COUNCIL (Lord Hailsham, L.C., Lord Blanesburgh, Lord Macmillan, Lord D Wright, and Sir Lancelot Sanderson), July 1, 2, 4, 5, 8, 9, 11, 12, 15, October 21, 1935]

[Reported [1936] A.C. 85; 105 L.J.P.C. 6; 154 L.T. 18; 52 T.L.R. 38; 79 Sol. Jo. 815]

Dangerous goods—Liability of manufacturer and retailer—Underwear—Sale in retail E *shop—Dermatitis causing illness to customer—Presence of free sulphite—South Australia Sale of Goods Act*, 1895 (58 *&* 59 *Vict.*, *No.* 630), *s.* 14 (1), (2).

The appellant contracted dermatitis by reason of the defective condition of woollen underwear which the retailers sold to him at their shop and the manufacturers put forth for retail and indiscriminate sale. In an action for damages brought by him against both the retailers and the manufacturers,

F **Held:** (i) the retailers were liable to the appellant in contract under s. 14 of the South Australia Sale of Goods Act, 1895 (which was in the same terms as s. 14 of the English Act of 1893)—under s. 14 (1) because in such a transaction as took place between the appellant, as customer, and the retailers the appellant made known the purpose for which the goods were required so as to show that he relied on the retailers' skill and judgment, and under s. 14 (2) because there was a sale by G description even though the appellant was buying something displayed before him on the counter, that article not being sold merely as a specific thing, but as a thing corresponding to a description, *i.e.*, woollen underwear, and the article sold was not "merchantable" since it was not fit for the purpose for which it was required.

(ii) the manufacturers had made the underwear in a negligent and improper way, the defective condition of the underwear was due to a latent defect which could not H be discovered by any reasonable examination, and the underwear reached the appellant in the same defective condition as that in which it was when it left the manufacturers, and, therefore, the manufacturers were liable to the appellant in tort.

Donoghue (*or McAlister*) v. *Stevenson* (1) ([1932] A.C. 562) applied.

Notes. Distinguished: *Evans* v. *Triplex Safety Glass Co.*, [1936] 1 All E.R. 283; I *Howard* v. *Furness Houlder Argentine Lines, Ltd., & Brown, Ltd.*, [1936] 2 All E.R. 781; *Kubach* v. *Hollands*, [1937] 3 All E.R. 907. Considered: *Dransfield* v. *British Insulated Cables, Ltd.*, [1937] 4 All E.R. 382; *Herschtal* v. *Stewart and Arden, Ltd.*, [1939] 4 All E.R. 123. Referred to: *Griffiths* v. *Conway, Ltd.*, [1939] 1 All E.R. 685; *Buckner* v. *Ashby and Horner, Ltd.*, [1941] 1 K.B. 321; *Haseldine* v. *Daw*, [1941] 1 All E.R. 525; *Travers* v. *Gloucester Corpn.*, [1946] 2 All E.R. 506; *Wilson* v. *Rickett, Locherell & Co., Ltd.*, [1954] 1 All E.R. 868.

As to a manufacturer's duty to a consumer, see 23 HALSBURY'S LAWS (2nd Edn.) 632–634, and as to implied terms as to quality or fitness on the sale of goods see 29 ibid., 63 et seq., and for cases see 36 Digest (Repl.) 85 et seq. and 39 Digest 440 et seq. For the Sale of Goods Act, 1893, see 22 Halsbury's Statutes (2nd Edn.) 985.

Cases referred to:

(1) *Donoghue* (*or McAlister*) v. *Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; 48 T.L.R. 494; 76 Sol. Jo. 396; 37 Com. Cas. 850; 36 Digest (Repl.) 85, *458*.

(2) *Medway Oil and Storage Co., Ltd.* v. *Silica Gel Corpn.* (1928), 33 Com. Cas. 195, H.L.; Digest Supp.

(3) *Cammell Laird & Co., Ltd.* v. *Manganese Bronze and Brass Co., Ltd.*, [1934] A.C. 402; 103 L.J.K.B. 289; 151 L.T. 142; 50 T.L.R. 350; 39 Com. Cas. 194, H.L.; Digest Supp.

(4) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 27 Sol. Jo. 667, C.A.; 36 Digest (Repl.) 7, *10*.

(5) *Dominion Natural Gas Co., Ltd.* v. *Collins & Perkins*, [1909] A.C. 640; 79 L.J.P.C. 13; 101 L.T. 359; 25 T.L.R. 831; 36 Digest (Repl.) 36, *176*.

(6) *Earl* v. *Lubbock*, [1905] 1 K.B. 253; 74 L.J.K.B. 121; 91 L.T. 830; 53 W.R. 145; 21 T.L.R. 71; 49 Sol. Jo. 83, C.A.; 36 Digest (Repl.) 107, *532*.

Appeal by special leave from a judgment of the High Court of Australia.

The plaintiff, Dr. Richard Thorold Grant, of Adelaide, South Australia, claimed damages on the ground that he had contracted dermatitis by reason of the improper condition of some underpants bought by him from the defendants, John Martin and Co., Ltd., and manufactured by the defendants, Australian Knitting Mills, Ltd.

The appellant bought the underwear on June 3, 1931. He put on one suit on the morning of June 28, 1931. By the evening of that date he felt itching, but no objective symptoms appeared until the next day, when a redness appeared in front of each ankle over an area of about 2½ in. by 1½ in. His condition got worse, the rash became generalised and very acute, and he was confined to bed for seventeen weeks. In November he became convalescent and went to New Zealand to recuperate. He returned in the following February, but soon had a relapse, and by March his condition was so serious that in April he went into hospital where he remained until July. In April he began this action.

The Supreme Court of South Australia (Murray, C.J.) gave judgment against both defendants, against the retailers on the contract of sale, and against the manufacturers in tort, following the decision of the House of Lords in *Donoghue* (*or McAlister*) v. *Stevenson* (1), but the decision of the Supreme Court was reversed by the High Court of Australia by a majority. The plaintiff appealed.

G. P. Glanfield and *P. J. H. Heycock* for the appellant.

Wilfrid Greene, K.C., *Wilbur Ham, K.C.*, and *Ian C. Baillieu* for the respondents.

Oct. 21. **LORD WRIGHT.**—The appellant is a fully qualified medical man practising at Adelaide in South Australia. He brought his action against the respondents claiming damages on the ground that he had contracted dermatitis by reason of the improper condition of underwear purchased by him from the respondents, John Martin & Co., Ltd., and manufactured by the respondents, the Australian Knitting Mills, Ltd. The case was tried by Sir George Murray, Chief Justice of South Australia, who after a trial lasting for twenty days gave judgment against both respondents for the appellant for £2,450 and costs. On appeal the High Court of Australia set aside that judgment by a majority. Evatt, J., dissented, and agreed with the Chief Justice. Of the majority, the reasoning of Dixon, J., with whom McTiernan, J., concurred, was in effect that the evidence was not sufficient to make it safe to find for the appellant. Starke, J., who accepted substantially all the detailed findings of the Chief Justice, differed from him on his general conclusions of liability based on these findings.

The appellant's claim was that the disease was caused by the presence in the cuffs or ankle ends of the underpants which he purchased and wore, of an irritating chemical, namely, free sulphite, the presence of which was due to negligence in manufacture, and also involved on the part of the respondents, John Martin & Co., Ltd., a breach of the relevant implied conditions under the Sale of Goods Act.

The underwear, consisting of two pairs of underpants and two singlets, was bought by the appellant at the shop of the respondents, John Martin & Co., Ltd., who dealt in such goods and who will hereafter be referred to as the retailers, on June 3, 1931; the retailers had in ordinary course at some previous date purchased them with other stock from the respondents, the Australian Knitting Mills, Ltd., who will be referred to as the manufacturers. The garments were of that class of the manufacturers' make known as Golden Fleece. The appellant put on one suit on the morning of Sunday, June 28, 1931; by the evening of that day he felt itching on the ankles, but no objective symptoms appeared until the next day, when a redness appeared on each ankle in front over an area of about 2½ in. by 1½ in. The appellant treated himself with calomine lotion, but the irritation was such that he scratched the places till he bled. On Sunday, July 5, he changed his underwear and put on the other set which he had purchased from the retailers; the first set was washed and when the appellant changed his garments again on the following Sunday he put on the washed set and sent the others to the wash; he changed again on July 12. Though his skin trouble was getting worse he did not attribute it to the underwear, but on July 13 he consulted a dermatologist, Dr. Upton, who advised him to discard the underwear, which he did, returning the garments to the retailers with the intimation that they had given him dermatitis. By that time one set had been washed twice and the other set once. The appellant's condition got worse and worse; he was confined to bed from July 21 for seventeen weeks; the rash became generalised and very acute. In November he became convalescent and went to New Zealand to recuperate. He returned in the following February and felt sufficiently recovered to resume his practice, but soon had a relapse and by March his condition was so serious that in April he went into hospital, where he remained until July. Meantime, in April, 1932, he commenced this action, which was tried in and after November of that year. Dr. Upton was his medical attendant throughout and explained in detail at the trial the course of the illness and the treatment he adopted. Dr. de Crespigny also attended the appellant from and after July 22, 1931, and gave evidence at the trial. The illness was most severe, involving acute suffering, and at times Dr. Upton feared that his patient might die.

It is impossible here to examine in detail the minute and conflicting evidence of fact and of expert opinion given at the trial: all that evidence was meticulously discussed at the hearing of the appeal before the board. It is only possible to state briefly the conclusions at which their Lordships after careful consideration have arrived.

In the first place, their Lordships are of opinion that the disease was of external origin. Much of the medical evidence was directed to supporting or refuting the contention strenuously advanced on behalf of the respondents that the dermatitis was internally produced and was of the type described as herpetiformis, which is generally regarded as of internal origin. That contention may now be taken to have failed; it has been rejected by the Chief Justice at the trial and in the High Court, by STARKE and EVATT, JJ., and, in effect also, by DIXON and MCTIERNAN, JJ. The evidence as to the symptoms and course of the disease given by the two doctors who attended the appellant is decisive: dermatitis herpetiformis is an uncommon disease of a type generally not so severe as that suffered by the appellant, and presenting in general certain characteristic features, in particular, bullae or blisters and symmetrical grouping of the inflammatory features, which were never present in the appellant. Dr. Wigley, a very eminent dermatologist, who examined the appellant, and as an expert gave evidence in support of the doctors who actually attended him, expressed his opinion that all dermatitis had an external origin, but whether he was right in this or not, he was confident that in the appellant's case the origin of the disease was external, and on all the evidence their Lordships accept this view.

But then it was said that the disease may have been contracted by the appellant from some external irritant the presence of which argued no imperfection in the garments, but which only did harm because of the appellant's peculiar susceptibility. Thus the disease might have been initiated by the mechanical irritation of the wool itself, or, if it was due to some chemical ingredient in the garments, that might have been something in itself harmless, either because of its character or because of the actual quantity in which it was present, so that the mischief was attributable to the appellant's own physical defect and not to any defect in the garments; the respondents, it was said, could not be held responsible for anything in the garments which would not be harmful in normal use. Two issues were thus involved: (i) was the appellant's skin normal, and (ii) was there in the garments or any part of them a detrimental quantity of any mischievous chemical?

The Chief Justice held that the appellant's skin was normal. He had habitually up to the material time worn woollen undergarments without inconvenience; that he was not sensitive to the mechanical effects of wool seemed to be proved by an experiment of his doctors who placed a piece of scoured wool on a clear area of his skin and found after a sufficient interval no trace of irritation being produced. It was said that he had suffered from tuberculosis some years before and that the disease had merely been arrested, not eliminated, and it was then said that tuberculosis made the patient more susceptible to skin disease, because it weakens the resistance of the skin and lowers the patient's vitality. But this contention did not appear to be established. It was admitted that the appellant's skin had by reason of his illness become what is denominated "allergic," that is, unduly sensitised to the particular irritant from which he had suffered; but that could throw no light on the original skin condition. A point was made that skin ordinarily normal might transiently and unexpectedly show a peculiar sensitivity, but that remained a mere possibility which was not developed and may be ignored. In the result, there does not seem any reason to differ from the Chief Justice's finding that the appellant's skin was normal.

What, then, caused this terrible outbreak of dermatitis? The place and time of the original infection would seem to point to the cause being something in the garments, and, in particular, to something in the ankle ends of the underpants, because the inflammation began at the front of the shins where the skin is drawn tight over the bone, and where the cuff of the pants presses tightly under the socks against the skin, and began about nine or ten hours after the pants were first put on: the subsequent virulence and extension of the disease may be explained by the toxins produced by the inflammation getting into the blood stream. But the coincidence, it was pointed out, was not sufficient proof in itself that the pants were the cause. The appellant then relied on the fact that it was admitted in the respondents' answers to interrogatories that the garments when delivered to the retailer by the manufacturers contained sulphur dioxide, and on the fact that the presence of sulphur dioxide indicated the presence of free sulphites in the garment. If there were in a garment worn continuously all day next the skin free sulphites in sufficient quantities, a powerful irritant would be set in operation. Sweat is being slowly and continuously secreted by the skin, and combines with the free sulphites to form successively sulphur dioxide, sulphurous acid, and sulphuric acid: sulphuric acid is an irritant which would produce dermatitis in a normal skin if applied in garments under the conditions existing when the appellant wore the underpants. It is a fair deduction from the answers and from the evidence that free sulphites were present in quantities not to be described as small, but that still left the question whether they were present in quantities sufficient to account for the disease.

It is impossible now, and was impossible at any time after the garments were washed, to prove what quantities were present when the garments were sold. That can only be inferred from various considerations. The garments were in July, 1931, handed back to the retailers and by them sent back to the manufacturers. In November, 1931, Mr. Anderson, of Victoria, an analytical chemist, on the instructions of the manufacturers, analysed one-half of one of the pants to ascertain what quantity of water soluble salts they contained and found certain quantities of sulphates, but sulphates would not irritate the skin. In the following May, Mr. Anderson made a further analysis of the other three garments and of the remaining half of the pair of pants: he was testing for sulphites, which he expressed in terms of sulphur dioxide percentage by weight. In one singlet he found a nil return, in the other ·0070; in the pants he found ·0082 in one and ·0201 in the other. There was some debate whether these figures were of free sulphites, or of sulphites adherent to the wool molecule, and not soluble by sweat. Their Lordships, after careful consideration and for a variety of reasons, do not differ from the conclusion of the Chief Justice that these results proved the presence of free sulphite. But the results were not such as to show quantities likely to cause irritation. On the other hand, a very eminent scientist, Professor Hicks, called by the appellant, gave his opinion that the garments before washing must have had sulphites in considerably greater quantity: and these tests of Mr. Anderson were of each garment as a whole, whereas it was clear that the relevant parts in each pair of pants were the ankle ends since the disease was initiated at that point in each leg. It is clear that no further light could be thrown by fresh analysis of the actual garments.

Evidence was given on behalf of the manufacturers as to the processes used in the manufacture of these garments. The webs of wool were put through six different processes: of these the second, third, and fourth were the most significant for this case. The second was for shrinking and involved treatment of the web with a solution of calcium hypochloride and hydrochloric acid. The third process was to remove these chemicals by a solution of bisulphite of soda, and the fourth process was to neutralise the bisulphite by means of bicarbonate of soda; the fifth process was for washing and the sixth was a drying and finishing process. If the fourth process did not neutralise the added bisulphite, free sulphites would remain, which the subsequent washing might not entirely remove. The manufacturers' evidence was that the process was properly applied to the wool from which these garments were made, and if properly applied was bound to be effective. The foreman scourer, Smith, was not called at the trial, where his absence was made matter of comment, but Ashworth, one of the scourers, gave evidence and among other things said that they had to be very careful that there was no excess of one chemical or the other. If there were an excess of some sort or the other it would be bound to be somebody's fault. The washing-off was to clear out as much of the traces of the previous process as possible. But something might go wrong, someone might be negligent, and as a result some bisulphite of soda which had been introduced might not have been got rid of. The cuffs of the pants were ribbed and were made of a different web separately treated. The appellant's advisers had, at the trial, no independent information as to the actual process adopted in respect of these garments or even when they were made, and, by petition, they asked for leave to adduce further evidence which would go to show, as they suggested, that the process deposed to was not adopted by the manufacturers until after June 3, 1931. Their Lordships, however, feel themselves in a position to dispose of the appeal on the evidence as it stands, taking due account of the fact that the manufacturers' secretary was called and deposed that in the previous six years the manufacturers had treated by a similar process 4,737,600 of these garments, which they had sold to drapers throughout Australia and he had no recollection of any complaints which, if made, would in ordinary course have come under his notice. Dr. Hargreaves, an analytical chemist, on the instructions of the manufacturers, analysed specimen garments, subjecting them to tests which would extract any sulphur adherent to the wool as well as free sulphites, if any were present, and found only negligible quantities. Against this evidence was that of Professor Hicks, who agitated in unheated water for two minutes a singlet of the manufacturers' Golden Fleece make, purchased in Nov., 1932, and found that the aqueous extract contained a percentage by weight of sulphite of ·11, which, in his opinion, was free in the fabric and readily soluble in cold water. The significance of this experiment seems to be that, however well designed the manufacturers' proved system may be to eliminate deleterious substances, it may not invariably work according to plan. Some employee may blunder.

Counsel for the respondents quite rightly emphasised how crucial it would have been for the appellant's case to prove by positive evidence that in fact the garments which the appellant wore contained an excess of free sulphites. He contended that the appellant's case involved arguing in a circle; his argument, he said, was that the garments must have caused the dermatitis because they contained excess sulphites, and must have contained excess sulphites because they caused the disease; but nought, he said, added to nought still is no more than nought. This, however, does not do justice either to the process of reasoning by way of probable inference which has to do so much in human affairs or to the nature of circumstantial evidence in law courts. Mathematical, or strict logical, demonstration is generally impossible: juries are in practice told that they must act on such reasonable balance of probabilities as would suffice to determine a reasonable man to take a decision in the grave affairs of life. Pieces of evidence, each by itself insufficient, may together constitute a significant whole, and justify by their combined effect a conclusion. Dixon, J., in the judgment in which he dissented from that of the Chief Justice, does not seem to suggest that there was no evidence for a decision in the appellant's favour, but merely that it was not safe so to decide. But the coincidences of time and place and the absence of any other explanation than the presence of free sulphite in the garments, point strongly in favour of the appellant's case: it is admitted as has been said above that some sulphites were present in the garments, and there is nothing to exclude the possibility of a quantity sufficient to do the harm. On the whole there does not seem adequate reason to upset the judgment on the facts of the Chief Justice. No doubt, this case depends in the last resort on inferences to be drawn from the evidence, though on much of the detailed evidence the trial judge had the advantage of seeing and hearing the witnesses. The plaintiff must prove his case, but there is an onus on a defendant who, on appeal, contends that a judgment should be upset: he has to show that it is wrong. Their Lordships are not satisfied in this case that the Chief Justice was wrong.

That conclusion means that the disease contracted and the damage suffered by the appellant were caused by the defective condition of the garments which the retailers sold to him and which the manufacturers made and put forth for retail and indiscriminate sale. The Chief Justice gave judgment against both respondents, against the retailers on the contract of sale, and against the manufacturers in tort, on the basis of the decision in the House of Lords in *Donoghue* (*or McAlister*) v. *Stevenson* (1). The liability of each respondent depends on a different cause of action, though it is for the same damage. It is not claimed that the appellant should recover his damage twice over; no objection is raised on the part of the respondents to the form of the judgment which was against both respondents for a single amount.

So far as concerns the retailers, counsel for the respondents conceded that, if it were held that the garments contained improper chemicals and caused the disease, the retailers were liable for breach of implied warranty, or rather condition, under s. 14 of the South Australia Sale of Goods Act, 1895, which is identical with s. 14 of the English Sale of Goods Act, 1893. The section is in the following terms:

> "Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose: (2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed: (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade: (4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

He limited his admission to liability under exception (2), but their Lordships are of opinion that liability is made out under both exception (1) and exception (2) to s. 14, and feel that they should so state out of deference to the views expressed in the court below.

Section 14 begins by a general enunciation of the old rule of caveat emptor, and proceeds to state by way of exception the two implied conditions by which it has been said the old rule has been changed to the rule of caveat vendor: the change has been rendered necessary by the conditions of modern commerce and trade. The section has been recently twice discussed by the House of Lords, once in *Medway Oil and Storage Co., Ltd.* v. *Silica Gel Corpn.* (2) and again in *Cammell, Laird & Co., Ltd.* v. *Manganese Bronze and Brass Co., Ltd.* (3). There are numerous cases on the section, but as these were cited below it is not necessary to detail them again. The first exception, if its terms are satisfied, entitles the buyer to the benefit of an implied condition that the goods are reasonably fit for the purpose for which the goods are supplied, but only if that purpose is made known to the seller "so as to show that the buyer relies on the seller's skill or judgment." It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express; it will usually arise by implication from the circumstances; thus to take a case like that in question of a purchase from a retailer the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment; the retailer need know nothing about the process of manufacture; it is immaterial whether he be manufacturer or not; the main inducement to deal with a good retail shop is the expectation that the tradesman will have bought the right goods of a good make; the goods sold must be, as they were in the present case, goods of a description which it is in the course of the seller's business to supply; there is no need to specify in terms the particular purpose for which the buyer requires the goods; which is none the less the particular purpose within the meaning of the section because it is the only purpose for which anyone would ordinarily want the goods. In this case the garments were naturally intended and only intended to be worn next the skin. The proviso does not apply to a case like the sale of Golden Fleece make such as is here in question, because Golden Fleece is rather a patent or trade name within the meaning of the proviso to exception (1). With great deference to DIXON, J., their Lordships think that the requirements of exception (1) were complied with. The conversation at the shop in which the appellant discussed questions of price and of the different makes did not affect the fact that he was substantially relying on the retailers to supply him with a correct article.

The second exception in a case like this in truth overlaps in its application the first exception; whatever else "merchantable" may mean, it does mean that the article sold, if only meant for one particular use in the ordinary course, is fit for that use. "Merchantable" does not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination; that is clear from the proviso, which shows that the implied condition only applies to defects not reasonably discoverable to the buyer on such examination as he made or could make. The appellant was satisfied by the appearance of the underpants; he could not detect and had no reason to suspect the hidden presence of the sulphites; the garments were saleable in the sense that the appellant or anyone similarly situated and who did not know of their defect, would readily buy them; but they were not merchantable in the statutory sense because their defect rendered them unfit to be worn next the skin. It may be that after sufficient washing that defect would have disappeared; but the statute requires the goods to be merchantable in the state in which they were sold and delivered; in this connection a defect which could easily be cured is as serious as a defect that would not yield to treatment. The proviso to exception (2) does not apply where, as in this case, no examination that the buyer could or would normally have made would have revealed the defect. In effect, the implied condition of being fit for the particular purpose for which they are required and the implied condition of being merchantable produce in cases of this type the same result. It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter; a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, e.g., woollen under-garments, a hot water bottle, a secondhand reaping machine, to select a few obvious illustrations.

The retailers, accordingly, in their Lordships' judgment are liable in contract; so far as they are concerned, no question of negligence is relevant to the liability in contract. But when the position of the manufacturers is considered, different questions arise; there is no privity of contract between the appellant and the manufacturers; between them the liability, if any, must be in tort, and the gist of the cause of action is negligence. The facts set out in the foregoing show in their Lordships' judgment negligence in manufacture. According to the evidence, the method of manufacture was correct; the danger of excess sulphites being left was recognised and was guarded against; the process was intended to be foolproof. If excess sulphites were left in the garment, that could only be because someone was at fault. The appellant is not required to lay his finger on the exact person in all the chain who was responsible or to specify what he did wrong. Negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances; even if the manufacturers could by apt evidence have rebutted that inference they have not done so.

On this basis, the damage suffered by the appellant was caused in fact (because the interposition of the retailers may for this purpose in the circumstances of the case be disregarded) by the negligent or improper way in which the manufacturers made the garments. But this mere sequence of cause and effect is not enough in law to constitute a cause of action in negligence, which is a complex concept, involving a duty as between the parties to take care, as well as a breach of that duty and resulting damage. It might be said that here was no relationship between the parties at all; the manufacturers, it might be said, parted once and for all with the garments when they sold them to the retailers and were, therefore, not concerned with their future history, except in so far as under their contract with the retailers they might come under some liability; at no time, it might be said, had they any knowledge of the existence of the appellant; the only peg on which it might be sought to support a relationship of duty was the fact that the appellant had actually worn the garments, but he had done so because he had acquired them by a purchase from the retailers, who were at that time the owners of the goods, by a sale which had vested the property in the retailers and divested both property and control from the manufacturers. It was said there could be no legal relationship in the matter save those under the two contracts between the respective parties to those contracts, the one between the manufacturers and the retailers and the other between the retailers and the appellant. These contractual relationships (it might be said) covered the whole field and excluded any question of tort liability; there was no duty other than the contractual duties.

This argument was based on the contention that the present case fell outside the decision of the House of Lords in *Donoghue* (*or McAlister*) v. *Stevenson* (1). Their Lordships, like the judges in the courts in Australia, will follow that decision, and the only question here can be what that authority decides and whether this case comes within its principles. In *Donoghue's Case* (1) the defendants were manufacturers of ginger beer which they bottled; the pursuer had been given one of their bottles by a friend who had purchased it from a retailer, who, in turn, had purchased from the defenders. There was no relationship between pursuer and defenders except that arising from the fact that she consumed the ginger beer they had made and bottled. The bottle was opaque so that it was impossible to see that it contained the decomposed remains of a snail; it was sealed and stoppered so that it could not be tampered with until it was opened in order to be drunk. The House of Lords held these facts established in law a duty to take care as between the defenders and the pursuer.

Their Lordships think that the principle of the decision is summed up in the words of Lord Atkin ([1932] A.C. at p. 599):

> "A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation of putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

This statement is in accord with the opinions expressed by Lord Thankerton and Lord Macmillan, who in principle agreed with Lord Atkin.

In order to ascertain whether the principle applies to the present case, it is necessary to define what the decision involves and consider the points of distinction relied upon before their Lordships.

It is clear that the decision treats negligence, where there is a duty to take care, as a specific tort in itself, and not simply as an element in some more complex relationship or in some specialised breach of duty, and still less as having any dependence on contract. All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is to be deduced. It is, however, essential in English law that the duty should be established; the mere fact that a man is injured by another's act gives in itself no cause of action; if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right; if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists. In *Donoghue's Case* (1), the duty was deduced simply from the facts relied on, namely, that the injured party was one of a class for whose use, in the contemplation and intention of the makers, the article was issued to the world, and the article was used by that party in the state in which it was prepared and issued without it being changed in any way and without there being any warning of, or means of detecting, the hidden danger; there was, it is true, no personal intercourse between the maker and the user; but though the duty is personal, because it is inter partes, it needs no interchange of words, spoken or written, or signs of offer or assent; it is thus different in character from any contractual relationship; no question of consideration between the parties is relevant; for these reasons the use of the word "privity" in this connection is apt to mislead because of the suggestion of some overt relationship like that in contract, and the word "proximity" is open to the same objection; if the term proximity is to be applied at all, it can only be in the sense that the want of care and the injury are in essence directly and intimately connected; though there may be intervening transactions of sale and purchase and intervening handling between these two events, the events are themselves unaffected by what happened between them: proximity can only properly be used to exclude any element of remoteness, or of some interfering complication between the want of care and the injury, and, like "privity" may mislead by introducing alien ideas. Equally also may the word "control" embarrass, though it is conveniently used in the opinions in *Donoghue's Case* (1) to emphasise the essential factor that the consumer must use the article exactly as it left the maker, that is in all material features, and use it as it was intended to be used. In that sense the maker may be said to control the thing until it is used. But that again is an artificial use, because, in the natural sense of the word, the makers parted with all control when they sold the article and divested themselves of possession and property. An argument used in the present case based on the word "control" will be noticed later.

It is obvious that the principles thus laid down involve a duty based on the simple facts detailed above, a duty quite unaffected by any contracts dealing with the thing, for instance, of sale by maker to retailer, and again by retailer to consumer or to the consumer's friend.

It may be said that the duty is difficult to define, because when the act of negligence in manufacture occurs there was no specific person towards whom the duty could be said to exist: the thing might never be used: it might be destroyed by accident or it might be scrapped, or in many ways fail to come into use in the normal way: in other words, the duty cannot at the time of manufacture be other than potential or contingent, and only can become vested by the fact of actual use by a particular person. But the same theoretical difficulty has been disregarded in cases like *Heaven* v. *Pender* (4), or in the case of things dangerous per se or known to be dangerous, where third parties have been held entitled to recover on the principles explained in *Dominion Natural Gas Co., Ltd.* v. *Collins* (5). In *Donoghue's Case* (1), the thing was dangerous in fact, though the danger was hidden, and the thing was dangerous only because of want of care in making it; as Lord Atkin points out in *Donoghue's Case* (1) ([1932] A.C. at p. 595), the distinction between things inherently dangerous and things only dangerous because of negligent manufacture cannot be regarded as significant for the purpose of the questions here involved.

One further point may be noted. The principle of *Donoghue's Case* (1) can only be applied where the defect is hidden and unknown to the consumer, otherwise the directness of cause and effect is absent: the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows because it follows from his own conscious volition in choosing to incur the risk or certainty of mischance.

If the foregoing are the essential features of *Donoghue's Case* (1) they are also to be found, in their Lordships' judgment, in the present case. The presence of the deleterious chemical in the pants, due to negligence in manufacture, was a hidden and latent defect, just as much as were the remains of the snail in the opaque bottle: it could not be detected by any examination that could reasonably be made. Nothing happened between the making of the garments and their being worn to change their condition. The garments were made by the manufacturers for the purpose of being worn exactly as they were worn in fact by the appellant: it was not contemplated that they should be first washed. It is immaterial that the appellant has a claim in contract against the retailers, because that is a quite independent cause of action, based on different considerations, even though the damage may be the same. Equally irrelevant is any question of liability between the retailers and the manufacturers on the contract of sale between them. The tort liability is independent of any question of contract.

It was argued, but not perhaps very strongly, that *Donoghue's Case* (1) was a case of food or drink to be consumed internally, whereas the pants here were to be worn externally. No distinction, however, can be logically drawn for this purpose between a noxious thing taken internally and a noxious thing applied externally: the garments were made to be worn next the skin: indeed LORD ATKIN ([1932] A.C. at p. 583) specifically puts as examples of what is covered by the principle he is enunciating things operating externally, such as "an ointment, a soap, a cleaning fluid, or cleaning powder."

Counsel for the respondents, however, sought to distinguish *Donoghue's Case* (1) from the present on the ground that in the former the makers of the ginger beer had retained 'control" over it in the sense that they had placed it in stoppered and sealed bottles, so that it would not be tampered with until it was opened to be drunk, whereas the garments in question were merely put into paper packets, each containing six sets, which in ordinary course would be taken down by the shopkeeper and opened and the contents handled and disposed of separately so that they would be exposed to the air. He contended that, though there was no reason to think that the garments, when sold to the appellant were in any other condition, least of all as regards sulphur contents, than when sold to the retailers by the manufacturers, still the mere possibility and not the fact of their condition having been changed was sufficient to distinguish *Donoghue's Case* (1): there was no "control" because nothing was done by the manufacturers to exclude the possibility of any tampering while the goods were on their way to the user. Their Lordships do not accept that contention. The decision in *Donoghue's Case* (1) did not depend on the bottle being stoppered and sealed; the essential point in this regard was that the article should reach the consumer or user subject to the same defect as it had when it left the manufacturer. That this was true of the garment is in their Lordships' opinion beyond question. At most there might in other cases be a greater difficulty of proof of the fact.

Counsel further contended on behalf of the manufacturers that, if the decision in *Donoghue's Case* (1) were extended even a hairsbreadth, no line could be drawn and a manufacturer's liability would be extended indefinitely. He put as an illustration the case of a foundry which had cast a rudder to be fitted on a liner: he assumed that it was fitted and the steamer sailed the seas for some years: but the rudder had a latent defect due to faulty and negligent casting and one day it broke, with the result that the vessel was wrecked, with great loss of life and damage to property. He argued that, if *Donoghue's Case* (1) were extended beyond its precise facts, the maker of the rudder would be held liable for damages of an indefinite amount, after an indefinite time and to claimants indeterminate until the event. But it is clear that such a state of things would involve many considerations far removed from the simple facts of this case. So many contingencies must have intervened between the lack of care on the part of the makers and the casualty that it may be that the law would apply, as it does in proper cases, not always according to strict logic, the rule, that cause and effect must not be too remote. In any case the element of directness would obviously be lacking. LORD ATKIN deals with that sort of question in *Donoghue's Case* (1) ([1932] A.C. at p. 591) where he refers to *Earl* v. *Lubbock* (6): he quotes the common sense opinion of MATHEW, L.J.:

> "It is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on."

In their Lordships' opinion it is enough for them to decide this case on its actual facts. No doubt, many difficult problems will arise before the precise limits of the principle are defined: many qualifying conditions and many complications of fact may in the future come before the Courts for decision. It is enough now to say that their Lordships hold the present case to come within the principle of *Donoghue's Case* (1) and they think that the judgment of the Chief Justice was right and should be restored as against both respondents, and that the appeal should be allowed with costs here and in the courts below, and that the appellant's petition for leave to adduce further evidence should be dismissed without costs. They will humbly so advise His Majesty.

Appeal allowed.

Solicitors: *Roney & Co.; Broad & Son.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

DE TRAFFORD *v.* ATTORNEY-GENERAL

[HOUSE OF LORDS (Lord Atkin, Lord Tomlin, Lord Russell, Lord Macmillan, and Lord Wright), February 19, 21, 22 and March 7, 1935]

[Reported [1935] A.C. 280; 104 L.J.K.B. 396; 153 L.T. 17; 51 T.L.R. 298; 79 Sol. Jo. 194]

Estate Duty—Passing—Cesser of annuity on death of life tenant—Annuitant becoming entitled to whole income—Allowance for annuity—Finance Act, 1894 (57 & 58 *Vict., c.* 30), *s.* 1.

Estate Duty—Determination of life interest—Sums raisable out of capital at death of life tenant—Sums raised under order of court within three years before death of life tenant —Liability to duty of sums raised—Finance Act, 1900 (63 & 64 *Vict., c.* 7), *s.* 11 (1) (*as amended by Finance* (1909–10) *Act,* 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 8), *s.* 59 (1)).

By virtue of the will of H. T. who died on May 4, 1886, and a re-settlement dated July 30, 1886, estates stood limited for the benefit of H. F. T. for his life with remainder to his first and other sons in tail male. H. F. T. had power to charge the settled estates with portions for his younger children of £90,000. By a Private Act, the De Trafford Estate Act, 1904, the trustees were authorised to purchase H. F. T.'s life interest, and the annual income arising during his life was to be applied in the manner therein specified including a discretionary application of a maximum annual sum for H. F. T., his wife and issue. In 1907 H. F. T. exercised his power of charging portions and charged the estate with £90,000 for that purpose, but not to be raised or paid in his lifetime. In 1912 H. E. T., the eldest son of H. F. T., attained the age of twenty-one years, and shortly afterwards he disentailed, and in 1914 re-settled, the estates. By the re-settlement of 1914 H. E. T. assured the estates to the trustees in fee simple to uses for raising further portions for the younger children of H. F. T. to the amount of £160,000 in addition to the £90,000 already charged, and subject thereto for H. E. T. for life with remainder to his first and other sons in tail male. The said re-settlement further provided that, notwithstanding anything in the Act of 1904, the annual income of the estates should, during the life of H. F. T., be held and applied by the trustees in making the payments therein mentioned which included the payment, during the joint lives of H. F. T. and H. E. T., of an annual sum to H. E. T. amounting to £8,000 as from his attaining the age of thirty-five years until he should attain the age of forty years. The said re-settlement also authorised H. E. T. to charge the estates with the payment to himself of capital sums not exceeding £50,000 with a proviso that no sum appointed under that power should be payable or raisable during the life of H. F. T. The re-settlement was ratified by a Private Act of Parliament. H. F. T. exercised his power of appointing portions to the full amount of the additional sum of £160,000, to be raised and paid after his death. H. E. T. from time to time borrowed moneys from the trustees amounting in all to £50,000 and on each occasion as part of the security for repayment he (in exercise of the power conferred by the re-settlement of 1914) charged a part of the estates with payment to the trustees of a sum equal to the loan. By an order dated July 28, 1928, the court approved a scheme pursuant to which by a deed dated Aug. 15, 1928, the trustees surrendered and released investments or cash of the amount or value of £300,000 to be raised forthwith by the trustees out of capital to the intent that the portions amounting to £250,000 and the said sum of £50,000 might be brought into immediate possession discharged from all trusts affecting the same during the life of H. F. T. The £250,000 for portions was, accordingly, raised and paid, and the £50,000 (then owed by H. E. T. to the trustees) was appropriated by the trustees. Shortly afterwards, on Jan. 10, 1929, H. F. T. died. Immediately prior to the death of H. F. T. the annual sum of £8,000 was being paid to H. E. T., who had attained the age of thirty-five years on Nov. 30, 1926. On the question of what claims for estate duty then arose.

Held: (i) estate duty was exigible under the Finance Act, 1894, s. 1, in respect of the whole of the estates remaining settled at the date of H. F. T.'s death, without any allowance for the annuity of £8,000 per annum payable to H. E. T. (*Cowley (Earl)* v. *Inland Revenue Comrs.* (1), [1899] A.C. 198, followed); (ii) the capital sums amounting to £300,000 were liable to estate duty by virtue of the Finance Act, 1900, s. 11 (1).

Notes. The Finance Act, 1900, s. 11, was repealed by the Finance Act, 1940, s. 65. The Finance Act, 1940, s. 43, deals with the determination of life interests where the relevant death occurs after June 26, 1940. Section 43 of the Act of 1940 was modified by the Finance Act, 1950, s. 43.

Considered: *Re Hodsons Settlement, Brookes* v. *A.-G.*, [1939] 1 All E.R. 196; *Re Lambton's Marriage Settlement*, [1952] 2 All E.R. 201. Referred to: *Burrell and Kinnaird* v. *A.-G.*, [1936] 3 All E.R. 758; *Re Hall, Holland* v. *A.-G.*, [1941] 2 All E.R. 358; *Re Norfolk's Will Trusts*, [1950] 1 All E.R. 664; *Re Longbourne's Marriage Settlement*, [1952] 2 All E.R. 933.

As to allowance for an annuity ceasing on the death of a life tenant, see 15 HALSBURY'S LAWS (3rd Edn.) 84, para. 177; and for cases on the subject, see 21 DIGEST 25, 26, *138–145*.

As to determination of a life interest, see 15 HALSBURY'S LAWS (3rd Edn.) 14, para. 23; and for cases on the subject, see 21 DIGEST 10, *40–42*.

Cases referred to:

(1) *Cowley (Earl)* v. *Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 47 W.R. 525; 15 T.L.R. 270; 43 Sol. Jo. 348, H.L.; 21 Digest 7, *27*.

(2) *Lord Wolverton* v. *A.-G.*, [1898] A.C. 535; 67 L.J.Q.B. 829; 79 L.T. 58; 62 J.P. 708; 47 W.R. 97; 14 T.L.R. 519, H.L.; 21 Digest 90, *660*.

(3) *A.-G.* v. *Cecil* (1870), L.R. 5 Exch. 263; 39 L.J.Ex. 201; 23 L.T. 20; 18 W.R. 949; 21 Digest 91, *662*.

(4) *A.-G.* v. *Assheton-Smith*, [1924] 2 K.B. 25; 93 L.J.K.B. 474; 132 L.T. 699; 40 T.L.R. 436; 21 Digest 91, *666*.

(5) *A.-G.* v. *Beech*, [1899] A.C. 53; 68 L.J.Q.B. 130; 79 L.T. 565; 63 J.P. 116; 47 W.R. 257; 15 T.L.R. 85; 43 Sol. Jo. 94, H.L.; 21 Digest 7, *26*.

Appeal from the decision of the Court of Appeal (Lord Hanworth, M.R., Lawrence and Slesser, L.JJ.) on an information dated Nov. 27, 1931. The information set out as follows:

1. The object of the information was to establish the right to and rate of estate duty and succession duty upon the death of Sir Humphrey Francis de Trafford (hereinafter called "the deceased") in respect of the property below mentioned.

2. By his will dated May 5, 1883, Sir Humphrey de Trafford (the father of the deceased) appointed the trustees thereof to be trustees also for the purposes of the Settled Land Act, 1882, and devised his residuary real estate to the use of the deceased for life with remainder to the use of the deceased's first and other sons successively in tail male, and gave the deceased power to charge the same with portions not exceeding (in the events which happened) £90,000 for the benefit of his younger children, and to appoint a term of years in the same for securing such portions, and the said Sir Humphrey de Trafford thereby settled his residuary leasehold estates upon trusts correspondingly with the said limitations of his residuary real estate. The said Sir Humphrey de Trafford died on May 4, 1886, and his said will was duly proved on July 28, 1886.

3. By an indenture of re-settlement dated July 30, 1886 (which was executed in order to comply with a condition contained in the said will), the deceased granted and assigned certain estates known as the Barton Estates and investments held therewith upon the like uses as those contained in the said will of Sir Humphrey de Trafford with respect to his residuary real estate or upon trusts corresponding therewith, but so as not to multiply charges. The said residuary real estate and leaseholds and the said Barton Estates and the capital moneys, policies of insurance, and other property for the time being subject to the uses or trusts of the said will and indenture are hereinafter together referred to as "the settled estate."

4. The deceased had four children and no more, namely, his eldest son, Humphrey Edmund de Trafford (now Sir Humphrey Edmund de Trafford and hereinafter called "the present baronet"), who was born on Dec. 1, 1891, and three younger children, Rudolph Edgar Francis de Trafford, Raymund Vincent de Trafford, and Violet Mary de Trafford (now Violet Mary Menzies), all of whom are still living.

5. In pursuance of a provisional agreement made April 16, 1904, between the deceased and the trustees at that date of the said will of Sir Humphrey de Trafford (which said trustees and the trustees for the time being of the said will are hereinafter called "the trustees") and of a private Act of Parliament confirming the said provisional agreement (namely, the De Trafford Estate Act, 1904) the trustees in or about the year 1904 purchased the life interest of the deceased in the settled estate for the sum of £46,156, subject to certain paramount charges on the settled estate, and to divers charges created by the deceased on his life estate.

6. By s. 22 of the De Trafford Estate Act, 1904, it was provided that the trustees should apply the net annual income of the settled estate to be received by them during the lifetime of the deceased in making a number of payments not now material and subject thereto (*a*) in appropriating year by year so much of the said income (but not exceeding £6,000) as should in the opinion of the trustees be adequate for the benefit of the deceased and his wife and children, and (*b*) in paying year by year to or for the benefit of the present baronet (on his attaining the age of twenty-one years), a sum not exceeding £1,000 until marriage and not exceeding £2,000 after marriage, and should accumulate the surplus in manner therein specified for the primary purpose of replacing capital of the settled estate expended in pursuance of the provisions of the Act.

7. By an indenture dated May 11, 1907, the deceased in exercise of the power in that behalf contained in the said will of Sir Humphrey de Trafford and the said indenture

dated July 30, 1886, irrevocably charged the settled estate, in remainder after his own life interest, with the payment to his younger children, in such shares as he should appoint and in default of appointment equally, with the sum of £90,000 for portions and appointed the settled estate to the use of the trustees for a term of 1,000 years from his decease upon usual trusts for raising the said sum.

8. By an indenture of disentailing assurance dated Aug. 22, 1913, the present baronet granted the settled estate (subject to the said portions charge of £90,000 and to the life interest of the deceased) to the use that a certain sum of £60,000 should be raised and applied as therein mentioned for the benefit of the deceased and his wife and subject thereto to his own use in fee simple and absolutely.

9. By an indenture of re-settlement dated May 8, 1914, and set out in the schedule to and confirmed by a private Act of Parliament, namely, the De Trafford Estate Act, 1914, the present baronet granted the settled estate, subject to the said portions charge of £90,000, and subject to the life interest of the deceased to the trustees to the use that the trustees should by mortgage or sale of the settled estate, or a sufficient part thereof, raise (in the events which happened) a further sum of £160,000 as portions for the younger children of the deceased and their issue, in such shares and for such interest as the deceased should appoint and subject thereto to the use of the present baronet for life with remainders over.

10. It was by the said indenture (as so confirmed) further provided that the limit of the yearly sum which the trustees might appropriate for the benefit of the deceased and his wife and children as mentioned in para. 6 hereof should be raised from £6,000 to £10,000, and that in lieu of the yearly sum to be paid to or for the benefit of the present baronet as in the said paragraph mentioned the trustees should (out of the income of the settled estate to be received by them during the lifetime of the deceased) make the following yearly payments to the present baronet, namely (i) £3,000 from Nov. 30, 1912, until he should attain the age of thirty years or previously marry, (ii) £5,000 from the date on which he should attain the age of thirty years or previously marry until he should attain the age of thirty-five years, (iii) £8,000 from the date on which he should attain the age of thirty-five years until he should attain the age of forty years, and (iv) £10,000 from the date on which he should attain the age of forty years. The said indenture further contained divers new provisions not now material with respect to the surplus income of the settled estate during the lifetime of the deceased.

11. It was by the said indenture (as so confirmed) further provided that it should be lawful for the present baronet (subject to the said portions charge of £90,000 and to the life interest of the deceased and to the said portions charge of £160,000) to charge the settled estate with the payment to himself or to any other person of a sum of £50,000.

12. On divers dates between Nov. 6, 1917, and March 5, 1928, the present baronet, in exercise of the power last above mentioned, charged the settled estate with the payment to himself of divers sums together amounting to the said sum of £50,000.

13. On Sept. 30, 1922, the deceased irrevocably appointed the sum of £50,000 (being part of the above-mentioned sum of £90,000) to his said daughter Violet Mary Menzies absolutely.

14. On Dec. 1, 1922, the deceased irrevocably appointed the sum of £15,000 (being a further part of the said sum of £90,000) to his said son Raymund Vincent de Trafford absolutely.

15. On July 14, 1923, the deceased irrevocably appointed the sum of £15,000 (being a further part of the said sum of £90,000) to his said son Rudolph Edgar Francis de Trafford absolutely.

16. On Dec. 18, 1923, the deceased irrevocably appointed the sum of £10,000 (being the balance of the said sum of £90,000) and the sum of £75,000 (being part of the above-mentioned sum of £160,000) to the said Rudolph Edgar Francis de Trafford absolutely.

17. On Nov. 1, 1924, the deceased irrevocably appointed the sum of £25,000 (being a further part of the said sum of £160,000) to the said Raymund Vincent de Trafford absolutely.

18. On Feb. 7, 1925, the deceased irrevocably appointed the sum of £60,000 (being

the balance of the said sum of £160,000) on certain trusts for the benefit of the said Raymund Vincent de Trafford and his issue.

19. By a deed of surrender dated Aug. 15, 1928, and made pursuant to an order of the High Court of Justice dated July 28, 1928, the trustees surrendered investments or cash forming part of the settled estate to the value of £300,000 discharged from all trusts relating thereto during the lifetime of the deceased to be applied in satisfaction of the sums of £90,000, £160,000, and £50,000 respectively charged on the settled estate as mentioned in paras. 7, 9, and 12 hereof.

20. By virtue of the appointments mentioned in paras. 13, 14, 15, 16, 17 and 18 hereof respectively and of certain settlements respectively made by the appointees thereunder, the said sums of £90,000 and £160,000, making an aggregate sum of £250,000, became divisible upon such surrender amongst the following persons and in the following proportions, namely:

	£
(i) The trustees under the marriage settlement of Violet Mary Menzies ..	50,000
(ii) (*a*) The trustees under the marriage settlement of Rudolph Edgar Francis de Trafford	40,000
(*b*) Rudolph Edgar Francis de Trafford absolutely	60,000
(iii) (*a*) The trustees in trust for Raymund Vincent de Trafford under the above-mentioned appointment dated Feb. 7, 1925	60,000
(*b*) Raymund Vincent de Trafford absolutely	40,000
	£250,000

21. The trustees, at some time after Aug. 15, 1928, distributed or retained the said sum of £250,000 accordingly, save that the trustees appropriated the sum of £6,200 out of the sum due to Rudolph Edgar Francis de Trafford in satisfaction of a like sum of £6,200 owing by him to the trustees and appropriated the sum of £35,000 out of the sum due to Raymund Vincent de Trafford in satisfaction of a like sum of £35,000 owing by him to the trustees.

22. The present baronet became absolutely entitled upon such surrender to the said sum of £50,000. The trustees with the assent of the present baronet appropriated the said sum in satisfaction of a like sum of £50,000 owing by him, to the trustees.

23. The deceased died on Jan. 10, 1929, being a date less than three years after the date of the said surrender dated Aug. 15, 1928. Upon such death the present baronet became tenant for life of the settled estate.

24. The present baronet attained the age of thirty-five years on Nov. 30, 1926. Immediately prior to the date of the deceased's death, therefore, the yearly sum payable to the present baronet out of the income of the settled estate (as mentioned in para. 10 hereof) had amounted to £8,000.

25. In the circumstances aforesaid the informant submits that estate duty became payable upon the death of the deceased (*a*) under s. 1 of the Finance Act, 1894, in respect of the principal value at the date of such death of the settled estate as property passing on such death without any deduction in respect of the said annuity of £8,000, (*b*) under s. 11 of the Finance Act, 1900, as amended by s. 59 (1) of the Finance (1909–10) Act, 1910, in respect of each of the above-mentioned sums of £90,000, £160,000, and £50,000 as property deemed to pass on such death.

26. The aggregate value of the property which passed on the death of the deceased within the meaning of the Finance Act, 1894 (including the settled estate and the said sums of £90,000, £160,000, and £50,000), was upwards of £2,000,000, and the appropriate rate of duty is therefore £40 per cent.

27. In the circumstances aforesaid the informant submits that succession duty became payable upon the death of the deceased, inter alia, under s. 2 of the Succession Duty Act, 1853, and s. 58 (1) of the Finance (1909–10) Act, 1910, at the rate of 5 per cent. in respect of the above-mentioned sum of £160,000 as on a succession thereto derived by the above-named brothers and sister of the present baronet or their respective descendants from the present baronet as predecessor.

28. The defendants as the present trustees of the said will of Sir Humphrey de

Trafford and of the said indenture of re-settlement dated July 30, 1886, have accepted liability to account for the said estate duty and the said succession duty, if held to be payable, but the defendants contend (i) that they are entitled to deduct from the principal value of the settled estate for the purpose of estate duty a principal sum sufficient to produce, at the average rate of income of the settled estate, an income of £8,000 per annum, being the yearly sum which, as above mentioned, was payable to the present baronet immediately prior to the date of the deceased's death; (ii) that no estate duty is payable in respect of any of the above-mentioned sums of £90,000, £160,000, and £50,000; and (iii) that succession duty in respect of the said sum of £160,000 is payable at the rate of 1 per cent. and no more as on a succession derived from the deceased as predecessor.

29. The defendants have in their possession or power divers deeds, accounts, writings, and other documents relating to the matters in question in this suit and they ought to produce the same.

The informant, on behalf of His Majesty, prays as follows:

1. That it may be declared that upon the death of the deceased estate duty at the appropriate rate became payable under s. 1 of the Finance Act, 1894, in respect of the principal value of the settled estate and without any such deduction as above mentioned as property passing on the death of the deceased.

2. That it may be declared that upon the death of the deceased estate duty at the appropriate rate became payable under s. 11 of the Finance Act, 1900, as amended by s. 59 (1) of the Finance (1909–10) Act, 1910, in respect of each of the above-mentioned sums of £90,000, £160,000, and £50,000, as property deemed to pass on the death of the deceased.

3. That it may be declared that upon the death of the deceased succession duty at the rate of 5 per cent. became payable under s. 2 of the Succession Duty Act, 1853, and s. 58 (1) of the Finance (1909–10) Act, 1910, in respect of the above-mentioned sum of £160,000 as on a succession thereto derived by the above-named brothers and sister of the present baronet or their respective descendants from the present baronet as predecessor.

4. That the defendants may be ordered to deliver accounts of the said estate duty and the said succession duty respectively and to pay the amount of the said duties, with interest thereon respectively from the death of the deceased, to the Commissioners of Inland Revenue, the informant hereby waiving such penalties as the defendants may have incurred by reason of the said duties not having been paid up to the present time.

5. That all necessary and proper inquiries may be made, directions given, and accounts taken for the purposes aforesaid.

6. That the informant on behalf of His Majesty may have such further or other relief in the premises as the case may require.

The Court of Appeal held (1) that what passed over on the death of the deceased baronet was the estate free from liability to pay the £8,000 a year to the present baronet, and, in fact, the estate passed in its entirety to the present baronet, therefore the £8,000 a year could not be deducted from what passed on the death of the deceased baronet.

The directions as to the effect of s. 1 of the Finance Act, 1894, given in *Cowley* (*Earl*) v. *Inland Revenue Comrs.* (1) followed.

(2) That estate duty was payable on the whole £300,000 within the meaning of the operative words of the first part of s. 11 of the Finance Act, 1900, as amended.

(3) That succession duty was only payable at the rate of 1 per cent. unless those who were successors took by title which conferred a new succession on them, and having regard to the decision of the House of Lords in *Lord Wolverton* v. *A.-G.* (2), where reversioners had created a charge upon their contingent reversionary interest in the estate, there was an alienation of a part of the succession created, and not a new succession. Authority of *A.-G.* v. *Cecil* (3) not accepted. *A.-G.* v. *Assheton Smith* (4) overruled.

The trustees appealed on findings (1) and (2) of the Court of Appeal. There was no appeal on finding (3), which was concerned with the question of succession duty.

H. S. Preston, K.C., *A. M. Latter, K.C.*, and *L. W. Byrne* for the appellants, the tax payers.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *J. H. Stamp* for the Crown.

The House took time for consideration.

March 7. **LORD ATKIN.**—I have had the opportunity of reading the opinion about to be pronounced by my noble and learned friend, LORD RUSSELL, and I entirely agree with it in every respect.

LORD TOMLIN.—I also have had the opportunity of reading the opinion which is about to be delivered by my noble and learned friend, LORD RUSSELL. I agree with his conclusions, and with the reasoning upon which they are based.

LORD RUSSELL.—For the purpose of indicating my view as to the order which should be made on this appeal, it will not be necessary to trace in minute detail the numerous documents which have been executed, the private Acts of Parliament which have been passed, or the Orders of Court which have been made in regard to the de Trafford Estates, since Sir Humphrey de Trafford (the grandfather of the present baronet) died on May 4, 1886.

Under and by virtue of his will and a re-settlement dated July 30, 1886, the de Trafford estates stood limited to uses under which (immediately before the passing of the de Trafford Estate Act, 1904, on Aug. 15, of that year) Sir Humphrey Francis de Trafford (the late baronet) was legal tenant for life in possession with remainder to his first and other sons in tail male. He had power to charge the estates with portions for his younger children to an amount in the events which happened of £90,000. I disregard a jointure in favour of the late baronet's mother who died on July 1, 1922.

Owing to circumstances which need not be discussed the de Trafford Estate Act, 1904, was passed. By s. 6 the trustees under the Act (who were the trustees of the testator's will) were authorised to purchase the life interest of the late baronet which was thereby vested in the trustees. By s. 22 the annual income arising during his life was to be applied in the order and manner and for the purposes therein specified, which included a discretionary application of a maximum annual sum for the maintenance and support of the late baronet, his wife and issue. In 1907 the late baronet exercised his power of charging portions and charged the de Trafford estates with a capital sum of £90,000 for that purpose, but not to be raised or paid during his lifetime.

Sir Humphrey Edmund de Trafford (the late baronet's eldest son and the present baronet) attained his age of twenty-one years on Nov. 29, 1912; and shortly afterwards he disentailed and re-settled the estates. The re-settlement is dated May 8, 1914, and by it the present baronet assured the de Trafford estates to the trustees in fee simple to uses for raising further portions for the late baronet's younger children to the amount of £160,000 in addition to the £90,000 already charged, and subject thereto to the use of the present baronet for life, with remainder to his first and other sons in tail male. By cl. 8 of the re-settlement it was provided that notwithstanding anything in the Act of 1904 contained the annual income of the de Trafford Estates should during the life of the late baronet be held and applied by the trustees in making the payments therein mentioned which included the payment (during the joint lives of the late baronet and the present baronet) of an annual sum to the present baronet amounting to £8,000 as from his attaining the age of thirty-five years until he should attain the age of forty years. By cl. 18 of the re-settlement he was authorised by deed to charge the estates with the payment to himself of capital sums not exceeding £50,000 with a proviso that no sum appointed under that power should be payable or raisable during the life of the late baronet. By s. 3 of the de Trafford Estate Act, 1914, this re-settlement was ratified and all the limitations trusts powers and provisions thereof were declared valid and effectual.

The late baronet exercised his power of appointing portions to the full amount of the additional sum of £160,000, to be raised and paid after his death, with the result that the total amount charged for that purpose upon the estates and raisable after his death was a capital sum of £250,000.

The present baronet from time to time, between Nov. 5, 1917, and Mar. 5, 1918, borrowed moneys from the trustees amounting in all to £50,000, and on each occasion as part of the security for repayment thereof he, in exercise of the power conferred by the re-settlement of 1914 and the Act of 1914, charged a part of the estates with payment to the trustees of a sum equal to the loan, and appointed a term of years commencing from the death of the late baronet for securing the sum so charged.

Although the said sums of £50,000 and £250,000 were not raisable or payable out of the estates until after the death of the late baronet, circumstances arose which rendered it advisable in the interests of all concerned that these sums should be raised and paid out of the estates in advance, and a scheme for that purpose was prepared and approved by an Order of the Chancery Division, dated July 28, 1928, which gave liberty to the trustees to carry the scheme into effect. The scheme provided (amongst other things) for such surrender or release of the late baronet's life interest as was subsequently executed.

In pursuance of that order and scheme the trustees by a deed of surrender dated Aug. 15, 1928, surrendered and released investments and cash, or investments only, of the amount or value of £300,000 to be raised forthwith by the trustees (by appropriation or otherwise) out of capital money or investments representing capital money, to the intent that the said portion amounting to £250,000 and the said sum of £50,000 might be brought into immediate possession discharged from all trusts affecting the same during the life of the late baronet.

The £250,000 portions for younger children were accordingly raised and paid, by appropriation or otherwise, and the sum of £50,000 raisable under the re-settlement of 1914 and the Act of 1914 was provided by the appropriation thereto of the £50,000 owing by the present baronet to the estate in respect of the moneys to that amount already borrowed by him from the trustees. Not long afterwards the late baronet died, namely, on Jan. 10, 1929.

It is in regard to the estate duty payable in consequence of his death, that two disputed points have come before your Lordships' House for determination.

The first one is concerned with the annual sum of £8,000, of which the present baronet was in receipt and had been in receipt since he had attained the age of thirty-five years on Nov. 29, 1925. That annual sum, since it was only payable out of the annual income arising during his father's life, came to an end with his father's death: but on the happening of that event he became tenant for life in possession of the estates, and as such entitled, during his life, to the whole income arising therefrom subsequently to his father's death. In these circumstances it is argued by the appellants (who are the trustees and have accepted liability for the duty payable) that a notional portion of the estates (namely, so much as was required to produce £8,000 per annum) neither passed on the death of the late baronet within the meaning of s. 1 of the Finance Act, 1894, nor should be deemed to be included in property so passing by reason of s. 2 of that Act. Alternatively it is contended that no benefit accrued or arose to the present baronet, by reason of the cesser of his right to receive the £8,000 a year.

These are contentions which in my opinion we are precluded by authority from adopting. I am unable to distinguish this case from *Earl Cowley* v. *Inland Revenue Comrs.* (1). In that case two points arose for decision. The first related to a sum secured by a mortgage which had been created on the fee simple of the Mornington estates before the execution of a settlement of those estates upon trust that the third Earl Cowley should receive during the life of his father, the second earl, a sum of £3,000 a year, and subject to and charged as aforesaid for the second earl for life and after his death for the third earl for life with remainders over. The second point arose in regard to the annual sum of £3,000. On the death of the second earl the Crown sought to recover estate duty on the footing of the estates being valued as unincumbered by the mortgage. It was held by your Lordships' House that the case fell under s. 1 of the Finance Act, 1894, and not under s. 2 (1) (*b*) of that Act; and further, that the property which passed on the death of the second earl was only the property which was settled, namely, the equity of redemption and not the unincumbered fee. The third earl, however, claimed that no duty should be paid in respect of the annuity of £3,000 since no benefit had accrued to him by the cesser of the second earl's interest and he claimed to deduct the capitalised value thereof. It was decided that there was no foundation for such a claim. It was urged before us here that the second point in the *Cowley Case* (1) had only been aruged as a question of deduction from the value of the property which passed; but that the present contention was a question of reduction of the quantum of the property which passed on the death; and it was said that the reasoning which decided the first point in the *Cowley Case* (1), was applicable here, to establish that the quantum of the property which passed on the death, should be reduced by excluding the notional portion of the estates which I have indicated above. It was further said that the *Cowley Case* (1) was distinguishable on the facts.

For myself I see no distinction of substance on the facts; for the fact that the life estate had been divested from the tenant for life and vested in trustees during his life, can of itself cause no different answer to be given to the question what property passed on his death. The mortgage in the *Cowley Case* (1) was outside and anterior to the settlement, and independent of it. The annual sum of £8,000 in the present case was payable out of income arising under the settlement. The reasoning which decided the first point in the *Cowley Case* (1) cannot therefore apply. Nor can I see any justification for the exclusion of any portion of the estates from the property passing on the death. The present baronet's right to an annual sum of £8,000 gave him no right to the receipt of any particular items of the annual income, or to the income of any particular portion of the estates. His right to receive an annual sum of £8,000 ceased on the death of the late baronet; his right, which then arose, to receive all the rents was a new and a different right. There was never either in fact or in law anything resembling a surrender of the life estate to the immediate remainderman, as was the case in *A.-G.* v. *Beech* (5). In my opinion it is impossible to distinguish this case from the *Cowley Case* (1). The property as a whole passed to the present baronet freed from the trust or liability to to pay the annual sum, which trust or liability automatically came to an end with the death of his father. The case falls within LORD WATSON's words ([1899] A.C. at p. 208).

> "The annuity . . . was regularly paid to the appellant during his father's lifetime, and ceased to be payable on his death. No part of it formed a charge upon the equitable estate to which the appellant has succeeded, under the deed of re-settlement, not in fee but in life-rent. In these circumstances I do not think it can, with any degree of plausibility, be maintained that the estate which passed to the appellant upon his father's death has been thereby diminished or affected."

The second point in dispute concerned the capital sums amounting to £300,000 which were paid off in advance some five or six months before the late baronet's death. They formed no part of the estates at the death; they had before the death been permanently taken out of the estates and paid away elsewhere. Nevertheless the Crown claims that the portions of the estates released to provide those sums must be deemed to have passed on the late baronet's death by virtue of s. 11 of the Finance Act, 1900. The appellants resist this claim on the ground that the facts of this case do not fit in with the provisions of that section. The section runs thus:

> "(1) In the case of every person dying after the thirty-first day of March nineteen hundred, property whether real or personal in which the deceased person or any other person had an estate or interest limited to cease on the death of the deceased shall, for the purpose of the Finance Act, 1894, and the Acts amending that Act, be deemed to pass on the death of the deceased, notwithstanding that that estate or interest has been surrendered, assured, divested, or otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting, or disposition was bona fide made or effected twelve months before the death of the deceased, and bona fide possession and enjoyment of the property was assumed thereunder immediately upon the surrender, assurance, divesting, or disposition, and thenceforward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise."

By a later statute [the Finance (1909–10) Act, 1910, s. 59 (1)] the section was amended by substituting the period of three years for the period of twelve months.

It seems to me that the section in terms covers this case. So far as concerns the portions of the estates which were released to provide the portions and the £50,000 during the lifetime of the late baronet, they were property in which the trustees had an interest limited to cease on the death of the late baronet, and that interest was surrendered, assured, divested or otherwise disposed of to or for the benefit of the younger children and the present baronet, each of whom was a person entitled to an interest in reversion in such property, the interest being one which (but for the disposition for his or her benefit) would only have become an interest in possession after the late baronet's death. That property must accordingly be deemed to pass on his death, inasmuch as the disposition was not made or effected three years before his death.

In the result I am of opinion that the decision of the Court of Appeal was correct and that this appeal should be dismissed with costs.

LORD MACMILLAN.—I agree.

LORD WRIGHT.—I also agree.

Appeal dismissed.

Solicitors: *Whitfield, Byrne, & Dean*, for *Taylor, Kirkman, & Mainprice*, Manchester; *Solicitor of Inland Revenue*.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

CLACK *v.* CLACK

[KING'S BENCH DIVISION (Avory, Hawke and Lawrence, JJ.), March 28, 1935]

[Reported [1935] 2 K.B. 109; 104 L.J.K.B. 271; 152 L.T. 588; 99 J.P. 243; 51 T.L.R. 341; 79 Sol. Jo. 306; 33 L.G.R. 210]

Magistrates—Husband and wife—Maintenance—No express provision in order as to income tax—Right or obligation of husband to deduct tax from sum ordered before paying wife—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 19 (1).

Income Tax—Deduction of tax—Maintenance order made by magistrate—No express provision as to tax—Whether tax deductible—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 19 (1).

A husband is obliged and entitled to deduct income-tax at the standard rate from payments made to his wife under a magistrates' court order which makes no mention of tax made pursuant to s. 5 of the Summary Jurisdiction (Married Women) Act, 1895.

Smith v. *Smith* (1), [1923] P. 191, applied.

Per LAWRENCE, J.: A magistrate may make a free of tax order (i.e., an order for payment of such a sum as after deduction of tax shall leave the sum ordered) provided that the total burden on the husband (i.e., the named sum plus the tax) does not exceed 40s. (now £5, see notes) a week.

Notes. The Income Tax Act, 1918, All Schedules Rules, rr. 19 (1), 21 (1) are now the Income Tax Act, 1952, ss. 169 (1), 170.

This case must now be read subject to ss. 205, 206 of the Income Tax Act, 1952. Section 205 provides that maintenance orders made by a magistrates' court (under the Guardianship of Infants Acts, 1886 and 1925 (as amended by the Act of 1951); the Summary Jurisdiction (Married Women) Act, 1895, ss. 5 and 7 (*b*) (as amended by the Married Women (Maintenance) Act, 1949, and the Guardianship and Maintenance of Infants Act, 1951) and the Married Women (Maintenance) Act, 1920, s. 1 (as amended by the Act of 1949); and the Affiliation Orders Act, 1952), are "small maintenance orders." The amending Acts referred to above increase the maximum amounts which a magistrates' court can order to £5 per week for a wife and 30s. per week for a child. Section 206 provides that small maintenance orders shall be made without deduction of tax, and that the amount of such orders shall be assessed and charged as income of the payee only.

The dictum of Lawrence, J., as to the magistrates' jurisdiction to make free of tax orders has been held to be the law, but the making of such orders has been repeatedly discouraged by the appellate courts (see, e.g., *Wallis* v. *Wallis*, [1941] 2 All E.R. 291; *J.* v. *J.*, [1955] 2 All E.R. 617; and *Jefferson* v. *Jefferson*, [1956] 1 All E.R. 31).

The effect of ss. 205, 206 of the Income Tax Act, 1952, is that a free of tax small maintenance order obliges the husband to pay to the wife not only the sum named in the order but also the tax payable in respect thereof: *Jefferson* v. *Jefferson* (ante).

This case is still authority for the now settled rule that in the absence of express contrary provision orders for maintenance are to be construed as being orders for payments "less tax," not "free of tax."

Referred to: *Taylor* v. *Taylor*, [1937] 1 All E.R. 464; *Watkins* v. *Inland Revenue Comrs.*, [1939] 3 All E.R. 165; *Wallis* v. *Wallis*, [1941] 2 All E.R. 291.

As to income tax on maintenance orders, see 12 Halsbury's Laws (3rd Edn.) 446, para. 1006.

For a comprehensive discussion of the impact of income tax law on maintenance orders, see the articles in 10 L.J. 615 and 630, and 106 L.J. 437. For the Income Tax Act, 1952, ss. 169 (1), 170, 205, 206, see 31 Halsbury's Statutes (2nd Edn.) 162, 165, 197, 198.

For the Summary Jurisdiction (Married Women) Act, 1895, ss. 5, 7 (*b*), see 11 Halsbury's Statutes (2nd Edn.) 851, 852.

Case referred to:

(1) *Smith* v. *Smith*, [1923] P. 128; 92 L.J.P. 107; 129 L.T. 187; 39 T.L.R. 294; 27 Digest (Repl.) 476, *4130*.

Case Stated by a metropolitan magistrate.

A complaint was made by the wife—Mrs. Lilian Maud Clack, that the appellant, her former husband, David James Clack, had failed to pay her £24 19s. due under a maintenance order.

The following facts were proved or admitted on the hearing of the complaint:

On Feb. 2, 1932, an order was made by the magistrate of the Greenwich Police Court, under the provisions of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1925, on the ground of desertion, directing the appellant to pay to the chief clerk of the court on behalf of the respondent the sum of 30s. a week and a further total sum of 15s. per week on behalf of the three children of the marriage; that is to say, 5s. per week on behalf of each child. The appellant paid the sums ordered for some time, but thereafter deducted income tax from the payments until June 13, 1934, by which date the sum deducted amounted to £24 19s.

The husband contended that there was no jurisdiction to make an order for the payment as maintenance under the above-mentioned Acts of sums free of income tax, that the order of Feb. 2, 1932, did not purport to direct that the payments should be made without deduction of income tax, and that the case was governed by the decision in *Smith* v. *Smith* (1).

The wife contended that the order of Feb. 2, 1932, specified the weekly sums which she was entitled to receive, and that the husband was not entitled to make any deduction therefrom for income tax.

The magistrate came to the conclusion that the order secured to the wife the payment in full of weekly sums amounting to 45s. and that the husband was not entitled to make any deduction therefrom in respect of income tax.

The husband appealed to the Divisional Court.

By the Summary Jurisdiction (Married Women) Act, 1895, s. 5: "The Court of Summary Jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, namely: . . . (*c*) A provision that the husband shall pay to the applicant personally, or for her use, to any officer of the court or third person on her behalf, such weekly sum not exceeding two pounds as the court shall, having regard to the means both of the husband and wife, consider reasonable; . . ."

By the Income Tax Act, 1918, r. 19 (1) of the rules applicable to all schedules: "Where any yearly interest of money, annuity, or any other annual payment (. . . whether payable half-yearly or at any shorter or more distant periods), is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, . . . shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due. The person to whom such payment is made shall allow such deduction upon the receipt of the residue of the same, and the person making such deduction shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid."

By r. 21 (1): "Upon payment of any interest of money, annuity, or other annual payment charged with tax under Sched. D . . . the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment."

Acton Pile for the husband.

The wife in person.

AVORY, J.—This case has raised a troublesome question, but I have come to a definite conclusion that the order of the magistrate cannot be sustained. [His Lordship stated the facts of the case and the contentions of the parties before the magistrate, as set out above, and continued:]

Once the conclusion is reached that the sums claimed by the wife were in fact the aggregates of the sums deducted by way of income tax by the husband, it becomes necessary to consider the second clause of r. 19. [His Lordship read the clause and proceeded:] This rule has statutory force, and it is not disputed here that the husband had no option in the circumstances other than to make the deductions in his returns to the income tax authority. Further than that, r. 21 provides as follows. [His Lordship then read that rule.] There being, therefore, no option but to deduct those amounts, it appears to me to follow that it became the wife's duty to permit the deductions to be made, and that thereupon the husband became, in the words of the rule, acquitted and discharged of the amount of the deductions as if those amounts had been paid to the respondent.

In those circumstances I do not think it was competent for the magistrate to order the husband to pay sums of which he had already been acquitted and discharged. The appeal must therefore be allowed.

HAWKE, J.—I agree, though I confess that I should have been glad to find reasons for deciding otherwise, for I am satisfied in my own mind that those dealing with this limited form of maintenance never thought about income tax at all. But, for the reasons given by my Lord, I agree that the appeal must be allowed.

LAWRENCE, J.—I also agree. I only wish to add that it is impossible to construe the magistrate's order having regard to the decision in *Smith* v. *Smith* (1) as an order to pay 30s. a week free of income tax, or that such a sum should be paid as would bring to the wife a clear 30s. a week. I do not, however, agree with counsel for the husband's contention that the magistrate could not have made such an order, had he desired to do so, provided always that the total burden on the husband did not exceed 40s. a week.

Appeal allowed.

Solicitors: *Percy Haseldine & Co.*

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

SOWTER *v.* STEEL BARREL CO., LTD.

[KING'S BENCH DIVISION (Lord Hewart, C.J., Hawke and Lawrence, JJ.), June 20, 21, July 30, 1935]

[Reported 154 L.T. 85; 99 J.P. 379; 33 L.G.R. 376]

Factory—Dangerous machinery—Duty to fence—Need to secure "actual safety"—Need of secure fencing, or safe position or construction of machine—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 10 (1) (*c*).

By the Factory and Workshop Act, 1901, s. 10 (1): "With respect to the fencing of machinery in a factory, the following provisions shall have effect: . . . (*c*) All dangerous parts of the machinery . . . must either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced."

A workman injured his hand when working a Rhodes double-action power press, which was so constructed that its dangerous parts could not be reached by his hand when in motion unless he operated the bi-manual control of the machine otherwise than with his hands. The bi-manual control was in proper working order at the time of the accident, and had for many years been accepted by the Home Office as complying with the requirements of the above subsection. At their suggestion an automatic fly-guard had for a time been adopted as an additional precaution, but it was subsequently discontinued as it was found by the workmen and their employers to be dangerous, and was admitted by the Home Office to be "not satisfactory." In getting his hand caught in the machinery as he did, the workman was disobeying his employers' instructions.

Held: (LAWRENCE, J., dissenting) on the above facts: "safe" in the above subsection means "actually safe," and actual safety must be secured by secure fencing, or by safe position, or by safe construction; and it was, therefore, not open to justices to hold that the machinery was of such construction as to be equally safe to every person employed in the factory as it would be if it had been securely fenced, and to dismiss an information against the employers under the above subsection on that ground.

Notes.—Section 10 (1) (*c*) of the Act of 1901 is now Factories Act, 1937, s. 14. The construction of the Act favoured by the majority in this case would appear also to apply to the duties imposed by ss. 12 (fencing prime movers) and 13 (fencing transmission machinery) of the Act of 1937.

Referred to: *Chasteney* v. *Nairn & Co., Ltd.*, [1937] 1 All E.R. 376; *Vowles* v. *Armstrong Siddeley Motors, Ltd.*, [1938] 4 All E.R. 796; *Burns* v. *Joseph Terry & Sons, Ltd.*, [1950] 2 All E.R. 987.

As to the meaning of "securely fenced," see 17 HALSBURY'S LAWS (3rd Edn.) 71, para. 123, and for cases on the subject, see 24 DIGEST 908–910, *65–76*. For the Factories Act, 1937, s. 14, see 9 HALSBURY'S STATUTES (2nd Edn.) 1009.

Cases referred to:

(1) *Atkinson* v. *London and North Eastern Rail. Co.*, [1926] 1 K.B. 313; 95 L.J.K.B. 266; 134 L.T. 217; 90 J.P. 17; 42 T.L.R. 79; 23 L.G.R. 702; 28 Cox, C.C. 112, D.C.; Digest Supp.

(2) *Hindle* v. *Birtwistle*, [1897] 1 Q.B. 192; 76 L.T. 159; 61 J.P. 70; 45 W.R. 207; 13 T.L.R. 129; 41 Sol. Jo. 171; 18 Cox, C.C. 508; sub nom. *Birtwistle* v. *Hindle*, 66 L.J.Q.B. 173, D.C.; 24 Digest 909, *71*.

(3) *Davies* v. *Thomas Owen & Co.*, [1919] 2 K.B. 39; 88 L.J.K.B. 887; 121 L.T. 156; 83 J.P. 193; 17 L.G.R. 407; 24 Digest 909, *68*.

(4) *Blenkinsop* v. *Ogden*, [1898] 1 Q.B. 783; 67 L.J.Q.B. 537; 78 L.T. 554; 46 W.R. 542; 14 T.L.R. 360; 42 Sol. Jo. 450; 24 Digest 943, *299*.

Case Stated by Middlesex justices.

At a court of summary jurisdiction held at Uxbridge an information was preferred by Robert John Sowter, one of His Majesty's inspectors of factories and workshops (the appellant prosecutor), under the Factory and Workshop Acts, 1901–1920, against the Steel Barrel Co., Ltd. (the respondent employers), charging the employers that they, on April 11, 1934, at Phœnix Wharf, Uxbridge, were the occupiers of a certain factory within the meaning of the above Acts, and that on the above date such factory was not kept in conformity with the Acts in that certain machinery dangerous to persons employed or working there, to wit, the tools of a Rhodes double-action power press, were not securely fenced on the above date, as required by s. 10 (1) (*c*) of the Factory and Workshop Act, 1901.

Upon the hearing of the information the following facts were proved or admitted:

The employers were at all material times the occupiers of a factory at Phœnix Wharf, Uxbridge, Middlesex, within the meaning of the above Acts, and the machinery in question was dangerous machinery within the meaning of the Acts. The machinery was installed in 1910 and no accident had occurred in connection with its use until April 11, 1934.

The workman, one Edmund Charles Hartley, who was a left-handed man, met with an accident on that date while in the employ of the respondents at the factory and sustained an injury to his left hand. At the time of the accident, the workman was employed in working a Rhodes double-action power press.

There was on the machine a bi-manual control, and the proper way of operating the machine was by inserting the plate to be pressed into it by hand while it was at rest, and then pulling the safety handle down with the left hand and the operating lever up with the right hand. The operating lever could not be moved until the safety handle had been pulled down. If the machine was thus operated with both hands and the person operating it kept his hands on the levers, neither of his hands could get into it.

The Home Office had for many years accepted the bi-manual control as complying with s. 10 (1) (*c*) of the Factory and Workshop Act, 1901, but subsequently had suggested the addition of an automatic fly-guard as an additional precaution. The respondents, while making no admission that they were not already complying with the provisions of s. 10 (1) (*c*) of the Act of 1901, adopted the suggestion.

In practice, the automatic fly-guard suggested by the Home Office was found by the respondents and their employees to be itself dangerous and was admitted by the Home Office to be "not satisfactory."

Immediately after the accident the machine was examined on behalf of the prosecutor, and it was found that the bi-manual control was in proper working order and that the machine itself was not in any way defective.

At the time of the accident the workman was putting a plate into the machine, but no satisfactory explanation was given as to how the accident occurred.

Since March, 1933, there had been an automatic fly-guard on the machine, but it was not in operation or in efficient working order at the time of the accident. If it had been in operation and in efficient working order it would have prevented the workman's hand being caught in the machine, although it might have caused other damage to his hand and, when in use, might have struck a careless workman who leant forward or got his head in the way of it. Some workmen preferred to operate the machine without the guard because of the anticipated danger of being struck by it.

It was unnecessary for the workman to put his hand into the machine when the machinery was in motion if he was operating the machine properly, and he was disobeying instructions in getting his hand caught as he did.

It was contended on behalf of the prosecutor that the employers were guilty of the offence charged, and that the machine was not securely fenced nor of such construction nor in such a position as to be equally safe to every person working in the factory as it would have been if it had been securely fenced.

It was contended on behalf of the employers that they were not guilty of the offence charged, and that by reason of the bi-manual control of the machine it was safer than it would have been if the fly-guard had been in operation and in efficient working order, and that the fly-guard presented additional dangers to the men working in the factory and itself required fencing.

The justices held, in so far as it was a question of fact for their decision, that the requirements of s. 10 (1) (*c*) had been complied with, in that the machinery in question was of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced. They accordingly dismissed the information.

The prosecutor appealed.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *Wilfrid Lewis* for the prosecutor.
Lord Erleigh, K.C. and *H. Salter Nichols* for the employers.

Cur. adv. vult.

July 30. The following judgments were read:

LAWRENCE, J.—In this case I regret that I differ from the other members of the court.

This is an appeal from a decision of justices of the peace for Middlesex, who dismissed an information under the Factory and Workshop Acts, 1901–1920, on the ground that the machinery in question, which was alleged to be dangerous and not securely fenced, was of such construction as to be equally safe as it would be if it were securely fenced. The machinery in question which gave rise to an accident to a workman was a Rhodes double-action power press, which was so constructed that its dangerous parts could not be reached by the hand of the workman when in motion unless he operated the bi-manual control of the machine in some other way than with his hands. There appears to have been no direct evidence as to how the bi-manual control was operated at the time of the accident. The press had been in use for twenty-four years without accident, and the Home Office had for many years accepted the bi-manual control as complying with s. 10 (1) (*c*) of the Act of 1901. Thereafter they suggested a guard, which was used for a time, but was subsequently disused, being, in the opinion of the employers, dangerous, and, in the opinion of the Home Office, not satisfactory.

The question which the justices had, in my opinion, to decide, having held that parts of the press were dangerous, was whether the bi-manual control was a method of construction which made it as safe as if it were securely fenced. The answer to this question involved a finding of fact, and a view of the law as to the meaning of the words "securely fenced." That such is the question for justices is accepted in *Atkinson* v. *London and North Eastern Rail. Co.* (1). The justices here decided that the press was of such construction as to be equally safe as it would be if securely fenced. No authority was cited which lays down that the words "securely fenced" mean so fenced that an accident cannot happen, and such a construction would be inconsistent with dicta in *Hindle* v. *Birtwistle* (2). In my opinion, the words, upon their true interpretation, have not that meaning, but mean so fenced that careless persons will be reasonably safeguarded. Unless the words "securely fenced" mean so fenced that no person or thing can get past the fence, it must, in my view, be a question of fact in each case whether the machinery is securely fenced, or is of such construction as to be equally safe.

It was suggested that SALTER, J., had decided differently in *Davies* v. *Thomas Owen & Co.* (3), but in my opinion what the learned judge there decided was that a fence which had been found by the proper tribunal of fact not to be secure was not in compliance with the section merely because it was not commercially or mechanically possible to provide a more secure fence. The duty was absolute to provide a secure fence, regardless of commercial or mechanical possibility, and the jury had found that the fence was not secure, but if the jury had found upon evidence that the fence was secure, or that the machinery was of such construction as to be equally safe as if it were securely fenced, no court could have overruled them either because they though a more secure fence was commercially and mechanically possible or for any other reason, for the jury would ex hypothesi have found that the statutory obligation had been fulfilled.

Here the justices have found as a fact that the construction of the press was such as to be equally safe as it would be if it were securely fenced, and there were, in my opinion, facts upon which the justices could reasonably come to that decision, inter alia, the actual construction of the machine and the disused guard, which they saw, and the consideration that the machine had been safely in use for twenty-four years, and that the Home Office for many years regarded it as complying with the Acts.

It was also suggested in the course of the argument that there is a contradiction between the justices' findings that the machinery was dangerous and that it was of such construction as to be equally safe as it would be if securely fenced, but in my opinion s. 10 (1) (*c*) of the Act of 1901 itself contemplates that dangerous parts of machinery may be of such construction as to be equally safe as they would be if securely fenced, and on a fair reading of the case stated there is no contradiction between the above two findings. It may be that another tribunal of fact would have come to a different decision on the question whether the press was of such construction as to be equally safe, but in my opinion that does not entitle this court to overrule the justices.

For these reasons, I am of opinion that the appeal should be dismissed.

LORD HEWART, C.J.—While I differ with regret from the opinion of LAWRENCE, J., I entertain no doubt that this appeal must be allowed, and that the case should go back to the justices with the direction that the offence which was charged was proved. It is not necessary to re-read the case. The statements which it contains show that the justices here coquetted with nearly all, though not quite all, the fallacies which this court for some years past has been endeavouring to destroy in such cases. It is not material that the workman who was injured was a left-handed man. He was, in fact, employed by the employers in their factory. Nor is it material that, if this admittedly dangerous and unfenced machine had been used in accordance with instructions, the accident might not have happened. One of the excellent reasons for this legislation relating to dangerous machinery is precisely the fact that, by reason of carelessness, indolence or haste, workmen sometimes omit to observe instructions. Where machinery is dangerous, they are to be saved even from themselves. Nor is it to the point that the machine had been in use for some time, nor that it was unnecessary for the workman to put his hand into it when the machinery was in motion. The scope of this legislation is not by any means limited to the prevention of accidents caused by necessary acts. The conclusion to which these justices came is the more strange because the case finds as a fact that since March, 1933—that is more than a year before the happening of this accident—there had been an automatic fly-guard on the machine, but it was not in operation or in efficient working order at the time of the accident, and, moreover, that if the automatic fly-guard had been in operation and in efficient working order it would have prevented the workman's hand from being caught in the machine. Much is said, or suggested, in the case about the difficulty of making this particular machine safe. But if in fact this machine could not possibly be made safe, the conclusion would be that it would have to be scrapped.

In the course of the argument before this court a new and ingenious fallacy was developed, and inaccurately said to be derived from the words of s. 10 (1) (*c*) of the Factory and Workshop Act, 1901. The relevant words are these:

> "All dangerous parts of the machinery . . . must either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced."

It is true—indeed, it is quite obvious—that the legislature is dealing with dangerous parts of machinery, but its object is not to leave them dangerous. On the contrary, its object is, under stringent penalties, to make them safe. And it is to be observed that the words are "securely fenced," not "somewhat securely fenced," and a little later the word employed is "safe," not "moderately safe." "Safe" means "actually safe," and this actual safety is to be procured (*a*) by secure fencing, or (*b*) by safe position, or (*c*) by safe construction. In this case the machine, at the time of the accident, was not safe at all. It is not suggested that the workman deliberately put his hand into the machine in order to hurt himself. On the contrary, his hand was accidentally caught in the machine in the course of his using it for the purpose of doing the very work which he was employed, by means of it, to do.

I must add that much time, trouble, and expense might be saved if those who adjudicate in cases about the fencing of machinery—often, as here, lay justices—and their advisers would read and consider with a little care the words of the section, and the leading decisions upon the matter, especially *Hindle* v. *Birtwistle* (2), *Blenkinsop v. Ogden* (4), *Davies* v. *Thomas Owen & Co.* (3), and *Atkinson* v. *London and North Eastern Rail. Co.* (1).

HAWKE, J.—I agree with LORD HEWART, C.J. I see no occasion to add anything to the observations which he has made, except this, that, in my opinion, having regard to the preceding findings of the justices, their alleged finding of fact, that the bi-manual control was in working order and that the machine itself was not in any way defective, is not a finding of fact at all, but a conclusion of law wrongly concluded.

Appeal allowed.

Case remitted with direction to find offence proved.

Solicitors: *Treasury Solicitor*; *Owen, White & Catlin.*

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

Re JAMES. JAMES *v.* JAMES

[CHANCERY DIVISION (Farwell, J.), February 21, 1935]

[Reported [1935] Ch. 449; 104 L.J.Ch. 247; 153 L.T. 277]

Administration of Estates—Gift—Imperfect gift—Statements by donor that at his death house and furniture to go to A.—On donor's death intestate delivery of furniture and title deeds of house to A. by only child of donor—Death of only child intestate—A. appointed co-administratrix of only child's estate—Vesting of legal estate of house and furniture in A. by letters of administration—Completion of A.'s title.

The donor from time to time stated that S. M. J. should have his house and furniture at his death. On the donor's death intestate his son and only child delivered the furniture and the title deeds of the house to S. M. J. At the son's subsequent death intestate S. M. J. and another were granted letters of administration of the son's estate.

Held: as there was a continuing intention of the donor up to the time of his death to give the property to S. M. J., and as S. M. J. had been appointed one of the administratrices of the son and so had got the legal estate of the property vested in her, she needed no assistance from equity to complete her title, and was entitled to retain the property beneficially.

The principle of *Strong* v. *Bird* (1) (1874), L.R. 18 Eq. 315, applied.

Notes. As to completion of incomplete gifts by appointment of donee as personal representative, see 18 HALSBURY'S LAWS (3rd Edn.) 399, para. 758, and for cases on the subject, see 25 DIGEST 538, *268–280*.

Case referred to:

(1) *Strong* v. *Bird* (1874), L.R. 18 Eq. 315; 43 L.J.Ch. 814; 30 L.T. 745; 22 W.R. 788; 25 Digest 538, *268*.

Adjourned Summons.

James James died on Jan. 24, 1924, a widower and intestate, leaving his son John James, his only child, him surviving. The defendant, Sarah Maria James, was in the employment of James James as his housekeeper from 1909 until the date of his death, and she received no salary for her services. From time to time, however, James James stated that his house, Green Vale, and the furniture therein, should go to S. M. James at his death.

On the death of James James his son took away from Green Vale a few small articles, but he handed over all the rest of the furniture and also the title deeds of the house to S. M. James. She and her husband continued to reside rent free at Green Vale and were living there when the summons was taken out. The son died intestate and a bachelor on June 17, 1933, and letters of administration were granted to the plaintiff and S. M. James.

S. M. James claimed that she was entitled to Green Vale as beneficial owner. The plaintiff took out a summons asking whether her claim should be allowed.

Lightwood for the plaintiff.

A. L. Ungoed-Thomas for the defendant.

FARWELL, J.—I am completely satisfied on the evidence before me that there was a continuing intention in the donor up to the time of his death to give the property to the defendant.

At the time of his death the position was that the defendant was in possession both of the property and the title deeds as donee from the intestate; but the legal estate in the property was still in the donor. The case was argued on behalf of the defendant on the footing that the position was the same as in a case of an imperfect gift of personalty, and I do not, therefore, propose to consider whether possession of the title deeds and the property gave the defendant an equitable interest in the land which she could have successfully asserted. I will deal with it as if it were an imperfect gift of personalty. It is now well settled that in such a case equity will not aid the donee, but on the other hand, if the donee gets the legal title to the property vested in him, he no longer wants the assistance of equity and is entitled to rely on his legal title as against the donor or persons claiming through him: see *Strong* v. *Bird* (1). In my judgment, those principles apply here. The defendant, by her appointment as one of the administratrices, has got the legal estate vested in her, and she requires no assistance from equity to complete her title In these circumstances she cannot be compelled at the suit of persons claiming through the donor to surrender her property. It follows that in my judgment the plaintiff here must recognise the title of the defendant to the property and no steps should be taken to recover it from her.

Solicitors: *Helder, Roberts, Giles & Co.*, for *Morgan Griffiths, Son, & Prosser*, Carmarthen; *Rhys Roberts & Co.*, for *Ungoed-Thomas & King*, Carmarthen.

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

GREG v. PLANQUE

[Court of Appeal (Greer, Slesser, and Scott, L.JJ.), November 12, 13, 14, 1935]

[Reported [1936] 1 K.B. 669; 105 L.J.K.B. 415; 154 L.T. 475]

Landlord and Tenant—Repair—Landlord's right to enter demised premises to execute repairs at other parts of building—Self-contained flue—Damage—Extent of landlord's liability.

A lease demised a lock-up shop "being part of the ground floor of [a building] together with the basement under the shop and the drains and watercourses thereunder." By cl. 2 (5) of the lease the tenant permitted the landlord to enter the demised premises for, inter alia, "executing repairs and alterations at or upon the other parts of (the building) . . . making good all damage thereby occasioned." The landlord entered and cleaned a flue, which was a self-contained pipe having no connections at all with the demised premises except certain facilities for cleaning it there. In cleaning the flue the landlord, without any negligence on his part, caused soot to escape and so damaged some of the tenants' stock-in-trade, and did not make good this damage.

Held: the tenant's claim for damages must succeed because (i) the flue was neither part of the demised premises nor was it an easement of necessity, and so was an "other part" of the building (dictum of Stirling, L.J. in *Union Lighterage Co., Ltd.* v. *London Graving Dock Co., Ltd.* (1), [1902] 2 Ch. 557, applied by Slesser, L.J.); (ii) cleaning the flue was "repairs" (dictum of Lord Blackburn in *Inglis* v. *Buttery* (2) (1878), 3 App. Cas. 552, applied by Slesser, L.J.); (iii) "damage" in cl. 2 (5) was not limited to damage to the structure, but included all damage occasioned by the repairs (*Crofts* v. *Haldane* (3) (1867), L.R. 2 Q.B. 194, distinguished by Slesser, L.J.).

Per Scott, L.J.: Where the dispute depends on the construction of a written document, it is very dangerous, usually useless, almost always undesirable, to cite a lot of cases decided on other documents.

Notes. Referred to: *London and North Eastern Rail. Co.* v. *Berriman*, [1946] 1 All E.R. 255.

As to the premises included in a demise of part of a building, see 20 Halsbury's Laws (2nd Edn.) 92, para. 102. As to entry by the landlord to repair, see 20 Halsbury's Laws (2nd Edn.) 222, para. 243.

Cases referred to:

(1) *Union Lighterage Co., Ltd.* v. *London Graving Dock Co., Ltd.*, [1902] 2 Ch. 557; 71 L.J.Ch. 791; 87 L.T. 381; 18 T.L.R. 754, C.A.; 19 Digest 20, *68*.

(2) *Inglis* v. *Buttery & Co.* (1878), 3 App. Cas. 552, H.L.; 7 Digest 334, *17*.

(3) *Crofts* v. *Haldane* (1867), L.R. 2 Q.B. 194; 8 B. & S. 194; 36 L.J.Q.B. 85; 16 L.T. 116; 31 J.P. 358; 15 W.R. 444; 19 Digest 92, *564*.

(4) *Nicholas* v. *Chamberlain* (1606), Cro. Jac. 121; 79 E.R. 105; 19 Digest 33, *161*.

(5) *Wheeldon* v. *Burrows* (1879), 12 Ch.D. 31; 48 L.J.Ch. 853; 41 L.T. 327; 28 W.R. 196, C.A.; 19 Digest 46, *253*.

(6) *Bishop* v. *Consolidated London Properties, Ltd.* (1933), 102 L.J.K.B. 257; 148 L.T. 407; 31 Digest (Repl.) 344, *4758*.

(7) *Melles & Co.* v. *Holme*, [1918] 2 K.B. 100; 87 L.J.K.B. 942; 119 L.T. 191; 62 Sol. Jo. 704, D.C.; 31 Digest (Repl.) 346, *4776*.

Appeal from an order of du Parcq, J.

The plaintiff landlord's claim was for £275, being one half-year's rent due under a lease made between the landlord and the defendant tenant, dated March 25, 1933, of a lock-up shop, being part of the ground floor of the messuage known as 25, Hanover-square, in the County of London, together with the basement under the demised shop.

The tenant, who was a court dressmaker, counterclaimed for damages caused to her stock by soot which escaped from the flues which were being cleaned by the landlord.

Du Parcq, J., held that the landlord was entitled by c. 2 (5) to enter upon the demised premises for the purpose of executing repairs, that this included the cleaning of the flues, and that the landlord could not be called upon to pay for the damage caused to the tenant's stock without negligence.

The tenant appealed.

C. Gallop and *Sir John Cameron*, for the tenant.

C. P. Harvey, for the landlord.

GREER, L.J.—This case has taken a long time to try, and counsel for the landlord has said all that could be said in support of the judgment of the learned judge, and a great many other things as well. He has, I have no doubt, commended himself to his clients as an advocate of courage, in the face of resistance by the Bench, but we have to judge this case on the evidence and on the true construction of the clauses in the lease, and the only doubt I have had, from beginning to end in this case, is as to whether the cleaning of the flue is a matter which could be regarded as repair of the flue.

The tenant, in the first instance, puts her counterclaim as based upon cl. 2 (5) of the lease. That contains permission to the lessor to enter upon the premises for the purpose of doing various things, including the executing of repairs and alterations to or upon the other parts of the said premises, that is to say, the parts that are not included in the lease to the tenant. It was necessary for the landlord to have an opportunity of going on to the demised premises, not merely for the purpose of viewing the state of repair of the demised premises, but for the purpose of doing repairs and alterations upon other parts of the messuage that were not included in the lease, and I cannot imagine a better illustration of the other parts of the messuage not included in the lease than the flues, which were not of any benefit whatever to the tenant, but which had to be kept in condition by the landlord, in order to benefit his other tenants in the other parts of the building, and I am satisfied that as between these parties the flues were not part of the demise from the lessor to the lessee, but were other parts of the said messuage, and he took the liberty to come upon the demised premises in order to put them in repair.

I have had some hesitation in coming to the conclusion that the word "repairs" is wide enough to include cleaning of the flues, but, on consideration, I have come to the conclusion that, as between these parties, in this lease, the word "repairs" does cover the kind of maintenance of the condition of the flue in which it ought to be, in order to carry out the purposes for which it was put into the premises, namely, to provide heat to the upper parts of the building, which were let out as flats, and, if that be so, then the permission to go on the premises to do that work was subject to the other terms of cl. 2 (5), namely, that when he did that, the landlord undertook he would make good all damage thereby occasioned.

An argument has been presented to us that the damage, referred to in that clause, is limited to damage to the structure. To my mind that is an argument that carries no weight, when we consider what it was that was being let and the purpose for which it was being let. There is an undertaking by the tenant to use the said premises for the business of dressmaking and millinery, or for such purpose or purposes as may be authorised from time to time by the previous consent of the landlord, and I cannot imagine, when we consider the effect of cl. 2 (5), that it has anything whatever to do with the damage occasioned to the tenant in the carrying on of the business of dressmaking and millinery. I think it was intended by this clause that if the landlord took advantage of the permission, granted to him by cl. 2 (5), he should be responsible for all the damage thereby occasioned, and that that would include damage to the stock-in-trade of the tenant who was carrying on this business. If damage was so caused, then it was damage which the landlord has undertaken to make good, and, if he could not make it good by restoring the frocks to the condition in which they were before the operations began, he must pay for having failed to do that which he had undertaken to do, namely, "make good all damage thereby occasioned."

Counsel for the landlord argued that we ought not to hold that in this case there was any "damage thereby occasioned," because, he says, the tenant might have prevented the damage by moving her goods from the position in which they were to some other parts of the premises.

Now I agree that she was under an obligation to take all reasonable steps to see that damage would not be occasioned by the operations of the landlord, but it is a question of fact, still to be determined, whether by removing her frocks as she did from the showroom to the office, she did all that could be reasonably expected of her, under the circumstances. I think the learned judge came to a wrong conclusion as to the construction of this clause, being persuaded by counsel for the landlord to take the view that it referred only to structural damage to the leased premises. I disagree with that view. I think it is wide enough to cover damage to the stock-in-trade that was on the premises. What the quantum is remains to be determined, and, in deciding that quantum of damage, the referee will have to take into account the question as to whether or not the tenant could be reasonably expected, and at reasonable expense which she would have been entitled to recover, to have prevented the damage which, in fact, did occur.

Reading the evidence, it is impossible to come to any other conclusion than that, though there was a removal into the office on the two occasions with which the action has to deal still, the damage, in fact, occurred. It will be for the referee to say whether or not the damage could not have been further diminished by some reasonable act on the part of the tenant, and I do not suppose too much importance would be attached to the casual observation made in the course of her evidence, that it was not her business to remove the frocks to the upstairs room, which was a very inconvenient place to have them, and that, she would have incurred even if she had done so some expense. Whether it could, under the circumstances, be reasonably expected that she should do so will be a matter which the tribunal estimating the damages will have to take into account.

For these reasons I think that the learned judge's judgment was wrong, and that the appeal ought to be allowed, that an order for reference as to the amount of damages should be made to a referee to be agreed by the parties, or in default of agreement, to the official referee, and that the costs of the appeal and the costs of the reference should depend on the result of the reference. It may be that the landlord will be well advised to pay some money into court, or to make some offer to the tenant. That might have some result upon the costs of the litigation, but the costs of the inquiry before the referee will be costs with which we do not deal, but which he will have power to deal with when he has heard the whole of the case with regard to damages.

For the reasons I have given this appeal should be allowed with costs, and the order of the judge should be modified by ordering the reference as to damages to a referee to be agreed or, in default of agreement, to the official referee.

SLESSER, L.J.—I am of the same opinion. Although this case at different times has been put on behalf of the tenant in different ways, by the time that the case fell to us for determination it was limited to really one matter, namely, whether the tenant can show that she is entitled to damages, by reason of cl. 2 (5) of her lease.

That clause reads as follows:

> "And will permit the lessor, or his surveyor, or agent and workmen at any time during the said term to enter the said premises or any part thereof during reasonable hours in the daytime to take schedules or inventories of the fixtures and things to be yielded up at the expiration or sooner determination of the said term as aforesaid, and for executing the repairs and alterations at or upon the other parts of the said messuage and sewers drains watercourses gaspipes meters electric wires and meters thereof or thereunder and effecting any alterations and repairs that may be necessary in or to the drains under the demised premises making good all damage thereby occasioned, provided that the lessor shall not thereby cause more interference with the lessee's business than is reasonably avoidable."

Now, in order that the tenant counterclaiming may bring herself within these words, it is necessary for her to show that the landlord or his agent has entered executing the repairs and alterations of, or upon, the other parts of the said messuage, and, therefore, the first question which arises in this case is, whether this flue, the cleaning of which has caused, or is alleged to have caused, the damage in this case, was, or was not, another part of the said messuage? If the flue was itself part of the premises demised to the defendant, then, of course, this part of cl. 2 (5) would not apply.

In my opinion, it is clear when the parcels and the intentions, as gathered from the lease, are considered, this flue was no part of the demised premises. The parcels are a lock-up shop,

> "being part of the ground floor of the messuage known as 25, Hanover-square, in the County of London, together with the basement under the said demised shop and the drains and watercourses thereunder."

There is, in terms, no demise of this flue, which is a self-contained pipe, having no connections at all with the tenant's premises, except certain facilities for the cleaning of it upon those premises, and which in no way serves the comfort or convenience of the tenant or the purposes of her business.

Now counsel for the landlord, in an elaborate and careful argument, met with that difficulty, and, being constrained to admit that the flue was a flue which was used by the other tenants and was being used at the time when this demise was made, attempted to show that this flue passing through or near these premises was itself a part of the demised premises, but that there was an easement whereby the tenant had agreed that the fumes and products of combustion passing through this flue should pass through her premises by way of easement.

Now it is clear there is no express easement so reserved. There is mention of the reservations of other easements in this lease. There is no reference to a flue. It would be necessary, therefore, for him, on any view in my opinion, to show that this was an easement of necessity.

I do not propose to discuss the old case in the reign of James I which was cited to us—*Nicholas* v. *Chamberlain* (4). Differing views have been taken of the effect of the judgment in that case in a more recent authority—*Wheeldon* v. *Burrows* (5), by Thesiger, L.J., on the one hand, taking it that the right to the supply of water there was by way of easement; and by James, L.J., on the other, who took the view (12 Ch.D. at p. 60) that in *Nicholas* v. *Chamberlain* (4):

> ". . . The court seems to have really proceeded on the ground that it was not an incorporeal easement, but that the whole of the conduit through which the water ran was a corporeal part of the house, just as in any old city there are cellars projecting under other houses. They thought it was not merely the right to the passage of water, but that the conduit itself passed as part of the house, just like a flue passing through another man's house."

No one case in these matters is any conclusive authority or ever can be. It must depend upon the express language and the purpose of the particular demises, but it is interesting to observe that James, L.J., in coming to the conclusion that in *Chamberlain's Case* (4) the conduit through which the water ran was not an easement but a corporeal part of the house, drew the analogy of a flue passing through another man's house.

I think it is impossible to say here that this is an easement of necessity. As was said by Stirling, L.J., in *Union Lighterage Co., Ltd.* v. *London Graving Dock Co., Ltd.* (1), an easement of necessity is not one which is a mere convenience, it is one without which the property retained on a severance cannot be used at all. I think it is impossible to say that this flue was in such a condition. The need for it might well have been supplied by electric heating, gas heating, or in any other way. I think it was no more, at the highest, than what Stirling, L.J., said, an easement of necessity is not, "one merely necessary to the reasonable enjoyment" of the property; and if it is not an easement, it follows, to my mind, apart from the actual language of the demise, that it was not part of the property demised.

The third view (which I think counsel for the landlord would hesitate to accept) is that it was the property of the tenant; that she had full disposition over it, and that it being part of her premises, and there being no easement, she could at any moment have closed up this flue and have refused to allow any soot or other matter to pass through it. That is a view, which needs only to be stated to be rejected, it being clearly contrary to the intention of the parties.

I agree with the views that have been expressed by Greer, L.J., with regard to the second matter which arises, that this being another part of the said messuage, this cleaning of the flue for executing repairs and alterations fell within cl. 2 (5) on the facts of this case; that is to say, that the making more efficient of this flue, by the removal of soot or any other matter which impeded its proper function, does seem to me, properly in the context and intentions of this document, to be covered by the words "execute the repairs and alterations." I take those two words together, "To repair," as meaning in the language of Lord Blackburn, in *Inglis* v. *Buttery & Co.* (2) "make good defects, including renewal where that is necessary." I think it may properly be said that an apparatus is repaired when an obstruction which is a defect to the proper working of the apparatus is taken out, even though, in any particular case, it may be that renewal does not prove to be necessary.

That was the view of the learned judge against whose decision this appeal is brought, in *Bishop* v. *Consolidated London Properties, Ltd.* (6). There a young dead pigeon had got into a pipe and caused an obstruction and an overflow of water. On the question of reparation du Parcq, J. (148 L.T. at p. 410), says this:

> "I have come to the conclusion that a pipe which is choked and not able to do its duty as a pipe is out of repair."

That seems to me to be a perfectly proper conclusion.

In another case, *Melles & Co.* v. *Holme* (7) the obligation was to keep in good and tenantable repair, but it was dealt with on the principle of the cases dealing with repair—where a stoppage was due to ashes, which had been discharged from chimneys and fallen upon the roof, and refuse had flowed into a gutter. Salter, J., said, in the Divisional Court,

> "In some case no doubt there must be read into a covenant by a landlord to repair a condition that the tenant must give him notice of the want of repair"

and treated the obligation to remove that obstruction as a reparation. That, it seems to me, is sufficient to determine that matter.

There follows only the question whether here it can properly be said that there having been repairs necessary or conceived to be necessary on other parts of this messuage, there is an obligation to make good all damage thereby occasioned, meaning thereby, not only make good damage to the actual matters repaired, but damage generally done to the tenant.

I do not find it necessary on that head to repeat what my Lord has said. It appears to me quite clear that these words are words of complete generality; that there is no reason to restrict them in the way in which counsel for the landlord has endeavoured to persuade us to restrict them, and it will also be observed that in the case which he cited to us, *Crofts* v. *Haldane* (3) the language was "make good all damage occasioned thereby to the adjoining premises"—it was limited in that way. I can find no such words of limitation in the present obligation to repair; if it be found in the reference that damage has been occasioned by the execution of repairs and alterations upon other parts of the said messuage, as contemplated in cl. 2 (5), then, applying the ordinary principles, which will include the question of the obligation of the tenant to minimise her damage and to act reasonably, having regard to all the ordinary considerations which arise, the exact extent of damage which has been occasioned to the tenant will be a matter for estimation by the referee.

SCOTT, L.J.—I agree, and I particularly desire to adopt the language of Greer, L.J., which covers the whole interpretation of the lease. I wish to add two or three observations. Where, as in this case, the dispute depends on the construction of a written document, it is very dangerous, usually useless, almost always undesirable, to cite a lot of cases decided on other documents. A great many cases referred to in the learned judge's judgment and a great many cases cited in court here would seem to me to throw no light at all on the interpretation of this document.

The second observation I desire to make is this. Unless a word in a document is quite clearly a word of art, having a definite legal meaning, it should be given its natural meaning in the English language. The word repair is an ordinary English word, having a pretty wide natural meaning. It should not be limited, as it was sought to be limited in the argument in this case, to such dealing with a piece of plant or machinery or structure as involves a renewal of any part. That is not the essence. That is one form of repair. But where you are dealing with working plant or machinery, if it is not in good working order, whatever the operation may be of putting it in good working order, it would properly be called a work of repair. If your motor car is not going well and it is sent to the works to be repaired, you would normally regard it as repair work, even if you were told that all that had to be done was to decarbonise the cylinders. People use ordinary words in rather a wide sense. Unless the word "repair" here was so used in this particular sub-clause of cl. 2 of this document, there was no provision at all for the ordinary and inevitable work, which the landlord would have to do, as lessee under his headlease, in order to keep in good working condition a piece of plant essential to the working of the hot water apparatus of all the flats in the other parts of the building. I think that the natural interpretation of the word is that which has been put upon it by Greer, L.J., and Slesser, L.J.

The only other point to which I desire to refer is this. The learned judge decided that the flue was no part of the demised premises. I agree. We are rather taking the same view that he took. I think that the simple ground on which we should decide that that is the true interpretation of the lease, is that it is not mentioned in any way at all in the parcels. Where, in a composite building containing a large number of tenements, some parts of the building are necessarily retained in the possession of the landlord, of the whole, and there is a particular demise of a particular tenement carved out of the whole, with a description of what is let, there is no ground at all for including in the demise any part of the building which may happen physically to pass through or be in the middle of the demised tenement, if it is of a nature to call for the retention of possession by the landlord.

On the second point as to the meaning of the word "repair" in the covenant, the learned judge took the same view as we are taking here. We are affirming him on that. The only part of the covenant where he differed from us was in the meaning of the words "making good all damage thereby occasioned." I put to counsel for the landlord, in the course of the argument, the question whether, if the proviso forbidding unnecessary interference with the lessee's business had been written at the beginning of the clause and the two purposes for which the right of entry was granted by the lessee as part of the clause were treated as subsidiary, the words "making good all damage thereby occasioned" would not necessarily apply to the whole clause and would then, almost obviously, mean "make good all damage caused to the lessee" on the occasion of the exercise of the right of entry, or incidental to it. That, in my view, is the right interpretation of the clause as a whole.

For these reasons I agree with the judgment that is proposed by Greer, L.J.

Appeal allowed.

Solicitors: *Forsyte, Kerman, & Phillips*; *Walbrook & Hosken.*

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

WITTY *v.* WORLD SERVICE, LTD.

[CHANCERY DIVISION (Eve, J.), December 13, 1935]

[Reported [1936] Ch. 303; 105 L.J.Ch. 63; 154 L.T. 491; 100 J.P. 68; 52 T.L.R. 235; 79 Sol. Jo. 966; 34 L.G.R. 150; 30 Cox, C.C. 375]

Gaming—Prize competition—Element of skill—Puzzle pictures—Betting and Lotteries Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 58), *s.* 26 (1) (*b*).

Gaming—Betting-house—Newspaper office—Puzzle picture competition in newspaper—Payments by competitors—Betting Act, 1853 (16 *&* 17 *Vict., c.* 119), *s.* 1.

The proprietors of a newspaper published therein particulars of a competition in which the competitors were required to state what places in the United Kingdom were represented by nine pictures published in the newspaper. More than one place might be suggested by a picture, but each picture was so designed that one name was more fitted to it than any other. Every attempt was individually scrutinised by a board of adjudicators presided over by the editor of the newspaper, who, it was stated, would present a prize of £50 to the winner or winners. Competitors had to pay 1½d. for each attempt or 6d. for five attempts.

Held: (i) the manner in which the competition was managed and the attempts at solution were investigated was immaterial, the question being whether success in the competition involved the exercise of skill; the competition was one in which success depended to a substantial degree on the exercise of skill; and, therefore, it was not unlawful under the Betting and Lotteries Act, 1934, s. 26 (1) (*b*).

Coles v. *Odhams Press, Ltd.* (1), printed p. 598, post, distinguished.

(ii) the competition was not a "game" within s. 1 of the Betting Act, 1853, and, therefore, the proprietors of the newspaper would not be guilty under that section of keeping a betting house.

Notes. As to betting houses, see 18 HALSBURY'S LAWS (3rd Edn.) 199 et seq., and for lotteries, see ibid., 238 et seq. For cases, see 25 DIGEST 436 et seq. and 452 et seq. For Betting Act, 1853, see 10 HALSBURY'S STATUTES (2nd Edn.) 761, and for Betting and Lotteries Act, 1934, see ibid., 785.

Case referred to:

(1) *Coles* v. *Odhams Press, Ltd.*, post, p. 598; [1936] 1 K.B. 416; 105 L.J.K.B. 208; 154 L.T. 218; 100 J.P. 85; 52 T.L.R. 119; 79 Sol. Jo. 860; 34 L.G.R. 34; 30 Cox, C.C. 329, D.C.; Digest Supp.

Action for injunctions.

The defendant company, incorporated in 1923 for the purpose of carrying on business as proprietors and publishers of newspapers, journals, magazines, etc., were the publishers and printers of a weekly newspaper called *The Winner*. On Nov. 18, 1935, they published therein particulars of a competition under the heading "Great new picture puzzle contest, £50 cash must be won," followed by these particulars: "Below are printed nine pictures representing the names of places in the United Kingdom (either as spelt or pronounced). There may be more than one place suggested by a picture, but upon examination of all the details in the picture you will find one name more fitting than others. You are invited to state what are the most fitting answers to the pictures. All you have to do is to study each picture carefully and determine what place in your knowledge most aptly fits the picture. There are no sealed solutions to guess. The more skilful and thoughtful you are the more likely you will be to gain the prize. Every attempt will be individually scrutinised by a board of adjudicators presided over by the editor of *The Winner*, who will present a prize of £50 in cash for the most meritorious attempt submitted."

By the rules it appeared that there was no official solution to the puzzle, and that each and every attempt would be individually scrutinised. In the event of equally meritorious attempts being submitted by more than one entrant the prize would be equally divided. Payment was to be made at the rate of 1½d. for each attempt, or of 6d. for five attempts. The form provided for five such attempts. Of these, the first three were diagrams incorporating some of the letters of the words London, Belfast, and Cardiff respectively, and the word "London" was printed as the solution of the first picture. The other pictures were sketches with no immediately obvious meaning. In the margin there was given "a list of places to help competitors," intimating that probably better ones might be found.

The plaintiff was a director of the defendant company, and, being in doubt whether the competition was illegal under the Betting and Lotteries Act, 1934, in which event he might become liable under s. 29 to penalties if the company were prosecuted and convicted under the Act, he brought this action claiming injunctions to restrain them from conducting in *The Winner* any picture puzzle contest or other competition in which prizes were offered for forecasts of the result of a future event, or in which success did not depend to a substantial degree upon the exercise of skill, contrary to the provisions of ss. 22 and 26 of the Betting and Lotteries Act, 1934, and from keeping or using offices for the receipt of money as consideration for any promise to pay money in any event or contingency relating to any game or exercise contrary to the provisions of s. 1 of the Betting Act, 1853.

The editor, Mr. C. B. Randall, in his affidavit, admitted the truth of the facts stated by the plaintiff, and said that he had instructed an artist to draw the pictures which appeared in *The Winner* suggesting in some cases two or more different places to each picture, but always in such a way that the place, the name of which he had communicated to the artist, appeared to be the most fitting answer in the sense that it took the most comprehensive account of the material contents of the picture. One of the pictures suggested six possible solutions, but one only in the editor's opinion was most appropriate. It was his intention to continue to publish the competition in this form, being advised that it did not offend against either s. 22 or s. 26 of the Betting and Lotteries Act, 1934, and was not a game or exercise within s. 1 of the Betting Act, 1853.

The Betting and Lotteries Act, 1934, provides:

> s. 26: "(1) It shall be unlawful to conduct in or through a newspaper, or in connection with any trade or business or the sale of any article to the public—(*a*) any competition in which prizes are offered for forecasts either of the result of a future event, or of a past event the result of which is not yet ascertained or not yet generally known; (*b*) any other competition success in which does not depend to a substantial degree upon the exercise of skill."

The Betting Act, 1853, provides:

> s. 1: "No house, &c., shall be opened, kept, or used . . . for the purpose of any money or valuable thing being received by . . . the owner . . . for the consideration for any assurance . . . to pay . . . any money or valuable thing on any event or contingency of or relating to any horse race or other race, fight, game, sport, or exercise. . . ."

Morle, for the plaintiff.
Beyfus, K.C., and *Walter Frampton*, for the defendants.

EVE, J.—This is a case in which I should be very sorry to set up my own opinion against the opinion of a tribunal so much more used to dealing with these questions of betting and matters of that sort than this court, but at the same time, having arrived at a conclusion, I think it my duty to state it.

The nature of the competition appears from studying the notice in the paper, the way in which the competition is conducted, and the way in which the result is arrived at, which must be taken as accurately described in the plaintiff's affidavit. As a result of these documents and of the arguments which have been addressed to me, I cannot help thinking that counsel for the plaintiff is right when he says that it is an attempt to introduce matter into the competition to evade the mischief to which the competition might be subjected if it was treated as coming within the judgment in *Coles* v. *Odhams Press, Ltd.* (1).

Speaking for myself, I do not appreciate to the full the answer which counsel has made to the suggestion that the present case stands on a different footing from *Coles* v. *Odhams Press, Ltd.* (1) by reason of the fact that skill is imported into it. The way I approach the subject is this. I ask myself whether this is a competition success in which depends on the exercise of skill. The words are few, but very often a few words are pregnant with suggestion of what the interpretation of them is. The framer of this scheme must, I think, have had in mind the necessity for its being a scheme which was consistent with the judgment to which reference has been made, and he was, no doubt, as fully aware as counsel for the plaintiff of the difficulties with which the promoters were faced in *Coles* v. *Odhams Press, Ltd.* (1).

Here I am limiting myself to the question whether, if this competition were put forward as a competition initiated and conducted as has been detailed, the court would not put to itself the question, and the only question which is material: Is this a competition which involves the exercise of skill on the part of those who attempt to solve it? In my view, it is. I think the solution of these pictures would require a great deal of skill to be exercised by the person solving them. No doubt, there is a class of person who gets so used to solving such problems that they do not present the same difficulty to him as they do to an ordinary mortal, but, speaking for myself—and I have some puzzles even in my daily work here—I should find it a very difficult thing to say what is the solution of one of these puzzles.

In my opinion, the question is whether the competition involves skill, and it seems to me that the manner in which it is managed and the way in which the attempts at solution are investigated are of no particular application here. All I have to do is to see whether it comes within the section of the enactment which says that it shall be unlawful to conduct in or through any newspaper any competition success in which does not depend to a substantial degree on the exercise of skill. Here, I think, the solution does depend on the exercise of considerable skill, and in those circumstances I do not feel justified in saying that it is within the mischief of s. 26 (1) of the Betting and Lotteries Act, 1934.

I have already said that, in my opinion, it is not a game within s. 1 of the Betting Act, 1853, and it is a competition. Throughout, there has been a distinction made between game and competition, and I should, therefore, not be prepared to hold the word "game" as covering such a competition as this, in the absence of any authority to that effect. The motion will be dismissed.

Solicitors: *Samuel Coleman*; *Amery-Parkes & Co.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

CARRAS *v.* LONDON AND SCOTTISH ASSURANCE CORPN., LTD.

[COURT OF APPEAL (Lord Wright, M.R., Slesser and Greene, L.JJ.), October 25, 28, 29, 30, November 15, 1935]

[Reported [1936] 1 K.B. 291; 105 L.J.K.B. 689; 154 L.T. 69; 52 T.L.R. 123; 41 Com. Cas. 120; 18 Asp. M.L.C. 581]

Insurance (Marine)—Freight—Loss—Recovery under freight policy—No constructive loss of ship.

The plaintiffs, owners of the Greek steamship *Yero Carras*, sued on a policy underwritten by the defendants for £4,000, part of £9,000 upon freight and (or) chartered freight and (or) anticipated freight. On Nov. 13, 1930, the ship stranded while proceeding from Monte Video to Valparaiso through the Straits of Magellan. She was eventually refloated and brought by salvors to Megallanes. On Nov. 17, 1930, the vessel was abandoned to the hull underwriters. On June 17, 1931, while she still lay at Megallanes, the hull underwriters compromised for a total loss by paying 100 per cent. and a proportion of sue and labour charges, the owners retaining the vessel, but remaining liable to the salvors. Later, the ship was surrendered to the salvors in discharge of their claim, was by them sold, and was repaired in 1932. At the time of the stranding the ship was proceeding to Valparaiso to load under a charterparty dated Sept. 16, 1930, between the agents for the plaintiffs and charterers, the cancelling date specified being Nov. 20, 1930. The charterparty contained the usual exceptions, including perils of the seas. The policy on freight was against the usual marine risks and was subject to the Institute of Freight (Voyage) Clauses, of which cl. 4 provided: " In the event of the total loss, whether absolute or constructive, of the vessel, the amount underwritten by this policy shall be paid in full, whether the vessel be fully or only partly loaded or in ballast, chartered or unchartered." By cl. 5: " In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account." By cl. 7: " Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise." The insured value of the ship under the hull policies was £30,000. The damage suffered by the ship was such that she could not be tendered to the charterers by the cancelling date, so that the adventure was frustrated by the casualty, and she could not be repaired except at a cost exceeding £13,000, her repaired value, though there was no evidence that she could not be repaired at a cost less than £30,000.

Held: the earning of freight under a charterparty of a specific vessel depended on the continued existence of that vessel as a cargo-carrying vessel and freight might be lost and the shipowner relieved as against the charterers if the vessel were so damaged as to be incapable of being repaired save at an expense exceeding her value when repaired; the freight policy did not provide, expressly or impliedly, that a total loss of freight should only be recoverable in the event of an actual or constructive loss of the ship under the hull policies; and, therefore, cl. 5 of the Institute Freight Clauses did not apply and the plaintiffs were entitled to succeed on their claim for a total loss of freight on the basis that the value of the ship for purpose of comparison with the cost of repairs was the actual value and no more.

Per LORD WRIGHT, M.R.: It is not true that there is a total loss on a freight policy by the constructive loss of the ship. A ship may be a constructive total loss and duly abandoned to the hull underwriters; if after that she earns the freight the shipowner has no claim for it, for, when earned, it belongs to the underwriters as then owners of the ship.

Notes. Considered: *Kulukundis* v. *Norwich Union Fire Insurance Society*, [1936] 2 All E.R. 242, 1488 n.; *Vroudissis* v. *Stevens*, [1940] 3 All E.R. 74. Referred to: *Robert-*

son v. *Petros Nomikos, Ltd.*, [1939] 2 All E.R. 723; *Irvin* v. *Hine*, [1949] 2 All E.R. 1089.

As to the liability of underwriters for loss of freight, see 18 HALSBURY'S LAWS (2nd Edn.) 359–361, 370, and for cases, see 29 DIGEST 96, 97, 105, 106, 141–144, 209–211, 251, 252, 256–260, 278–280.

Cases referred to:

(1) *Bensaude* v. *Thames and Mersey Marine Insurance Co., Ltd.*, [1897] A.C. 609; 66 L.J.Q.B. 666; 77 L.T. 282; 46 W.R. 78; 13 T.L.R. 501; 8 Asp. M.L.C. 315; 2 Com. Cas. 238, H.L.; 29 Digest 47, *93*.

(2) *Assicurazioni Generali and Schenker & Co.* v. *S.S. "Bessie Morris" Co., Ltd. and Browne*, [1892] 2 Q.B. 652; 61 L.J.Q.B. 754; 67 L.T. 218; 41 W.R. 83; 8 T.L.R. 715; 36 Sol. Jo. 682; 7 Asp. M.L.C. 217; 4 R. 33, C.A.; 41 Digest 493, *3219*.

(3) *Moss* v. *Smith* (1850), 9 C.B. 94; 19 L.J.C.P. 225; 14 L.T.O.S. 376; 14 Jur. 1003; 137 E.R. 827; 29 Digest 260, *2096*.

(4) *Rankin* v. *Potter* (1873), L.R. 6 H.L. 83; 42 L.J.C.P. 169; 29 L.T. 142; 22 W.R. 1; 2 Asp. M.L.C. 65, H.L.; 29 Digest 279, *2259*.

(5) *Philpot* v. *Swann* (1861), 11 C.B.N.S. 270; 30 L.J.C.P. 358; 5 L.T. 183; 7 Jur. N.S. 1291; 1 Mar. L.C. 151; 142 E.R. 800; 29 Digest 209, *1681*.

(6) *De Cuadra* v. *Swan* (1864), 16 C.B.N.S. 772; 143 E.R. 1329; 29 Digest 258, *2086*.

(7) *Scottish Marine Insurance Co.* v. *Turner* (1853), 4 H.L. Cas. 312, n.; 21 L.T.O.S. 10; 17 Jur. 631; 1 W.R. 537; 1 Macq. 334; 10 E.R. 483, H.L.; 29 Digest 209, *1678*.

(8) *Jackson* v. *Union Marine Insurance Co., Ltd.* (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp. M.L.C. 435, Ex.Ch.; 29 Digest 258, *2087*.

(9) *Macbeth & Co., Ltd.* v. *Maritime Insurance Co., Ltd.*, [1908] A.C. 144; 77 L.J.K.B. 498; 98 L.T. 594; 24 T.L.R. 403; 11 Asp. M.L.C. 52; 13 Com. Cas. 222, H.L.; 29 Digest 269, *2167*.

(10) *Angel* v. *Merchants' Marine Insurance Co.*, [1903] 1 K.B. 811; 72 L.J.K.B.498; 88 L.T. 717; 51 W.R. 530; 19 T.L.R. 395; 9 Asp. M.L.C. 406; 8 Com. Cas. 179, C.A.; 29 Digest 270, *2185*.

(11) *Hall* v. *Hayman*, [1912] 2 K.B. 5; 81 L.J.K.B. 509; 106 L.T. 142; 28 T.L.R. 171; 56 Sol. Jo. 205; 12 Asp. M.L.C. 158; 17 Com. Cas. 81; 29 Digest 271, *2188*.

(12) *Coker* v. *Bolton*, [1912] 3 K.B. 315; 82 L.J.K.B. 91; 107 L.T. 54; 56 Sol. Jo. 751; 12 Asp. M.L.C. 231; 17 Com. Cas. 313; 29 Digest 289, *2348*.

(13) *Roura and Forgas* v. *Townend*, [1919] 1 K.B. 189; 88 L.J.K.B. 393; 120 L.T. 116; 35 T.L.R. 88; 14 Asp. M.L.C. 397; 24 Com. Cas. 71; 29 Digest 273, *2214*.

Appeal from an order of PORTER, J.

The facts are stated in the headnote and in the judgment of the MASTER OF THE ROLLS. The arguments which were put before the court on Oct. 25, 28, 29 and 30 sufficiently appear from the judgments.

Sir Robert Aske, K.C., and *Willink, K.C.*, for the plaintiffs.
David Davies, K.C., and *Charles Stevenson*, for the defendants.

Cur. adv. vult.

Nov. 15. The following judgments were read:

LORD WRIGHT, M.R.—The appellants were plaintiffs in the court below; they sued as owners of the Greek steamship *Yero Carras* on a policy underwritten by the defendants for £4,000, part of £9,000 upon freight and (or) chartered freight and (or) anticipated freight. The appeal is from the judgment of PORTER, J., who dismissed the action.

The steamer, while proceeding from Monte Video to Valparaiso through the Straits of Magellan stranded on Nov. 13, 1930. She was eventually refloated and brought by salvors to Megallanes. On Nov. 17, 1930, the vessel was abandoned to the hull underwriters. On June 17, 1931, while she still lay at Megallanes, the hull underwriters compromised for a total loss by paying 100 per cent., and a proportion of sue and labour charges, the owners retaining the vessel, but remaining liable to the salvors. Eventually, the vessel was surrendered to the salvors in discharge of their claim and was by them sold A and was repaired in 1932. At the time of the casualty the steamer, as already stated, was proceeding to Valparaiso to load under a charterparty dated Sept. 16, 1930, between the agents for the plaintiffs and the Chilean Nitrate Producers' Association (Overseas), Ltd. as charterers. The cancelling date specified was Nov. 20, 1930. The charterparty contained the usual exceptions including perils of the seas. The policy on freight on which the action was brought was against the usual marine risks and was for £4,000, B part of £9,000 on freight and (or) chartered freight and (or) anticipated freight valued at £9,000 subject to reduction, after loading, to the actual freight at risk as per bills of lading less advances. The policy was subject to the Institute of Freight (Voyage) Clauses. Of these the following are particularly material in this case. Clause 4 reads as follows:

> "In the event of the total loss, whether absolute or constructive of the vessel, the C amount underwritten by this policy shall be paid in full, whether the vessel be fully or only partly loaded or in ballast, chartered or unchartered."

By cl. 5:

> "In ascertaining whether the vessel is a constructive total loss the insured value D in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account."

Clause 7 reads as follows:

> "Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise." E

Except in cls. 4 and 5 the words "constructive total loss" do not appear in the policy.

It was clear that the damage was such that in any case the steamer could not be tendered to the charterers by the cancelling date or at any time consistent with the commercial adventure, and, accordingly, it was not questioned that the particular adventure was frustrated by the casualty which, by reason of the inevitable delay consequent upon it, made it impossible to carry out the freight contract. It was, F however, conceded by the plaintiffs that to a claim formulated on the ground of that frustration, cl. 7 of the policy was a sufficient answer since the case was governed by the authority of *Bensaude* v. *Thames and Mersey Marine Insurance Co., Ltd.* (1). But the plaintiffs based their claim on the doctrine that the contract of affreightment was discharged between themselves and the charterers by perils of the sea, which had rendered the ship unnavigable, and had damaged her to such an extent that she could G not be repaired save at an expense exceeding her value (by which was meant her actual value of £13,000) when repaired; hence for purposes of the adventure she was lost to the owners, because it was impossible in a commercial sense to repair her. They relied on the well-known principles illustrated in *Assicurazioni Generali and Schenker & Co.* v. *S.S. "Bessie Morris" Co., Ltd. and Browne* (2) (hereinafter referred to as the "*Bessie Morris*" *Case*), and they went on to contend that by the dissolution of the freight H contract, on which depended the chartered freight within the meaning of the policy, there was a total loss of freight within the principles expounded in *Moss* v. *Smith* (3). It is true that no notice of abandonment on the freight policy was given, but it was contended that there was nothing to abandon. The ship had at the date of the casualty no cargo on board; she could not make her cancelling date or be tendered according to contract to the charterers at Valparaiso. No substituted employment was possible; I hence there existed all the conditions postulated in *Rankin* v. *Potter* (4) as rendering unnecessary in a case like the present a notice of abandonment on a freight policy.

In my judgment, there was here an actual total loss of freight. The freight was lost because the charterparty under which it was to be earned was destroyed by the perils of the seas. The judge, however, has decided against this claim on the ground that there cannot be a loss of freight (at least on the ground of the cost of repairing sea damage to the ship) unless there is either an actual or a constructive total loss of the ship in such a sense as to bring into operation the terms of cl. 5 of the policy with the consequence that there could not be in this case a constructive total loss of the ship save on the basis of a repaired value of £30,000, an actual loss of the ship not being in question.

It will be convenient to examine the legal position so far as relevant to this case apart from the specific effect of cl. 5 of the freight policy. I shall disregard the numerous and difficult questions which arise in regard to freight insurances in circumstances different from those here in question, as, for instance, where there is at the date of the casualty cargo on board which may be transhipped so that freight can be earned in whole or in part, or where a substituted cargo may be procured though the contract cargo is lost. These and other like problems are not relevant in this case. The earning of freight under a charterparty of a specific vessel depends on the continued existence of that vessel as a cargo-carrying vessel, at least in a case like the present where no cargo is on board and the vessel is on her way to the port where she should be tendered to the charterers. If, therefore, in such a case the ship is lost or destroyed, the performance of the charterparty and the earning of the freight is prevented, and, if that is due to perils of the seas, the shipowner is relieved from liability in damages to the charterers by the usual exception of perils of the seas in the charterparty. But apart from the loss or destruction of the vessel the freight may be lost and the shipowner may be relieved as against the charterers if the vessel is so damaged and disabled as to be incapable of being repaired save at an expense exceeding her value when repaired. Such a case is covered by the reasoning in the *Bessie Morris Case* (2) though it was held that in the facts of that case the ship could, and ought, to have been repaired, and hence the freight was not lost. LORD ESHER, in that case, said ([1892] 2 Q.B. at p. 657):

> "If it is possible in a business sense of the word to repair the ship, the shipowner is bound to repair her. If the cost of the repairs necessary to enable her to complete the voyage contracted for would be more than the benefit which the owner would derive from them, then it would be impossible in a business sense to repair her."

Similarly, BOWEN, L.J., said ([1892] 2 Q.B. at p. 659):

> "The ship went aground, but in order to show that she was prevented from performing the voyage agreed upon by the perils of the sea she must have become unnavigable for that voyage, either on the ground that it was impossible to get her afloat again, or that, on account of the extraordinary expenditure necessary for that purpose, it would be unreasonable to require the shipowners to incur it."

Then BOWEN, L.J., quotes from the judgment of MAULE, J., in *Moss* v. *Smith* (3) (9 C.B. at p. 103), and from the judgment of CRESSWELL, J., in the same case at p. 105 ([1892] 2 Q.B. at p. 660):

> "When is the shipowner said to be prevented by perils of the sea from fulfilling the contract he has entered into? When the ship is, by a peril of the sea, rendered incapable of performing the voyage. A ship is not rendered incapable of performing the voyage when she is merely damaged to an extent which renders some repairs necessary; if that were so, the most inconsiderable damage, such as the loss of her rudder, without which she could not proceed, would render her incapable of fulfilling the contract contained in the bill of lading. But if a ship sustains so much sea damage that she cannot be repaired so as to be rendered competent to continue the adventure, then the owner is prevented by a peril of the sea from fulfilling his contract. If the ship is totally destroyed or sunk, the performance of the contract is obviously prevented by a peril of the sea. The courts of law have also engrafted this qualification upon the contract—that, if the damage which results from a peril of the sea is so great that it cannot be repaired at all, or only at a cost so ruinously large that no prudent owner would undertake the repairs, the owner may treat the loss as total, and say that he is prevented by a peril of the sea from performing his contract."

Moss v. *Smith* (3) involved an application of these principles to a claim on a freight policy. It was contended there on behalf of the shipowner that there was such commercial prevention as to cause a total loss under a freight policy by insured perils if the sea damage could not be repaired save at a cost exceeding the value of the freight though less than the value of the ship; that contention was rejected, and the same conditions were held to be necessary to justify a claim on the freight policy as to relieve the shipowner under the charterparty. I need not repeat the passages I have just quoted from the judgment of MAULE, J., and CRESSWELL, J., as adopted by LORD ESHER, M.R., and BOWEN, L.J. The test is the same under the freight policy and under the charterparty, namely, whether the shipowner has been prevented, either in a physical sense or in a business sense, from performing the freight contract, so that the freight is lost.

In this way a question has to be solved analogous to that which arises when it is claimed on a hull policy on the ground of cost of repairs that there has been a constructive total loss of ship. But the three contracts—the charterparty, the freight insurance and the hull insurance—are completely different; as LORD CHELMSFORD said in *Rankin* v. *Potter* (4) (L.R. 6 H.L. at pp. 154, 155), dealing with the policies.

> "In the arguments the counsel for the appellant complicated the question by introducing the consideration of the conduct of the plaintiffs with reference to the policy on the ship, as bearing upon their rights under the policy on freight."

And he adds later, in view of the admission,

> "that the amount of damage was such that a prudent, uninsured owner would not have incurred the expense of repairing the ship. No prudent man would, in such a state of things, incur the expense of repairing the ship; and the shipowners electing not to repair were entitled to consider the charter at an end, and the chartered freight as totally lost by a peril of the sea."

PORTER, J., I think, treats these decisions as meaning that in order to constitute a claim for total loss on a freight policy the ship must be an actual or constructive total loss within the only proper meaning of that term, that is, in insurance law, and under the actual or notional hull policy. Reliance was placed on what was said by COLLINS, J., in the *Bessie Morris Case* (2) ([1892] 1 Q.B. at p. 580):

> "In other words, where the freight is said to be lost through damage to the ship, it must be shown that the ship itself to which the freight is an accessory was actually or constructively lost."

But these words are, I think, explained by what precedes them. COLLINS, J., had said ([1892] 1 Q.B. at p. 580):

> "It is clear from *Moss* v. *Smith* (3) and *Philpot* v. *Swann* (5) that unless the ship is either irreparable or repair practically impossible, the shipowner cannot show as against his underwriter that he was prevented from earning the freight through damage to the ship, and the standard of what is practically impossible is the same as that of a constructive total loss."

It was, it seems, with reference to these observations that in the Court of Appeal in the same case ([1892] 2 Q.B. at p. 658) LORD ESHER, said:

> "The only colour for it [for the argument addressed on behalf of the appellants] is to be found in the suggestion that the case is governed by the rules applicable to what is known as 'constructive loss.' But the doctrine of constructive loss can arise only between an underwriter and his assured. There is no underwriter concerned in the present case, and the doctrine of constructive loss has no application to it."

It is to be observed that in *Moss* v. *Smith* (3) the term "constructive total loss" does not appear in the judgments. The rule is similarly stated in *De Cuadra* v. *Swan* (6) without these words, "constructive total loss," occurring in the judgments, though they do occur in *Philpot* v. *Swann* (5) (11 C.B.N.S. at p. 282) as being a paraphrase of what MAULE, J., said in *Moss* v. *Smith* (3), but as, I think, merely a convenient mode (not strictly correct) of describing the position as between shipowner and charterer. In many cases it would not be necessary to distinguish between the two positions—that is, on the one hand, the position as between shipowner and charterer, upon which depends the claim under the freight policy, and, on the other hand, the position as between the shipowner and the hull underwriter on the policy on hull. Here it is important, because of cl. 5 of the Institute Freight Clauses, to be more precise. Can it then be truly said that the essential condition for recovery on the freight policy is the constructive total loss of the ship as that term would be used correctly under the hull policy? It is certainly not true that there is a total loss on a freight policy by the constructive total loss of the ship. A ship may be a constructive total loss and duly abandoned to the hull underwriters; if, after the property in her has passed to the hull underwriters under the abandonment, she earns the freight, the shipowner has no claim for loss of freight (apart from cl. 4 of the Institute Freight Clauses); the freight has not been lost at all, though the shipowner does not get it, but that is only because the freight belongs to the hull underwriters as owners of the ship when the freight, which is incident to the property in the ship, is earned. In such a case the freight assured cannot recover from the goods owners who are bound to pay the hull underwriters, nor from the freight underwriters, who are entitled to refuse to pay on their policy because the freight is not lost.

This was held by the House of Lords in *Scottish Marine Insurance Co.* v. *Turner* (7). Conversely, if the ship has been actually lost, but the cargo she was carrying at the time of the casualty has been recovered by the shipowners, there may be no loss of freight if it is (for instance) a lump sum freight and some of the cargo is delivered in specie. The same may be true in the case of a constructive total loss of ship if the cargo has been separated from the ship and has remained in the possession of the shipowners before the date at which the property passed to the abandonees of the ship. Again, in such a case as *Jackson* v. *Union Marine Insurance Co., Ltd.* (8), the freight may be a constructive total loss though the damage to the ship is comparatively slight, for example, a broken shaft, provided only that the delay necessary to effect repairs is such as by frustration of the adventure to dissolve the freight contract and thereby cause a total loss of freight. This would be the case unless the freight policy contained an express clause such as cl. 7 of the Institute Freight Clauses.

It is not necessary to multiply illustrations of the fact that the freight policy and the hull policy are independent contracts in the absence of a provision in the freight policy whereby the former is governed by the latter. But it may be observed again that a constructive total loss of ship in a case such as the present is an actual total loss of freight; there is no spes recuperandi; the assured is irretrievably deprived of any possibility of earning the insured freight. What is insured under the freight policy is not a chattel like a ship or a cargo; it is, even in the case of chartered freight, as in the present case, which is the most definite type of insurable interest in freight, merely a chose in action, a right of earning freight under the charter, a fortiori where there is merely an expectancy of earning freight, though enough to constitute an insurable interest. Thus, apart from express terms in the freight policy, the freight underwriter has no concern in the hull policy; it is a separate and independent contract, probably with different underwriters; on the freight policy the assured may not even be the shipowner. Thus, for instance, chartered freight may be insured by a charterer by demise; the chartered owner may have no general interest in the ship, while the shipowner in such a case has no interest in that chartered freight, though he may have a separate insurable interest in the freight under the head charter. In any case the freight underwriter is not interested in the fate of the ship, except in so far as sea or other perils have so affected the ship as to cause a loss of freight. Whether this is so in fact is a matter which will be exactly the same whether the ship is insured or not; the determination of that question in an issue as between shipowner and charterer will settle whether the freight contract is destroyed by sea or other perils, so that the freight is lost. As between these parties, questions of insurance are irrelevant, as LORD ESHER, M.R., pointed out in the *Bessie Morris Case* (2) ([1892] 2 Q.B. at p. 658) in the passage last quoted above. But it follows logically that qua the ship they are, in the absence of special terms, equally irrelevant in this connection between the shipowner and the freight underwriter. Further, in the absence of special terms a different test will apply in reference to the freight contract in order to ascertain if the ship is too damaged to be capable of being repaired by the shipowner, the test which will determine whether the ship is a constructive total loss under the hull policy.

It is clear that the definition of a constructive total loss of ship in s. 60 (2) (i) of the Marine Insurance Act, 1906, is only dealing with the position under the hull policy; it does not qualify the common law rules according to which it is to be decided if the ship is lost in a commercial sense as between shipowners and charterer as laid down in the *Bessie Morris Case* (2). These common law rules are not affected by the Marine Insurance Act, which, by s. 91 (2), says:

> "The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance."

It may, indeed, be that the shipowner in this issue as between himself and the charterer may be entitled to bring in as part of the expense of repairing the ship a sum which represents what the wreck would be worth to him as a wreck if he does not repair. This was the common law rule as laid down by the House of Lords in *Macbeth & Co., Ltd.* v. *Maritime Insurance Co., Ltd.* (9), reversing the decision of the Court of Appeal in *Angel* v. *Merchants' Marine Insurance Co.*, (10). Section 60 (2) (ii) of the Act gave effect to the more technical rules which the Court of Appeal had approved, and, therefore, superseded (as it was held in *Hall* v. *Hayman* (11)) for purposes of a constructive total loss claim on the ship the more elastic rules adopted in *Macbeth's Case* (9); but, as the section only applies to an insurance on hull, it would seem that the rules laid down by the House of Lords in *Macbeth's Case* (9) would still apply in a question between shipowner and charterer in which the test is still what course the prudent uninsured owner would adopt; as already explained, the question between freight underwriter and shipowner must follow the same lines in the absence of special terms as those between shipowner and charterer in the matter now in question. There is then a further objection to assimilating the claim for loss of freight to the claim for a constructive total loss of hull. It is well known that the Act did not deal expressly with the subject of freight insurance except in s. 16 (2), where it defined the insurable value of an interest in freight as the gross amount of the freight at the risk of the assured plus the charges of insurance, and in s. 70, where it gave the rules for adjusting a partial loss on freight. It may, indeed, be that part of the definition of actual total loss in s. 57 (1), that is, the words "where the assured is irretrievably deprived" of the subject-matter insured, may apply to an actual total loss of freight such as the present; similarly, the relevant words of s. 60 (1) may apply to a constructive total loss of freight in a case like *Jackson* v. *Union Marine Insurance Co., Ltd.* (8), or a case where cargo is on board which might be transhipped. But I do not think that section can apply to a case like the present which, in my judgment, is an actual total loss of freight.

The reasoning by which the learned judge meets these contentions is, as I understand, that since he holds that the assured have to prove a constructive total loss of ship in order to recover, cl. 5 of the Institute Freight Clauses is brought into operation, with the result that the repaired value is deemed for purposes of the freight policy to be, not £13,000, the actual value, but £30,000, the insured value under the hull policy. Whether that is so must depend on whether cl. 5 applies. In substance, the learned judge treats the freight policy as if it provided expressly or by implication or by intendment of law that a total loss of freight should only be recoverable in the event of an actual or constructive total loss of ship under the hull policies. An express clause to this effect is not uncommon in freight policies. A policy on the chartered freight on the very voyage in question was produced, with the terms:

> "To pay only in the event of the total and (or) constructive and (or) arranged total loss of steamer."

I merely refer to this as an illustration of a common clause. But there is certainly no such clause in this policy. For reasons already explained, I do not think that apart from express terms the right to claim a total or constructive total loss under this policy can depend upon whether there is a constructive total loss under the hull policies. Certainly cl. 5 contains no such condition. Clause 5 by its terms can only apply when it is the constructive total loss of the ship that is an essential condition of recovery under the freight policy. The first part of cl. 4 deals with the case referred to above, where the shipowner, but for the clause, would lose his freight on the ground that it has been earned by the ship after it had been abandoned to underwriters, and the clause in such an event gives an added right of recovery of the full freight. Its effect was explained in this sense by HAMILTON, J., in *Coker* v. *Bolton* (12). But there is no other condition of the freight policy which postulates or refers to constructive total loss of the ship; the term is nowhere else than in cls. 4 and 5 used in the policy. Clause 5 gives no added right and imposes no new condition save when it is necessary to establish a constructive total loss of the ship. The clause, if more correctly expressed, would read: " Whenever it is necessary to prove the total loss, actual or constructive, of the ship," &c. But that can only apply where the contract of insurance requires the ascertainment of that fact as a condition of recovering. Clause 5 does not import any such condition. The answer made by the defendants' counsel to that proposition was that if it is decided that by the general law an actual or constructive total loss of the vessel in the technical insurance sense is not an essential condition to the recovery of a total loss under the freight policy, still in ordinary commercial parlance the state of irreparability of the ship which is discussed in the *Bessie Morris Case* (2) is spoken of as a constructive total loss because it is a total loss in a commercial, and not physical, sense. But I cannot accept that view of the position. I do not know if such ideas or language are common among business men, but in any case the two legal concepts appear to me, for reasons already explained, to be essentially different. I do not, indeed, think that cl. 5 is necessarily limited to a constructive total loss for purposes of cl. 4. I think it might apply to any term in the policy which refers, as cl. 4 does, to a constructive total loss of the ship under the hull policy. Such a policy must, if the clause is to apply, contain an insured value. The clause is, therefore, inapplicable to a notional constructive total loss of ship under a notional hull policy such as is illustrated by *Roura and Forgas* v. *Townend* (13). As cl. 4 can only become effective if applied to a case of abandonment of the ship to hull underwriters under a hull policy containing the insured value clause, the expression " constructive total loss " must there be used in its technical and correct sense. The defendants here seek to construe the same expression in cl. 5 as not only applicable, as it properly is, to such a case, but also as equally applicable to what, in my opinion, is the entirely different case, which is in question here, where the question is primarily as between the shipowner and the charterers, and only as a consequential issue between the shipowner and freight underwriters. But I do not think the same words can properly be construed as having so widely different meanings in the same clause.

In the result, I do not think that cl. 5 can be applied to the facts of this case, because I do not think the freight policy required that there should be a constructive total loss of the ship within the true meaning of that phrase in cl. 5 of the freight policy. But it might be a sufficient answer to the defendants' contention to say that the decision of the learned judge involves a serious limitation of the shipowner's right under the policy, though they lose the benefit of their freight contract vis-à-vis the charterers and hence the freight, because their ship is so damaged that she cannot be repaired (as I assume here to be the case) except at a cost exceeding her repaired value of £13,000, and they cannot, according to the judge's decision, recover on the freight policy because they cannot prove that the ship could not be repaired at a cost less than £30,000. I think much clearer words are necessary to achieve the consequence that the assured is to be so limited in his rights under the policy, and the basis of his right to recover for a total loss of freight is to be radically changed. On that ground alone I should, with all deference, feel bound to come to a conclusion different from that of the learned judge.

I think the appeal should be allowed and the judgment of the court below should be set aside, and it should be declared that the plaintiffs are entitled to succeed on the claim for a total loss of freight on the basis that the value of the ship for purposes of comparison with the cost of repairs is the actual value and no more. The judge has made no specific finding on that issue, but the facts that he has found seem to leave little doubt that the plaintiffs must succeed on that basis. If the defendants so desire, the case will be remitted to the judge for his finding on that basis for him to determine the precise amount recoverable. If the defendants do not so desire, judgment will be entered for the plaintiffs on the claim.

SLESSER, L.J.—I have read the judgment of the MASTER OF THE ROLLS, with which I agree, and I have little to add thereto.

The critical question which arises in this case is whether the value of the ship should be taken to be £30,000, or a far less sum, namely, £13,000, it is said. The former is the value stated to be the insured value in the policy on ship, and the latter to be the actual value as found by the learned judge before the casualty. If the insured value of £30,000 be properly taken, the ship when repaired would be worth the sum which it is necessary to spend on her, and the failure to repair and consequent loss of freight would be practically possible, and there would be no case of total loss. If, on the other hand, the value of the ship is the less sum it may be, in the language of MAULE, J., in *Moss* v. *Smith* (3) (9 C.B. at p. 103), that the ship would have sustained

> "such extensive damage that it would not be reasonably practicable to repair her, seeing that the question of the repairs would be such that no man of common sense will incur the outlay."

and the freight would be lost by perils of the sea and so the freight insurers would be liable.

The ground upon which it could be said that the value of the ship was £30,000 can only be supported by invoking cl. 5 of the freight policy, which provides that:

> "In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account."

The learned judge has come to the conclusion that it is necessary for the plaintiffs, in order that they may recover, to show that the ship is a constructive total loss, and he, therefore, comes to the conclusion that such a finding being necessary, cl. 5, which I have quoted, must apply when the test, whether the reparation is or is not commercially feasible is considered, and £30,000, the insured value in the policy on ship, be taken as the basis of that inquiry.

While it may be true to say, subject to qualifications which I mention hereafter, that the test in fact to be applied in the case of loss of freight may be substantially the same as that to be applied in ascertaining whether there is a total constructive loss of the ship, namely, that laid down in *Moss* v. *Smith* (3), and now in s. 60 (2) (ii) of the Marine Insurance Act, 1906, to the effect that there is

> "a constructive total loss in the case of damage to a ship where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired,"

yet it is not right to say, because the facts which have to be considered may be to some extent similar, and similar conclusions on like facts may be arrived at, that constructive total loss of the ship, as such, has to be proved in the case of a claim for loss of freight. The words "constructive total loss of the ship" in cl. 5 of the freight policy are words of art and cannot properly be employed in the case where the question for determination is whether the freight has been lost by perils of the sea. It is this assumption that it is necessary actually to prove constructive total loss of the ship in order to recover upon a claim for loss of freight by perils of the sea which, in my opinion, invalidates the judgment against which this appeal lies: if there be wreck value to be taken into account it is not even accurate to say that the same facts will support a finding of loss of freight by perils of the sea and a finding of constructive total loss of the vessel by the same perils or that the standards are comparable for the following reason.

In *Macbeth & Co., Ltd.* v. *Maritime Insurance Co., Ltd.* (9) it was held before the passing of the Marine Insurance Act, 1906, s. 60, that, in estimating the value of a ship as worth repairing, the value of the damaged ship as a wreck was taken into account. Now, by that section, the value of the wreck cannot any longer be added by the assured to the cost of repairs (*Hall* v. *Hayman* (11)), but in so far as s. 60 is not dealing, in my view, with loss of freight in such a case as this, in considering the problem whether loss of freight is due to perils of the sea, the value of the wreck in applying the test of whether a prudent insured owner would sell the ship where she lies or repair her may still be relevant (see s. 91 (2) of the Act preserving the common law when not disturbed), so that the criteria in any given case of disputed causation by perils of the sea in the case of constructive total loss of ship and loss of freight may in certain cases differ.

There remains for consideration the question for what purpose it was necessary to insert a provision determining the basis of ascertainment of constructive total loss in cl. 5 of the freight policy. To understand this it is first necessary to quote cl. 4 of the same policy, which is to the effect that:

> "In the event of the total loss, whether absolute or constructive, of the vessel, the amount underwritten by this policy shall be paid in full, whether the vessel be fully or only partly loaded or in ballast, chartered or unchartered."

In *Coker* v. *Bolton* (12) it was held that what is here this cl. 4 prevented the operation of the ordinary rule of law by which, in the event of a constructive total loss, the right to the freight earned subsequently to the loss passes to the underwriters on hull, and for such a purpose it may have been considered necessary to consider a matter not generally material in the case of a claim to loss under the freight policy, namely, what constitutes constructive total loss of the ship, and the contracting parties have thought fit for such a purpose to fix as the ship's value the insured value of the ship in the hull policy. It is to be noted that such a clause is in favour of the assured; here cls. 4 and 5 read together are sought to be used to his detriment.

I am not prepared to say that the operation of cl. 5 is necessarily limited to cases coming under cl. 4, and whenever the question whether there has been a total constructive loss of the ship is raised on the freight policy, cl. 5 may well operate, though I find it difficult to imagine such a case under this contract. But, for the reasons I have stated, that question should not have been propounded in that form in the present case, and there is no reason, therefore, for invoking cl. 5, which produces an artificial enhancement of the value of the ship.

It is true that in the books there are certain dicta which seem to support the view of the learned judge in this case, that

> "there can be no total loss of freight unless there be a total or constructive total loss of the ship"

PORTER, J.'s judgment (40 Com. Cas. at p. 293), such as the words of COLLINS, J., in the *Bessie Morris Case* (2) ([1892] 1 Q.B. at p. 580) to the effect that:

> "When the freight is said to be lost through damage to the ship, it must be shown that the ship itself to which the freight is an accessory was actually or constructively lost."

But these and similar statements really mean no more than that the standard to be applied in the case of freight is that which would be appropriate to the case of constructive total loss if the claim were upon a hull policy, though, for reasons which I have stated, since the passing of the Marine Insurance Act even this may not now be entirely accurate. The test whether the expense is one which a prudent uninsured owner would incur may, or may not, be precisely the same in the case of a claim on freight or on hull policy. But to say simpliciter that it is necessary to prove on a freight policy that the vessel is a constructive total loss is, to my mind, not correct.

As I have said, on the actual value of £13,000, there can be no question but that this freight was lost by perils of the sea, and I agree, therefore, that the assured succeeds, and this appeal should be allowed, and the case remitted on the terms stated by my Lord.

GREENE, L.J.—I agree. There are three contracts to be considered in this case, and it is important to keep them distinct. They are: (i) the charterparty, (ii) the hull policy, (iii) the freight policy.

(i) The charterparty regulates the rights and obligations of the shipowners and the charterers. It contains the usual exception of perils of the sea the effect of which is to excuse the parties from performing the contract if performance is prevented by a peril of the sea. The rights and obligations of the parties under the charterparty are not affected by the existence or the terms of either the hull policy or the freight policy. In considering those rights and obligations it is, in my opinion, important to avoid the introduction of the expression "constructive total loss." This is a technical expression relating to the rights and liabilities of assured and underwriters under marine policies, and is not proper to be employed in dealing with the position as between owner and charterer under a charterparty. So far as regards owner and charterer the relevant question in the present case is: What is the state of facts arising from a peril of the sea which will entitle the shipowner or the charterer to treat the contract as discharged? Where such a state of facts exists and either party properly elects not to proceed with the contract, the contract is discharged and the shipowner loses his right to receive the unpaid freight.

A lengthy discussion took place before us as to what state of facts arising from a peril of the sea would justify a determination of the charterparty. It was said on behalf of the respondents that, apart from actual total loss of the vessel, there must be a constructive total loss of the vessel. As I have already pointed out, constructive total loss is a conception with which, as such, the charterparty has nothing to do. The misleading nature of the proposition appears in a striking manner when the question what is meant by constructive total loss as therein used is investigated. If it means constructive total loss in the sense prescribed by s. 60 of the Marine Insurance Act, 1906, the result will be that the rights and liabilities of the parties under the charterparty are governed in this respect by a statute which is concerned only with marine insurance; and it would appear to follow that they would be affected by an amendment of that section which altered the statutory definition of constructive total loss. It is to be observed that the section itself altered the law as to what is necessary to constitute constructive total loss as laid down by the House of Lords in *Macbeth & Co., Ltd.* v. *Maritime Insurance Co., Ltd.* (9). I am unable to accept the view that the facts necessary to discharge the contract contained in the charterparty can, in any way, be affected by the statutory provisions from time to time in force with regard to constructive total loss. If, on the other hand, the expression means "constructive total loss" as it was before the statute, under the decision in *Macbeth's Case* (9), the argument fails to secure that correspondence between the position under the charterparty and the position under the hull policy which it aims at establishing.

In truth, as I have already said, the proposition is a misleading one. The question what facts will constitute constructive total loss under a hull policy, where the vessel is damaged by a peril of the sea, appears to me to be fundamentally different from the question what facts will discharge the contract contained in the charterparty when the vessel has been damaged by a peril of the sea. In each case the amount of expenditure required to repair the vessel (if she is reparable) is a vital consideration; and, ignoring for the moment the complication introduced by the Marine Insurance Act above referred to, it may be that no damage will discharge the contract contained in the charterparty, which would not be sufficient to constitute a case of constructive total loss under an actual or imaginary policy on hull, any conventional value agreed upon in a hull policy being for this purpose of course ignored. For the purposes of my judgment in this case I am prepared to proceed upon this hypothesis, although it must not be assumed that I accept it as correct or that I accept the view that the amount of damage requisite to discharge the contract contained in the charterparty is in any way affected by statutory provisions for the time being in force in relation to what constitutes constructive total loss for the purposes of a policy on hull. I must also make it clear that the acceptance of this hypothesis is a different thing from the acceptance of the proposition that "constructive total loss" is a proper way of describing the state of the vessel when the question is one between owner and charterer or between assured and underwriter on freight. The importance of this distinction for the present case will appear when I come to consider the Institute Clauses which are incorporated in the freight policy.

It was said on behalf of the appellants that the true test is in principle that performance of the charterparty is excused if the expenditure necessary to make the vessel navigable for the voyage in question is such that it would be unreasonable to require the shipowner to incur it. The effect of this contention, if correct, would be to introduce a standard of damage different from that required to constitute a constructive total loss under a policy on hull, and, accordingly, to make it impossible to say that cl. 5 of the Institute Clauses applied. For the purposes of this judgment it is unnecessary to consider whether or not this contention is correct.

(ii) The position of the parties under the hull policy presents no difficulties. It only comes into consideration in this case for the purpose of seeing to what extent its existence or its terms may affect the mutual rights and liabilities under the freight policy.

(iii) By the freight policy the shipowner effected an insurance of the freight payable under the charterparty against the risk of loss by perils of the sea. The subject-matter of the insurance is a chose in action, namely, the contractual right to receive the freight from the charterer under the charterparty. If that right is lost through a peril of the sea, the underwriters are liable as on a total loss.

In considering whether or not there has been such a loss of the right to receive freight through a peril of the sea, it is necessary to determine in the first place whether or not as between charterer and shipowner the right to receive the freight has been lost by peril of the sea. Upon principle and apart from any special provisions in a freight policy (such as, e.g., cl. 7 in the Institute Clauses), this would, in my opinion, be the relevant question to determine in deciding what are the liabilities of the freight underwriter, and, in deciding this question, the same principles must apply as between assured and underwriter on freight as apply as between owner and charterer.

The question was discussed before us as to the state of facts necessary to enable the assured on a freight policy, apart from special provisions, to recover where the ship is damaged. This question is similar to that discussed in the case of charterer and owner, and similar contentions were made on behalf of the parties. Here, again, I do not find it necessary to decide whether or not the plaintiffs' contention is correct, and, in particular, I refrain from expressing any opinion as to the correctness or otherwise of certain observations of BLACKBURN, J., when advising the House of Lords in *Rankin* v. *Potter* (4) (L.R. 6 H.L. at p. 117) which were discussed at length before us. I am content, without deciding the question, for the purpose of this judgment to accept in the case of the freight policy a hypothesis corresponding to that which I have for the like purpose accepted in the case of the charterparty.

Apart from certain special clauses in the freight policy, it could not have been contended that the right of the assured in the circumstances to recover from the freight underwriters would have been affected in any way by the valuation clause in the hull policy, the effect of which on the facts of the present case was to prevent the case being one of constructive total loss as between the owners and the hull underwriters. Apart from the special clauses in the freight policy, the existence and the terms of the hull policy appear to me to be irrelevant for the purpose of determining the rights and liabilities of the parties under the freight policy. The fact that the parties to the hull policy have for the purposes of that policy agreed on a conventional value for the vessel cannot in the absence of special provision to that effect in the freight policy prevent the assured under the freight policy from asserting that he has lost the right to receive the freight from the charterer by a peril of the sea.

Upon the hypothesis referred to above the decision of the present case, in my opinion, turns entirely on the true effect of cls. 4 and 5 of the Institute Voyage Clauses—Freight which are incorporated in the freight policy. The terms of these clauses have already been stated, and I need not repeat them. A clause similar to cl. 4 has already been judicially considered by LORD SUMNER (HAMILTON, J., as he then was) in *Coker* v. *Bolton* (12). The form of Institute Freight Clauses which fell for consideration in that case did not, as we were informed by counsel, contain a clause corresponding to what is now cl. 5, that clause having been introduced into the form at a later date. LORD SUMNER held that what is now cl. 4 was introduced to meet the hardship caused by the rule that a shipowner who, by giving notice of abandonment, has lost his right to any freight subsequently earned is precluded from suing on the policy on freight. I do not read this judgment as meaning that this is necessarily the only effect of the clause;

indeed, the words "whether the vessel be fully or only partly loaded or in ballast, chartered or unchartered," seem to show it has a wider operation. The object of the clause, however, was I think clearly to confer additional rights upon the assured, not to cut down rights which he already enjoyed.

I turn now to a consideration of cl. 5. One argument advanced on behalf of the respondents with regard to this clause may be stated as follows: In order to entitle the assured to recover on the freight policy there must be a constructive total loss of the vessel; apart from cl. 5 it might be doubtful whether the real value of the vessel or its conventional value as stated in the hull policy should be taken for this purpose; cl. 5 removes this doubt by providing that the conventional value is to be taken, and, as on the basis of that value, there was no constructive total loss of the vessel, the assured is not entitled to recover. On the other hand, it is said on behalf of the appellants that cl. 5 is merely a definition of the expression constructive total loss in cl. 4, an expression which does not appear elsewhere in the freight policy.

It is right to observe that if the sole object of cl. 4 was to afford a remedy for the injustice referred to by LORD SUMNER, cl. 5 would appear to be in part, at any rate, otiose, since that injustice could not arise unless there had in fact been abandonment of the vessel to the underwriters and abandonment as on a constructive total loss could only take place in accordance with the terms of the hull policy and on the basis of the conventional value appearing therein.

But this does not dispose of the matter. The argument is necessarily based upon the assumption that constructive total loss of the vessel is as such essential to the right of the assured to recover under the freight policy, since it is only upon this assumption that the formula laid down in cl. 5 for ascertaining when a constructive total loss has taken place is relevant. If I am right in my view that this assumption is incorrect, the whole argument appears to me to fall to the ground. The formula can, in my opinion, only be applied where constructive total loss as such is relevant for the purposes of the freight policy, and it can only become relevant if the parties have so agreed. The only matter in respect of which the parties have expressly so agreed are the matters dealt with in cl. 4, and I think that the operation of cl. 5 must in this policy be confined to those matters, although a similar clause in a different policy might have a wider effect, e.g., if the policy itself contained other references to constructive total loss of the vessel. The other argument as to the operation of cl. 5 was as follows:

It was said that, even if the phrase "constructive total loss" of the vessel is not in itself apt to be used in reference to the question between assured and underwriter on freight, yet the parties must be taken so to have used it in the present case; and in support of this argument it was said that what would be in strictness a misuse of a technical expression is intelligible if the relevant state of facts with regard to the condition of the vessel is the same both for the purpose of constituting a constructive total loss under a hull policy and for that of constituting a loss of freight by a peril of the sea under the freight policy. But I do not think that this argument should be accepted. The effect of accepting it would be to cut down the rights of the assured under the freight policy to a serious extent. If the parties had this object in mind it would have been natural to use clear language, and, in my opinion, the language of cl. 5 has no such clear meaning. If the argument were accepted it would mean that the parties had in the first place tacitly assumed that the requisite state of facts with regard to the condition of the vessel was the same under the freight policy as under the hull policy—an assumption which leaves at large the question whether constructive total loss at common law or under the Marine Insurance Act is meant—and had then inaccurately used in cl. 5 the expression "constructive total loss" to describe that state of facts.

If it had not been for the fact that we are differing from PORTER, J., I should have been content to express my agreement with the judgments already delivered, but out of respect for the learned judge, I have thought it right to state my reasons, which I do with all deference.

Appeal allowed.

Solicitors: *Holman, Fenwick & Willan*; *William A. Crump & Son.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS v. DUKE OF WESTMINSTER

[HOUSE OF LORDS (Lord Atkin, Lord Tomlin, Lord Russell, Lord Macmillan and Lord Wright), March 12, 14, 20, May 7, 1935]

[Reported [1936] A.C. 1; 104 L.J.K.B. 383; 153 L.T. 223; 51 T.L.R. 467; 79 Sol. Jo. 362; 19 Tax Cas. 490]

Surtax—Deductions—Annual payments—Payments under covenant to employee—Reduction of employee's salary by amount of covenanted sum—Substance of the transaction.

The taxpayer executed deeds of covenant, all in substantially the same form, in favour of employees of his. In each deed he covenanted to pay to the relevant employee in consideration of past services as from a stated date, during the joint lives of himself and the employee or for a period of seven years, a stated weekly sum. It was expressly provided that the payments were " without prejudice to such remuneration as the annuitant will become entitled to in respect of such services (if any) as the annuitant may hereafter render to" the taxpayer. A letter of explanation was sent to each employee in whose favour a covenant was made informing him that there was nothing to prevent him claiming full remuneration for his future services, but stating that it was expected that, in practice, he would be content with the provision which was being made by the deed, in addition to such sum (if any) as might be necessary to bring the total periodical payment up to the amount of the salary which he had lately been receiving. The employee was asked to acknowledge that he accepted the provision made for him by the deed, and each employee signed such an acknowledgment. The taxpayer claimed to deduct the amount of each annuity from his total income for the purposes of surtax.

Held (LORD ATKIN dissenting): under the deeds of covenant each employee was entitled to an annuity which, as between himself and the taxpayer, was liable to deduction of income tax by the taxpayer and which the taxpayer was entitled to treat as a deduction from his total income for surtax purposes; and the letters of explanation and acknowledgments did not qualify the deeds so as to change the legal rights and liabilities created by them.

Per LORD TOMLIN: Every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine that the court may ignore the legal position and regard " the substance of the matter " seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable.

Notes. The Income Tax Act, 1918, All Schedules Rules, r. 19, was replaced by the Income Tax Act, 1952, s. 169. The Finance Act, 1946, s. 28, was passed to meet the circumstances of such cases as this, and is now replaced by the Income Tax Act, 1952, s. 415.

Considered: *Carnarvon (Earl)* v. *Inland Revenue Comrs.* (1934), 19 Tax Cas. 455. Referred to: *Kemp* v. *Evans* (1935), 20 Tax Cas. 14; *Inland Revenue Comrs.* v. *Morgan-Grenville-Gavin*, [1936] 1 All E.R. 895; *Cronk & Sons, Ltd.* v. *Harrison*, [1936] 3 All E.R. 747; *Eastern National Omnibus Co.* v. *Inland Revenue Comrs.*, [1938] 3 All E.R. 526; *Inland Revenue Comrs.* v. *Mallaby-Deeley*, [1938] 4 All E.R. 818; *Racecourse Betting Control Board* v. *Wild*, [1938] 4 All E.R. 487.

As to deductions of annual payments from total income for income tax and surtax purposes, see 17 HALSBURY'S LAWS (2nd Edn.) 232, para. 471, p. 246, para. 497; and for cases on the subject, see 28 DIGEST 111, *683–689*.

For the Income Tax Act, 1952, s. 169, see 31 Halsbury's Statutes (2nd Edn.) 162.

Cases referred to:

(1) *Helby* v. *Matthews*, [1895] A.C. 471; 64 L.J.Q.B. 465; 72 L.T. 841; 60 J.P. 20; 43 W.R. 561; 11 T.L.R. 446; 11 R. 232, H.L.; 3 Digest 93, *245*.

(2) *Secretary of State for India* v. *Scoble*, [1903] A.C. 299; 72 L.J.K.B. 617; 89 L.T. 1; 51 W.R. 675; 19 T.L.R. 550; 4 Tax Cas. 618, H.L.; 28 Digest 65, *337*.

(3) *Re Hinckes, Dashwood* v. *Hinckes*, [1921] 1 Ch. 475; 90 L.J.Ch. 335; 124 L.T. 681; 37 T.L.R. 308; 65 Sol. Jo. 291, C.A.; 44 Digest 472, *2913*.

(4) *Partington* v. *A.-G.* (1869), L.R. 4 H.L. 100; 38 L.J.Ex. 205; 21 L.T. 370, H.L.; 21 Digest 119, *899*.

Appeal from the decision of the Court of Appeal (Lord Hanworth, M.R., Slesser and Romer, L.JJ.) on a Case stated under the Finance Act, 1927, s. 42 (7) (*d*), and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The Case stated as follows:

1. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on Nov. 3, 1932, and April 3, 1933, the Duke of Westminster, hereinafter called "the appellant," appealed against assessments to surtax made upon him for the three years 1929–30, 1930–31 and 1931–32.

2. The question for the decision of the court is whether certain payments, or any of them, made by the appellant under various deeds of covenant, constitute annual payments which are admissible as deductions in arriving at his liability for surtax for the years under appeal.

3. The deeds referred to in the foregoing paragraph are not all in precisely the same terms, but they are all deeds under which the appellant covenanted to make payments to persons who in fact were when the deeds were respectively executed, and in most cases remained throughout the material period, in his employ. Apart from the deeds of covenant executed in favour of Mr. Detmar Jellings Blow, hereafter referred to in para. 8 of this case, each of the deeds referred to above was in one or other of six forms.

5. The case of Frank Allman, gardener, is here set forth as a case typical of the cases covered by the before-mentioned six forms of deed. Deed of covenant made Aug. 14, 1930, between the appellant and Frank Allman, gardener, recites that in recognition of services faithfully rendered to the appellant for over twenty-seven years past the appellant desires to make provision for Allman notwithstanding that he may re-engage or continue in the appellant's service in which event he will become entitled to remuneration in respect of such future service. In consideration of Allman's past services the appellant covenants to pay Allman during the joint lives of himself and Allman or for a period of seven years the weekly sum of £1 18s. 0d.

6. It was admitted that all the covenantees were in fact getting under their deeds of covenant (with or without other moneys), the amounts which they would respectively have received as wages or salary if they lived during the period and continued in their employment, and that if they ceased to work the payments secured by the deed must still be made. It was also admitted on behalf of the respondents that in the case of an employee of the appellant who ceased to be in that employment at the date of the deed applicable to his case the payments made under that deed by the appellant were proper deductions in computation of his surtax income, and that such payments made to any employee who though in the appellant's employment at the before-mentioned date ceased to be in that employment during the period covered by the deed were also—in respect of the period after retirement of the employee—proper deductions in computation of the appellant's surtax income. This case accordingly concerns only the payments made by the appellant in respect of periods during which the covenantees were in the appellant's service. No question of figures arises.

In some cases in which like deeds or substantially similar deeds were entered into the covenantees had retired and were still being paid under the deeds.

7. Except in the case of Mr. Blow, letters of explanation were sent to the employees

informing each of them before he signed the deed that there was nothing therein to prevent him from being entitled to and claiming full remuneration for such future work as he might do for the appellant, but stating that it was expected that in practice he would be content with the provision which was being legally made by the deed with the addition of such sum (if any) as might be necessary to bring the total periodical payments while he was still in the appellant's service up to the amount of the salary or wages which he had lately been receiving. The letter asked in each case for an acknowledgment from the employee if he was satisfied to accept the provision made for him by the deed.

8. The case of Mr. Detmar Jellings Blow is different in its facts from the other cases. Mr. Blow was at the date of each of the under-mentioned deeds and continued during the relative years to be in the appellant's service. By deed of covenant dated Aug. 2, 1927, the appellant, in consideration of the past services of Mr. Blow, covenanted to pay him or in the event of his death to his personal representatives and assigns for ten years from the date thereof a yearly sum of £2,000.

A new deed of covenant, dated Aug. 5, 1931, substitutes a period of twenty years from Aug. 5, 1931, for the period of ten years covered by the former deed. No letter was written to or acknowledgment required from Mr. Blow in connection with either of the deeds referred to in this paragraph.

9. It was contended on behalf of the appellant: (1) that all the payments made under the before-mentioned deeds so far as such payments were not already allowed or admitted as deductions should be allowed as deductions from the appellant's income in arriving at his liability for surtax for the years under appeal; (2) that the assessments were severally excessive in amount.

10. It was contended on behalf of the respondents that except as regards payments to covenantees who had left the appellant's service all payments under the deeds with employees were (in effect) payments for services to be rendered to the appellant and were not allowable as deductions from his income.

11. The commissioners who heard the appeal, held that in construing the true effect and substance of the deeds under which payments are made to the appellant's employees, they were entitled to consider together with these deeds the letters of explanation and form of acknowledgment which were sent to the covenantees. These letters, like the deeds themselves, were not in one stereotyped form, but were sufficiently to the same effect to enable them to arrive at a decision in respect of them all. They held that the payments made under these deeds to persons who remain in the appellant's employ were, in substance, payments for continuing service ejusdem generis with wages or salaries so long as the recipients in fact remain in the appellant's service and as such were not annual payments which were a proper deduction from his assessment to surtax.

They further held that the new deed of covenant with Mr. Blow did not alter the facts, and that the payment to him must fall under the principle of the above decision so long as Mr. Blow remained in the appellant's service.

12. The appellant immediately upon the determination of the appeal by his counsel declared to the commissioners his dissatisfaction with such determination as being erroneous in point of law and he in due course required them to state a case for the opinion of the High Court pursuant to the Finance Act, 1927, s. 42 (7) (*d*), and the Income Tax Act, 1918, s. 149.

The Court of Appeal held, reversing the decision of Finlay, J., that the genuine nature of these deeds was not impugned, and if no further services were to be rendered by the employees, the covenant, it was not disputed, would stand good, and in respect of that the payments would fall within r. 19 of the All Schedules Rules to the Income Tax Act, 1918, when income tax would be deducted from an annual sum paid out of profits already brought into charge; but the covenants, being definitely effective whether the employee continued in service or not, must be accepted in any event and the payments were payments under the deed and nothing else; therefore there existed a covenant to pay an annual sum and the covenantee, being the recipient, was bound under the latter part of r. 19 to allow deduction of income tax. If these payments could be considered as wages only, the matter would be different, as income tax on them would be assessable under Sched. E directly on the recipients, and surtax was payable on any money which was paid to employees for wages beyond the amount payable under the deed. The Commissioners of Inland Revenue appealed.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *Reginald P. Hills* for the appellants, the Inland Revenue Commissioners.

Wilfrid Greene, K.C., Raymond Needham, K.C., W. Cleveland Stephens, K.C., and *Cyril King* for the respondent, the taxpayer.

The House took time for consideration.

May 7. **LORD ATKIN.**—In 1930 and in subsequent years the respondent, the Duke of Westminster, executed a series of deeds in which he covenanted to pay to the several parties mentioned in the deed certain weekly sums for a period of seven years or the joint lives of the parties. The recipients in all the cases in question were persons then in the employ of the respondent at fixed wages or salaries, and after completion of the deeds continued in the employment and continued to receive such sums as with the sum payable by the deed made up the amount of the wages or salary payable before the deed and no more. The sums varied from 12s. to £2,000; the employment from gardener and laundryman to architect; and the past periods of employment from four years to forty-five. The Crown say that the payments made under the deed were made in the circumstances given in evidence as remuneration for services, and could not be deducted from the respondent's total income for purposes of surtax. The respondent says that the payments were annual payments which he was entitled to deduct. It is agreed between the parties that the question in this case is whether the payments were remuneration for services or not; if the former the respondent is chargeable, otherwise not. It is unnecessary, therefore, to trouble your Lordships with the various relevant sections and rules of the Income Tax Act, 1918, and subsequent Finance Acts. It is sufficient to say that your Lordships were satisfied that the admission was correct.

It was not, I think, denied, at any rate it is incontrovertible, that the deeds were brought into existence as a device by which the respondent might avoid some of the burden of surtax. I do not use the word device in any sinister sense; for it has to be recognised that the subject, whether poor and humble or wealthy and noble, has the legal right so to dispose of his capital and income as to attract upon himself the least amount of tax. The only function of a court of law is to determine the legal result of his dispositions so far as they affect tax. In the present case FINLAY, J., affirming the commissioners, decided in favour of the Crown, while the Court of Appeal have set aside that decision and given judgment in favour of the respondent.

The commissioners have taken six cases as typical in which the documents differ slightly in form, but in their opinion have the same effect. They chose for special example the case of Frank Allman, a gardener, and I will adopt the same course, though reference may have to be made later to some of the other instances.

The deed is in the following terms:

> "This deed of covenant is made this Aug. 14, 1930, between the Most Noble Hugh Richard Arthur Duke of Westminster, D.S.O. (hereinafter called 'the Duke') of the one part and Frank Allman of Vine Cottage Aldford near Chester Gardener in the Duke's service (hereinafter called 'the annuitant') of the other part.
>
> "Whereas in recognition of the services which for over twenty-seven years past the annuitant has well and faithfully rendered to the Duke the Duke desires to make provision for the annuitant in manner hereinafter expressed notwithstanding that the annuitant may re-engage or continue in the service of the Duke in which event he will become entitled to remuneration in respect of such future service.
>
> "Now this deed made in furtherance of the Duke's said desire and in consideration of the past services so rendered as aforesaid witnesses as follows:
>
> > "1. The Duke covenants to pay to the annuitant as from Aug. 2, 1930, during the joint lives of himself and of the annuitant, or for a period of seven years the weekly sum of £1 18s. (amounting in each year to the sum of £98 16s.) the first of such payments having fallen to be made on Aug. 9, 1930.

"2. The said payment shall be made from time to time on such days for such period and in such proportions as shall from time to time be mutually agreed upon by the parties hereto and in default of agreement shall be made in weekly payments on the Saturday of each week.

"3. It is hereby expressly agreed that the said payments are without prejudice to such remuneration as the annuitant will become entitled to in respect of such services (if any) as the annuitant may hereafter render to the Duke.

"In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written."

"[Signed and attested.]"

Counsel for the respondent took the view that the period of the covenant was the joint lives or seven years whichever was the shorter, and that the deed was to be without prejudice to the recipient receiving full remuneration for his future services. I shall assume that this construction is correct. No contention was raised in the present case that the payments, though expressed to be weekly, were not annual payments within the Income Tax Act, and Rules.

It will be convenient to consider the legal relations which would exist between the Duke and his servant on the supposition, which is that of the respondent, that the deed came into force without any further agreement of any kind being made between the parties.

The servant was serving the Duke under a contract of employment under which he was entitled to receive an agreed weekly wage of, we will suppose, £3: which contract would continue until terminated by notice or summarily or varied by agreement. On this footing when the deed came into operation the servant remaining in the employment would be entitled to 38s. a week in addition to the 60s. wages, and it is obvious that so far from benefiting himself by avoiding income tax the Duke would be adding several thousand pounds annually to his expenditure. I conceive it to be self-evident that no single party to the transaction ever contemplated that the servant would in fact draw the full contract wages in addition to the 38s. under the deed. And in fact as we learn from the case the servant after the deed continued to receive weekly the exact former amount of his wages, 60s., i.e., he received 38s., and such additional sum as made the total weekly payment the equivalent of his contractual wages. We are to assume, however, on the respondent's contention that no contract was made modifying either the terms of the deed or the contract of employment. The position of the Duke therefore was that, assuming the servant was content to draw only 60s. a week, the Duke would remain at all times liable to pay to the servant the arrears of the contractual wages, i.e., 60s.—22s., in other words, a sum equal to the payment under the deed. However long a time the service continued the servant would be entitled to this sum within the limit, if the Duke of Westminster chose to plead the Statute of Limitations, of six years arrears. The arrears would be a debt due to the servant and could be attached by any creditor of the servant, and would on death be assets of his which his personal representative would be bound to recover. It is perhaps worth mentioning that if in fact the Duke were only paying as wages 22s. peculiar results might follow if the wages were regulated by statute as by the Agricultural Wages Act or similar legislation: but as we have no evidence of such a position it is unnecessary to dwell on it. A nice question might also arise as to the amount which the Duke would be bound to tender as wages in lieu of notice.

The embarrassments, however, are not all on the Duke's side. One result to the servant, perhaps unexpected, would be that his total income having become 98s. a week he would incur liability to income tax, for salary or wages that he is entitled to but voluntarily forgoes must be included in his total income. And on what footing his "earnings" in his last employment would be calculated for purposes of workmen's compensation whether on 22s. or 60s. is a problem which I am glad we have not to decide.

Such being the position if the matter rested upon the deed and no more, it seems to me plain that the Duke's advisers were not prepared to leave him exposed to the liabilities I have mentioned. In every case before the deed became operative a letter was written by the Duke's solicitors to the servant the effect of which seems to me to be the material question in this case. The letter is not in the same form in every case though its effect is the same. In Allman's case it is on a typed form and is signed by the solicitors over a 6d. stamp. It is as follows:

> "Private.—The Grosvenor Office, 53, Davies-street, Berkeley-square, London, W.1.—Aug. 13, 1930.—To Mr. Frank Allman.—Dear Sir,—On Wednesday, the 6th instant, we read over with you a deed of covenant which the Duke of Westminister has signed in your favour under which you will be entitled to a gross sum of £1 18s. 0d. a week in consideration of your past faithful service and irrespective of any work which you may do for His Grace after the deed comes into effect. The deed will be in force for seven years if you and the Duke should so long live, and His Grace can reconsider the position at the end of that period. We explained that there is nothing in the deed to prevent your being entitled to and claiming full remuneration for such future work as you may do, though it is expected that in practice you will be content with the provision which is being legally made for you for so long as the deed takes effect, with the addition of such sum (if any) as may be necessary to bring the total periodical payment while you are still in the Duke's service up to the amount of the salary or wages which you have lately been receiving. You said that you accepted this arrangement, and you accordingly executed the deed. We write, as promised, to confirm the explanation which we gave you on the 6th instant. If you are still quite satisfied we propose to insert the 6th instant as the date of the deed, and we shall be obliged by your signing the acknowledgment at the foot of this letter and then returning it to us.—Yours faithfully, Boodle, Hatfield and Co., Stamp 6d."
>
> "Acknowledgment.—To the Duke of Westminster, D.S.O.—And to Messrs. Boodle, Hatfield and Co., his solicitors.—I have read the above written letter, and I confirm that I accept the provision made for me by the deed. I agree to the deed being dated and treated as delivered by and binding upon the Duke of Westminster and myself.—Frank Allman."

It will be observed from the letter that on Aug. 6 the solicitors had produced to the servant the deed already executed by the Duke, but undated and had made the explanation set out in the letter: that the servant had accepted "this arrangement" and had executed the deed. Now what was the object of the letter and the signed acknowledgment which formed part of the document? The respondent gravely says merely to provide evidence that the servant was satisfied with the provision made for him by the deed and to protect the Duke against claims against him in the future for any increased pension. But the servant in no case had any legal claim to pension, in any case the deed was not to last for more than seven years: and finally, and as I suggest, conclusively, the servant had already signified his acceptance of the provision made in the deed by executing it "accordingly." Execution by the servant had been in law unnecessary.

In my opinion, the facts and the terms of the letter indicate that the transaction was intended to have and had far more substantial results than the interchange of unnecessary assurances between master and servant. The document was intended to bind the servant, exactly to what terms I will shortly discuss. They must depend on the terms of the letter. But that the document was intended to be contractual is a conclusion that I find irresistible. For what reason is the signature of the solicitors placed by them over a contract stamp? Can there be any reason except that they thought that the letter contained an offer of a contract which would be completed by the signature of the acknowledgment by the party to whom it was addressed. I am satisfied that a letter signed over a contract stamp and requiring the addressee to return it with the appended acknowledgment signed, addressed by the employer's solicitors to a workman at weekly wages would inevitably be understood by the recipient and would be intended by the writers to be understood as a representation that he was being asked to make a contract in the terms of the document.

It still remains to consider whether the document discloses the parties to be agreed and sufficiently defines the terms. I have already pointed out the urgent necessity there was to relieve the duke from the obligations which would exist if the deed stood alone. I read the letter as saying there is nothing in the deed to prevent your claiming 60s. in addition to the sum mentioned in the deed, but you are expected in practice to be content with the provision, &c., with the addition, &c.: you have already said that you accept this arrangement, and will you now bind yourself by a formal contract to this effect. The acknowledgment "I confirm that I accept the provision made for me in the deed" in my opinion plainly relates to the only matter previously recited as being said by the servant, namely, I confirm that I accept this arrangement: and the arrangement is that I will be content with the provision in the deed with the addition, &c., of any sum necessary, &c.

We are thus, I think, inevitably forced to the conclusion that before the deed was executed there was a contract between master and servant as to the effect of the deed on the existing contract of service.

The only remaining question is relatively simple. Is the contract one which radically alters the terms of the existing contract of service: I will make a new contract of service, and I will serve you as gardener for 22s. a week; or, as in some of the other cases, I will serve you for nothing; or is it a contract which maintains the existing contract of service, I will continue to serve you as gardener for 60s. a week: but I will take payment of that 60s. as to 38s., the payment under the deed, and as to the balance, by the ordinary weekly payment. In the latter case the employer remains under an obligation to pay 60s., and discharges 38s. of that obligation by making the payment under the deed, which has been delivered with that bargain in existence.

I quite agree that the former is a possible bargain. A servant may agree to work for nothing, or for some sum which is merely a fraction of the current rates of wages. But such agreements are, in my experience, very exceptional. In the present case they would apply, it is said, to about a hundred employees. And I cannot contemplate so many servants consciously making bargains so alien to their traditions and for a period which would not be longer than seven years and might be shorter. The better construction appears to me to be that the servants were never asked to abandon the existing contractual rate. If it were otherwise one bears in mind the strange position of what were neatly called the uncovenanted servants, serving for higher wages, together with the other difficulties earlier referred to as wages statutes and wages in lieu of notice.

With great respect to the members of the Court of Appeal they seem to ignore what seems to me the essential fact of the document of Aug. 13, 1930, signed by both parties. SLESSER, L.J., alone makes what seems to me the necessary assumption that it is contractual, but for the reasons given I cannot assent to his view of the ensuing legal effect. Nor am I impressed with the fact that the deed would have a different effect on the surtax liability of the Duke if later he did not happen to be employing the recipient. That seems to me a very ordinary result if the circumstances of the covenantor and covenantee alter for income tax purposes. The fact is that what would make the difference in the tax position would be that the recipient would no longer be employed: the letter would not be in operation, and there could be no ground for alleging that the Duke was paying the money as remuneration.

I do not, myself, see any difficulty in the view taken by the commissioners and FINLAY, J., that the substance of the transaction was that what was being paid was remuneration. Both the commissioners and FINLAY, J., took the document of Aug. 13 into consideration as part of the whole transaction, and, in my opinion, rightly. I agree that you must not go beyond the legal effect of the agreements and conveyances made construed in accordance with ordinary rules in reference to all the surrounding circumstances. So construed, the correct view of the legal effect of the documents appears to me to be the result I have mentioned. I think the difficulty has probably arisen from the wording of the commissioners' finding that "the payments made under the deed were in substance" payments by way of remuneration. Standing alone, I do not think that phrase would be justified. But reference to the immediately preceding sentence indicates that the commissioners had taken into consideration the letters and form of acknowledgment before expressing their finding as above. Though they have not analysed the transaction as fully as I have endeavoured to do I have little doubt that they and Finlay, J., arrived at the same result as I, and it may be noted that so far as there is any question of fact involved, the finding of the commissioners if there is evidence is final.

Basing as I do my conclusion on the preliminary contract contained in the letter and acknowledgment, I find myself unable to accept the commissioners' conclusion in the case of Mr. Detmar Blow. No letter appears to have been written to him, and there was no evidence before the commissioners as to any agreement made with him. In those circumstances, on the facts as they were made known to the commissioners, it appears necessary to treat the legal relations between him and the duke in respect of the payment of £2,000 a year as governed by the deed alone. The assessment, therefore, should be reduced by that sum. Except as thus varied, in my opinion the order of the commissioners should be restored, and the appeal allowed with costs here and below.

LORD TOMLIN.—It cannot I think be doubted that each one of the annuities payable under the deeds of covenant brought to your Lordships' attention if considered with reference to the deed creating it and without regard to the other matters upon which the appellants rely falls into that class of payments which are treated as part of the taxable income of the payee and not of the payer. Each annuity is on this footing therefore an item from which the payer is entitled to deduct income tax and which he is entitled to treat as deductible from his total income in making his return for surtax purposes.

So far as concerns the annuity payable to Detmar Jennings Blow I can discover no element in the case which upon any view of the law or facts can alter the position as I have stated it and in my opinion the appeal in regard to this annuity must fail.

With regard to the other annuities the correspondence in each case contemporaneous with or following upon the execution of the deed of covenant together with the fact that after the deed the payee being in the Duke's employment was in fact getting under the deed (with or without other moneys) the amount which he would have received as salary or wages if no deed had been executed, is said by the appellants to alter the whole position and so long as the payee continues in the Duke's service to render it impossible for the Duke to treat the annuity under the deed as a deductible item in his return of income for surtax purposes.

It is agreed that as between the annuities under consideration (other than that of Blow) no distinction can be drawn and that Allman's annuity is typical. A decision in Allman's case must therefore govern the remainder.

Now, so far as I understand the argument, the appellants, while admitting that Allman's annuity is payable under the deed, say that there is, having regard to the correspondence and in all the circumstances, another collateral contract between the Duke and the payee to the effect that the payee will serve the Duke in consideration of a salary or wage equal to the salary or wage he was receiving before the deed of covenant was executed and that he will accept what he receives under the deed in part satisfaction of this salary or wage, and therefore that the annuity, so long as the payee remains in the Duke's service, is of a changed nature and is no longer a payment which the Duke is entitled to deduct from his income for the purposes of surtax.

In the first place I would observe that if any such contract is proper to be inferred from the correspondence and circumstances, the contract must be a separate independent contract in the case of each payee, and could only be inferred from a full examination of each case separately, and unless the contract alleged is wholly in the correspondence only after hearing evidence from the parties to the alleged contract or their representatives. In fact no evidence of this kind was called before the commissioners and the commissioners have not found that any such contract existed. Their only finding is expressed in para. 11 of the case stated and is as follows:

> "11. We, the commissioners who heard the appeal, held that in construing the true effect and substance of the deeds under which payments are made to the appellant's employees, we were entitled to consider together with these deeds the letters of

> explanation and form of acknowledgment which were sent to the covenantees. These letters, like the deeds themselves, were not in one stereotyped form, but were sufficiently to the same effect to enable us to arrive at a decision in respect of them all. We held that the payments made under these deeds to persons who remain in the appellant's employ were, in substance, payments for continuing service ejusdem generis with wages or salaries so long as the recipients in fact remain in the appellant's service and as such were not annual payments which were a proper deduction from his assessment to surtax."

I will deal later with that part of the finding which says that the payments were "in substance" payments for continuing service ejusdem generis with salaries or wages.

In the next place I would note that a contract in the terms alleged is nothing more than a contract that the payee will serve the Duke for a salary or wage equal to the difference between the amount received under the deed and the amount of the original salary or wage. In any event, whether he serves the Duke or not the payee is entitled under the deed to the amount of the annuity less tax and the annuity already legally payable cannot become part of the consideration for a new contract of service.

Again, such a contract if it could be inferred at all is in flat contradiction of the deed. Under the deed the payments are expressed to be without prejudice to such remuneration as the annuitant would become entitled to in respect of such services (if any) as the annuitant might thereafter render to the Duke. It is also in flat contradiction of the terms of the letter to which I will presently refer.

In fact I do not think that upon the true construction of the relevant letter and written acknowledgment even when regarded in the light of such facts as are admitted or found in para. 6 of the case stated, there was any such collateral contract as alleged.

The letter of Aug. 13, 1930, told the annuitant that there was nothing in the deed to prevent his being entitled to and claiming full remuneration for such future work as he might do, though it was expected that in practice he would be content in effect with the difference between the annuity and salary or wages which he had been lately receiving.

I cannot think that a letter so framed can be construed as constituting a contract that the payee would serve the Duke upon terms in contradiction of the language of the letter, namely, that he should be entitled to less than the salary or wages which he had been then lately receiving. Further, the arrangement which the annuitant is stated in the letter to have accepted must, I think, on a proper reading of the letter refer to all that is set out in the letter as well as what is contained in the deed and includes his right to full remuneration over and above what is received under the deed. Again, the acknowledgment signed by the annuitant at the foot of the letter is that he accepts the provision made for him by the deed, and that is a provision without prejudice to his right to full remuneration over and above what he receives under the deed. In short it seems to me that there is no such contract as that which the appellants suggest can be inferred.

Apart, however, from the question of contract with which I have dealt, it is said that in revenue cases there is a doctrine that the court may ignore the legal position and regard what is called "the substance of the matter," and that here the substance of the matter is that the annuitant was serving the Duke for something equal to his former salary or wages and that, therefore, while he is so serving the annuity must be treated as salary or wages. This supposed doctrine (upon which the commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled and the supposed doctrine given its quietus the better it will be for all concerned, for the doctrine seems to involve substituting "the uncertain and crooked cord of discretion" for "the golden and straight mete wand of the law" (4 Inst. 41).

Every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of "the substance" seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable. A

The principal passages relied upon are from opinions of LORD HERSCHELL and LORD HALSBURY in your Lordships' House. LORD HERSCHELL, L.C., in *Helby* v. *Matthews* (1) ([1895] A.C. at p. 475) observed:

> "It is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree," B

but he went on to explain that the substance must be ascertained by a consideration of the rights and obligations of the parties to be derived from a consideration of the whole of the agreement. In short, LORD HERSCHELL was saying that the substance of a transaction embodied in a written instrument is to be found by construing the document as a whole. C

Support has also been sought by the appellants from the language of LORD HALSBURY, L.C., in *Secretary of State for India* v. *Scoble* (2) ([1903] A.C. at p. 302). There LORD HALSBURY, said:

> "Still, looking at the whole nature and substance of the transaction (and it is agreed on all sides that we must look at the nature of the transaction and not be bound by the mere use of words), this is not the case of a purchase of an annuity." D

Here again LORD HALSBURY is only giving utterance to the indisputable rule that the surrounding circumstances must be regarded in construing a document.

Neither of these passages, in my opinion, afford the appellants any support or has any application to the present case. The matter was put accurately by my noble and learned friend, LORD WARRINGTON OF CLYFFE, when, as WARRINGTON, L.J., in *Re Hinckes, Dashwood* v. *Hinckes* (3) ([1921] 1 Ch. at p. 489), he used these words: E

> "It is said we must go behind the form and look at the substance. I do look at the substance, but in order to ascertain the substance I must look at the legal effect of the bargain which the parties have entered into."

So here the substance is that which results from the legal rights and obligations of the parties ascertained upon ordinary legal principles, and having regard to what I have F already said the conclusion must be that each annuitant is entitled to an annuity which, as between himself and the payer, is liable to deduction of income tax by the payer and which the payer is entitled to treat as a deduction from his total income for surtax purposes.

There may, of course, be cases where documents are not bona fide nor intended to be acted upon, but are only used as a cloak to conceal a different transaction. No such G case is made or even suggested here. The deeds of covenant are admittedly bona fide and have been given their proper legal operation. They cannot be ignored or treated as operating in some different way because as a result less duty is payable than would have been the case if some other arrangement (called for the purpose of the appellants' argument "the substance") had been made.

I find myself, therefore, in regard to the annuities other than that of Blow unable to H take the same view as the noble and learned Lord upon the Woolsack.

In my opinion in regard to all the annuities the appeal fails and ought to be dismissed with costs.

LORD RUSSELL.—I would dismiss this appeal. It is conceded that the deeds are genuine deeds, i.e., that they were intended to create and do create a legal liability on the Duke to pay in weekly payments the annual sum specified in each deed, whether I or not any service is being rendered to the Duke by the covenantee. Further, it is conceded that the sums specified in the deeds were paid to the covenantees under the deeds.

The question for our decision is whether those sums so paid constitute part of the Duke's income for the purpose of computing his liability for surtax in the particular years in question.

I need not consider in detail the various statutory provisions which are relevant to the consideration of this matter. The result may for the purposes of this case be summarised thus:—if the payment of these sums is payment of salary or wages within Sched. E, from which tax is not deductible by the Duke, then he is not entitled to exclude the amounts paid in ascertaining his total income for surtax purposes, but if the payment is an annual payment within Sched. D, from which tax is deductible by the Duke, then he is entitled to exclude the amounts paid in ascertaining such total income.

There can, I think, be no doubt that if the deeds stood alone the payments are annual payments within Sched. D. Indeed, this is not, I think, disputed. It is, however, argued that certain letters written by the Duke's solicitor to the covenantees and certain acknowledgments signed by the covenantees at the foot of those letters, effect a complete change in the situation, and turn the payments made under the deeds into payments of salary and wages within Sched. E.

I will consider the suggestion in relation to the case of Frank Allman. The argument centred round his case, and it was common ground that all the cases (with the exception of the case of Mr. Blow) stood or fell together notwithstanding any difference of wording which might exist among them.

The legal position created by Allman's deed is clear. He is entitled during the defined period to his annual sum of £98 16s. by weekly payments of £1 18s., commencing on Aug. 9, 1930. He is not bound to do a stroke of work in order to be entitled to payment. If he does in the future render any service to the Duke, he will be legally entitled to claim remuneration for it, over and above the payments under the deed, which are to be without prejudice to his remuneration for future services. The deed expressly so provides.

The letter to Allman states the effect of the deed, but says that it is expected that in practice he will be content with the legal provision made by the deed

> "with the addition of such sum (if any) as may be necessary to bring the total periodical payment while you are still in the Duke's service up to the amount of the salary or wages which you have lately been receiving."

That is an expression of hope or anticipation that the covenantee will not enforce his legal right to remuneration for future services beyond a certain amount. The letter states that the covenantee had "accepted this arrangement," and asks him to sign an acknowledgment in a form already written out at the foot of the letter. The arrangement said to have been accepted can be nothing more than what the letter states, namely, the execution of a deed which was to be binding and in full force, coupled with an expectation on the part of the Duke that the covenantee's legal right to full remuneration for future services would not be enforced. There is no evidence of any other arrangement. Acceptance of that arrangement cannot turn the expectation into an enforceable legal right.

The acknowledgment signed by the covenantee is in strictly limited terms. It accepts the provision made by the deed; it in no way admits or suggests that the deed has to any extent been qualified by the letter.

For myself I can find nothing in the letter and acknowledgment which constitutes or resembles a contract, notwithstanding the fact that the names of the solicitors were written across an adhesive stamp. There is an expression of a hope or anticipation or expectation that the covenantee will pursue a certain line of conduct, but he nowhere binds himself to do so, nor indeed is he even asked to do so. In my opinion, the letter has no operation at all, and has no effect upon the legal rights and liabilities of the parties created by the deed.

But if I am wrong in this view, and some contract dehors the deed was brought into existence by means of the letter and acknowledgment, it can be no more than a contract by Allman that his remuneration for future services shall not be full remuneration but only the additional sum referred to in the letter. I can see no grounds for extracting from the language used a contract that the remuneration for future services shall, despite the deed, be the sums payable under the deed in respect of past services plus the additional sum mentioned in the letter. I can find no possible justification for this. A suggestion was made that such a contract can be found by reason of the presence in the letter of the words

> "to bring the total periodical payment up to the amount of the salary which you were receiving previously to the deed of covenant."

I fail to see how these words can bear this strain. Indeed, to me they seem to point in the opposite direction. They recognise that full remuneration for future services will not be paid, and that the total periodical payment will be composed in part of salary and in part of something which is not salary at all.

If the true view is that (contrary to my opinion) a contract has been made to accept less than full remuneration for future services, the position is still the same, namely, that the legal rights and liabilities of the parties created by the deed remain unqualified and unaffected.

The result is that payments, the liability for which arises only under the deed, are not and cannot be said to be payments of salary or wages within Sched. E. They cannot with any regard to the true legal position be said to arise from an employment. They are, and can only be said to be, annual payments within Sched. D. Tax was deductible on payment; they are income of the recipient, and are accordingly not part of the Duke's total income for the purpose of calculating his liability for surtax.

The commissioners and FINLAY, J., took the opposite view on the ground that (as they said) looking at the substance of the thing the payments were payments of wages. This simply means that the true legal position is disregarded, and a different legal right and liability substituted in the place of the legal right and liability which the parties have created. I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if, in accordance with a court's view of what it considers the substance of the transaction, the court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case. As LORD CAIRNS said many years ago in *Partington* v. *A.-G.* (4) (L.R. 4 H.L. at p. 122):

> "As I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover tax cannot bring the subject within the letter of the law the subject is free however apparently within the spirit of the law the case might otherwise appear to be."

If all that is meant by the doctrine is that having once ascertained the legal rights of the parties you may disregard mere nomenclature and decide the question of taxability or non-taxability in accordance with the legal rights, well and good. That is what this House did in the case of *Secretary of State for India* v. *Scoble* (2); that and no more. If, on the other hand, the doctrine means that you may brush aside deeds, disregard the legal rights and liabilities arising under a contract between parties, and decide the question of taxability or non-taxability upon the footing of the rights and liabilities of the parties being different from what in law they are, then I entirely dissent from such a doctrine.

The substance of the transaction between Allman and the Duke is, in my opinion, to be found and to be found only by ascertaining their respective rights and liabilities under the deed, the legal effect of which is what I have already stated.

The case of Mr. Blow's deed, which is uncomplicated by any letter, is necessarily decided, in my view, in the same way as Allman's case.

For these reasons I am of opinion that the order of the Court of Appeal was right and ought to be affirmed.

LORD MACMILLAN.—The respondent recently entered into certain transactions with a number of his employees, and the question to be determined in this appeal is whether these transactions have affected his liability to surtax. It has been agreed that, to test the matter, the respondent's transaction with Frank Allman may be taken as typical of the series.

Allman was employed by the respondent as a gardener at a weekly wage, the amount of which is not stated, but which was in excess of 38s. a week. The wages paid by the respondent to Allman were profits arising to Allman from his employment within the meaning of Sched. E to the Income Tax Act, 1918. Consequently the respondent was not entitled to deduct tax on paying Allman his wages, nor was he entitled to deduct his payments to Allman in computing his total income for surtax purposes. Such being the position of the parties, they executed in 1930 a deed of covenant which has been quoted in full by my noble and learned friend LORD ATKIN.

It is agreed on all hands that the legal effect of this deed was to give Allman thereafter for the period of its endurance the right to a weekly payment of 38s. irrespective of whether he remained in the respondent's employment or not, but without prejudice to Allman's right to remuneration for such services as he might thereafter render to the respondent. I do not think that there can be any doubt, and indeed none was suggested, that, if this deed had stood alone, the sums paid to Allman in pursuance of it would have been of the nature of an annual payment payable as a personal debt or obligation by virtue of a contract within the meaning of r. 1 applicable to Case III of Sched. D, with the result of entitling the respondent, under r. 19 (1) of the All Schedules Rules to deduct income tax on making the covenanted payments to Allman and consequently to deduct the amount of these payments in computing his total income for surtax purposes.

But the deed of covenant did not stand alone. There were in addition a letter addressed to Allman by the respondent's solicitors and an acknowledgment by Allman, which have also been quoted in full by my noble and learned friend. In my opinion these two documents formed part of the transaction between the parties. It has been suggested that they had no legal efficacy. The respondent's solicitors do not appear to have held that view. They may have been mistaken in their belief that the letter and the acknowledgment embodied a binding arrangement but I confess that I share it. In my opinion these documents embody an agreement between the parties that, notwithstanding Allman's unqualified right under the deed to 38s. a week, work or no work, and to full remuneration for any future work he may do for the respondent, nevertheless, so long as he remains in the respondent's employment, he will be content with the covenanted payments under the deed plus the difference between them and the wages he was previously receiving. In other words Allman agrees that in view of the respondent having undertaken to pay him 38s. a week in the future independently of his employment, he will not expect or be entitled to any further payment from the respondent, so long as he remains in the respondent's employment, beyond the difference between the covenanted payments and the wages he previously received.

Allman has, I understand, remained in the respondent's service and receives in fact the same sum of money weekly from the respondent as he received before the transaction in question. Has that sum to the extent of 38s. altered its legal character in consequence of the transaction? In my opinion it has. Whereas previously Allman was entitled to the 38s. a week as wages, he is now entitled to payment of this sum weekly whether he is employed by the respondent or not. That is the effect of the deed of covenant. The arrangement embodied in the two collateral documents does not alter that effect, whatever else it does. It is difficult to see how a sum which is payable irrespective of employment can be said to be a profit arising from employment. If the collateral documents had affected the absolute and independent nature of the obligation under the deed of covenant different considerations might have arisen. But the absolute obligation to pay irrespective of employment remains unaffected by the collateral documents, which recognise that Allman will in future have an unqualified right to a weekly payment of 38s. from the respondent whether the respondent employs him or not.

I venture to suggest that the proper approach to the problem is to ask the question, in the language of r. 1 applicable to Case III of Sched. D: Is the 38s. a week of the nature of an annual payment payable by the respondent as a personal debt or obligation by virtue of a contract? Plainly it is, and none the less so because of the collateral arrangement which, whatever it does, does not convert the deed of covenant into a contract of employment, for the 38s. remains payable, employment or no employment. It is agreed that if Allman leaves the respondent's employment the weekly payments which he will continue to receive under the deed will fall within r. 1 applicable to Case III of Sched. D. But the payments made to him while he remains in the respondent's employment are exigible by him under precisely the same legal obligation on the part of the respondent. If then the question which I have put must be answered in the affirmative, r. 19 (1) of the All Schedules Rules automatically applies and the respondent is entitled to deduct tax on making the covenanted payments to Allman and if he is entitled to deduct tax from the payments he is also entitled to deduct the amount of these payments in computing his total income for surtax purposes. The same reasoning is applicable to the respondent's transactions with his other employees, except that in the case of Mr. Blow there was only a deed of covenant and no collateral letters. His case is consequently a fortiori of the others.

I am fully conscious of the anomalous consequences which might conceivably arise in other connections from the course adopted by the respondent, but your Lordships are concerned only with the technical question whether the respondent has brought himself within the language of the income tax rule as to contractual payments, and I think that he has succeeded in doing so. That is enough for the decision of the case. It is not likely that many other employers will follow the respondent's example, for few employers would care to take the risk to which the respondent has left himself exposed, namely, that his servants may quit his employment and take their services elsewhere and yet continue to exact the covenanted weekly payments from him.

The result of the views which I have expressed is that in my opinion the appeal should be dismissed and the judgment of the Court of Appeal affirmed.

LORD WRIGHT.—The difference of opinion which this appeal has elicited has caused me some doubt, but after careful consideration I am bound to say that, speaking for myself, I have come to the conclusion that the appeal must fail.

If the case were one in which it was found as a fact in regard to each of the deeds in question that it was never intended to operate as a legal document between the parties, but was concocted to cover up the payment of salary or wages and to make these payments masquerade as annuities in order to evade surtax, it may well be that the court would brush aside the semblance and hold that the payments were not what they seemed. But there is no such finding by the commissioners; indeed, no such case was even suggested; on the contrary, it is admitted that the deeds are genuine and carry an obligation according to their tenor, irrespective of whether the various payees are or are not in the respondent's service at any material date. This is clearly so in the cases not here questioned in which the covenantees are no longer in the respondent's employment. And all your Lordships are of opinion that this is so in the case of Blow, though he is still in the respondent's service, and that the payments in his case are properly deductible.

What then is the difference which distinguishes Blow's case from that of the other covenantees whose cases are to be considered in this appeal? The only difference is to be found in the accompanying letter and form of acknowledgment, both of which are absent in Blow's case. It is on these documents that the commissioners arrive at their conclusion that the payments under the deeds are not annual payments but "in substance payments for continuing service ejusdem generis with wages or salaries" so long as the recipients remain in the respondent's service.

Like others of your Lordships I shall take as typical the case of Allman. The covenant in the deed to pay him is unconditional. It is not conditioned by the contingency of Allman re-engaging or continuing in the respondent's service; the relevance of that contingency is expressly negatived in the recital; and by cl. 3 it is expressly agreed that the payments are to be without prejudice to such remuneration (what that may be is unspecified) as the annuitant will become entitled to in respect of such services, if any, as he may thereafter render to the respondent.

On the footing that the deed is genuine, I do not see any possibility of going behind what appears on the face of the document, or qualifying its effect by documents dehors the deed and in no way embodied in it or regarding the payments as other than annual payments, as it is admitted that ex facie they are. And what the legal effect is as between the covenantor and the covenantee must determine for revenue purposes the character of the payments actually made.

That character is not to my mind changed if the letter of explanation and the letter of acknowledgment can be taken into account.

The letter of explanation quite correctly, and in accordance with the actual terms of the deed, states that there is nothing to prevent Allman from claiming full remuneration for future work from the respondent; the letter goes on to state what is expected, namely, that Allman will " in practice be content " with the provision made by the deed with such additional payment as will, with the payments under the deed, bring his salary up to what he had been previously receiving. This seems to me to be merely the language of hope and expectation and not to be language capable of being construed as an offer which, if accepted by Allman, would bind him to work for the respondent at the reduced rate; that is if in future he did so work, because no one suggests that if he did not work for the respondent his right under the deed would be affected.

But if the letter of explanation, together with the acknowledgment, were treated as constituting a contract, it could only be a contract to pay and accept what may be called the additional sum. I cannot extract from the actual words a promise or right to pay or receive what is called the " full remuneration for future work " ; it is true that Allman would under the deed be entitled to claim " full remuneration " if he were so minded, as a condition of working, but I cannot find any ground for thinking that he ever did so, and still less that the respondent employed him on that footing.

But whatever view is taken, the nature of the obligation embodied in the deed appears to me to be unaffected. I do not stop to examine what is the precise position of Allman and those in like case with him if they go on working in the respondent's employment. It may be that the true inference of fact is that they are working for the additional sum and nothing else, the reason why they are content with this reduced rate being that they are receiving also the annuities under the deed. There may be difficulties in that position. But in any event any such agreement would be merely collateral to the deed.

I may add that I do not understand what is meant by the expression " payments for continuing service ejusdem generis with wages or salaries." The payments must be one thing or the other, either annual payments or wages; there is no room for anything intermediate or in the nature of cy près. And once it is admitted that the deed is a genuine document, there is, in my opinion, no room for the phrase " in substance." Or, more correctly, the true nature of the legal obligation and nothing else is " the substance."

I need not develop this point, as I agree with what has been said by my noble and learned friends, LORD TOMLIN and LORD RUSSELL.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue*; *Boodle, Hatfield & Co.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re BOYER. NEATHERCOAT *v.* LAWRENCE

[CHANCERY DIVISION (Farwell, J.), January 22, 23, 1935]

[Reported [1935] 1 Ch. 382; 104 L.J.Ch. 171; 152 L.T. 553; 51 T.L.R. 259]

Will—Gift to children and after their death to such of brothers and sisters of testatrix "or their heirs" living at her death—"Heir"—Husband of sister of testatrix.

A testatrix by her will gave £600 upon trust to pay the interest thereon upon trusts for the benefit of her two children A. and B. and after the death of both of them to divide the £600 and any accumulated interest thereon equally "among such of my brothers and sisters or their heirs as shall be living at the time of my decease." C. a sister of the testatrix died intestate in 1871, after the death of the testatrix, and she left a husband and six children her surviving.

Held: that the husband did not take any share of the £600 as the heir of his wife C.

Notes. As to gifts to "heirs" see 34 HALSBURY'S LAWS (2nd Edn) 309 et seq., and for cases see 44 DIGEST 861 et seq.

Cases referred to:

(1) *Gittings* v. *McDermott* (1834), 2 My. & K. 69; 2 L.J.Ch. 212; 39 E.R. 870, L.C.; 44 Digest 868, *7234*.

(2) *Re Walton's Trust* (1856), cited 2 K. & J. 738; reversed on other grounds, sub nom. *Re Walton's Estate* (1856), 8 De. G.M. & G. 173; 25 L.J.Ch. 569; 27 L.T.O.S. 22; 2 Jur. N.S. 363; 4 W.R. 416; 44 E.R. 356, L.JJ.; 44 Digest, 869, *7254*.

(3) *Doody* v. *Higgins* (1852), 9 Hare. App. I. xxxii; 1 W.R. 30; 2 K. & J. 729; 68 E.R. 774; 24 Digest 757, *7850*.

(4) *Re Cusin*, [1917] 1 I.R. 63; 18 Digest, 19, *s.*

Adjourned Summons. By her will dated April 13, 1868, the testatrix directed her executor and trustee to invest £600 and pay the interest thereon upon trusts for the benefit of her natural children Emma Boyer and Frederick Boyer, and after the death of both of them to divide the £600 and any accumulation of interest therefrom "among such and so many of my brothers and sisters or their heirs as shall be living at the time of my decease." The testatrix died on April 7, 1868. Emma, a sister of the testatrix, died intestate on Nov. 10, 1871, leaving a husband, Frederick Nicole, and six children her surviving, one of whom was the defendant, Agnes Amelia Williams. The husband, Frederick Nicole, re-married and died on Nov. 18, 1907, leaving two children of his second marriage him surviving, one of whom was the defendant, Edward Charles Nicole. The survivor of the testatrix's two children, Emma Boyer and Frederick Boyer, namely, Emma Boyer, died on March 18, 1930.

The present trustee of the will of the testatrix took out this summons in which the principal question to be determined was whether C. F. Nicole, the husband of Emma Boyer, the sister of the testatrix, took on the death of his wife her share in the £600 as her heir, and, therefore, whether all his children, by both his marriages, participated.

Eardley Wilmot for the trustee.

Wilfrid Hunt for Edwin Charles Nicole, a child of the second marriage of Charles Frederick Nicole, the husband of the testatrix's sister Emma Boyer.

H. O. Danckwerts for A. A. Williams, a child of the first marriage of Charles Frederick Nicole with the testatrix's sister Emma Boyer.

FARWELL, J.—The question which I have to determine is whether under a gift to a person or his heirs, the words "or his heirs" include, or do not include, the husband of the first taker. I have already decided on a previous occasion in this case that the gift was a substitutionary gift and that the words "or his heirs" operate to give the personal estate to the persons who would have become entitled on the death intestate of the first taker to his or her personalty. That, however, does not conclude the question which I am now considering, namely, whether where the first taker was a married woman the persons entitled include her husband.

This matter has been considered to some extent in certain cases and it has been treated by the text writers as a matter which is now settled. I find in HAWKINS ON WILLS (2nd Edn.), p. 123, the rule stated in these terms:

> "A bequest of personal estate to 'A. or his heirs' is construed as a gift by way of substitution to the heirs, in the event of the death of A. before the period of distribution."

Then the learned author goes on:

> "And the word 'heirs' is held to mean the persons who would be entitled to the personal estate of A., by virtue of the statutes of distribution, if he had died intestate, including therefore a widow, but not including a husband."

A statement to a similar effect is to be found in JARMAN ON WILLS (7th Edn.), pp. 1541, 1545. A similar statement up to the last edition, without any qualification, is to be found in THEOBALD ON WILLS; but in the 8th edition of THEOBALD, at p. 369, there is a reference to an Irish case to which I shall have to refer in a moment.

The question really is this: Do the persons who take by way of substitution mean the persons entitled on the death of the first taker as though the first taker had died intestate, that is, without any reference to the statutes of distribution at all, but simply the persons who would take if he had died intestate, or do they mean the persons who take by virtue of the statutes of distribution, or do they mean the next of kin? Now, if the words mean the next of kin that would exclude the widow, if the first taker was a married man, and I think it is quite plain that that is not the meaning which has been attributed to these words in any of the cases. There seems to be little doubt that a widow is one of the persons who is entitled to take under a gift of this sort, and she is entitled to take although there is imported into the gift a reference to the statutes of distribution—indeed she is one of the persons who takes by virtue of those statutes. But in no case, if the words are to be treated as meaning next of kin or as meaning the persons who take under the statutes of distribution, can a husband participate if the first taker is a married woman, because the husband succeeds to his wife's property, not as one of the next of kin, nor by virtue of the statutes of distribution, but by reason of his marital right.

This being so, there appears to be some doubt whether the husband ought to be included or not. The principle upon which the courts have acted in construing the word "heirs" in reference to personal estate seems to be this. The word "heirs" as referring to personal estate is not a very apt word. The courts have said it can be given a proper and reasonable meaning by analogy to the use of the word in connection with real estate, and that, therefore, it can be taken to mean the persons who succeed to the personal estate of the first taker. If that be the ratio decidendi I find it a little difficult to see why it is necessary to import the statutes of distribution at all. I should have thought the logical conclusion would have been that the persons who take are the persons who are what LORD BROUGHAM called in *Gittings* v. *McDermott* (1), the heirs of the personalty, that is to say, the persons who succeed upon an intestacy to the personal estate of the first taker.

But, even if the statutes of distribution are not brought in, there is still a difficulty in the way of the husband, because it may be said that, although he may take his wife's personal property on her death intestate, he does not succeed to it. He takes it, not by way of succession, but by his marital right. That would seem to be a somewhat artificial use of the word "succeed," because for all practical purposes, e.g., paying succession duty, he does succeed to his wife's property, and, had the matter been free from authority, I should have thought the proper conclusion to come to was that the husband was one of the persons who would be entitled to participate in a gift of this kind.

But this matter is not free from authority, because, apart from the textbooks, there is a case which appears to decide the point adversely to the husband—*Re Walton's Trust* (2). That was a decision of KINDERSLEY, V.-C. Unfortunately, the case is not reported, but it is referred to and cited by Wood, V.-C., in *Doody* v. *Higgins* (3). So far as I can gather from the reference to *Re Walton's Trust* (2) in Wood, V.-C.'s judgment, Kindersley, V.-C., decided two points: (i) that the gift was substitutional; (ii) that the husband did not participate. That case went to the Court of Appeal, who reversed the decision on the first point and consequently did not have to consider the second point at all, and if that be so, Kindersley, V.-C.'s decision that the husband was not included in the class to take stands and is a direct authority on the point. That appears to have been the view of Wood, V.-C., in *Doody* v. *Higgins* (3), because, having cited *Re Walton's Trust* (2), he adds this (2 K. & J. at p. 738):

> "The husband does not take by succession—he is not entitled under the Statutes of Distribution, but by virtue of his marital right—a right distinct from and paramount to the statutes of distribution."

Under those circumstances, I think it would not be right for me to decide in favour of the husband in a case of this kind, even though the statement by Wood, V.-C., in *Doody* v. *Higgins* (3) is only dictum, since it appears to have been based on the decision in *Re Walton's Trust* (2).

The matter is not wholly free from authority the other way, because in a comparatively recent case in Ireland, Barton, J., in *Re Cusin* (4), held that in a case of this kind a husband was entitled. Apparently *Doody* v. *Higgins* (3) was cited to him, but he does not make any express reference to it in his judgment. He says at the end of his judgment ([1917] 1 I.R. at p. 66):

> "There was no serious dispute at the Bar except in the case of Sarah. In her case it was contended that under the word 'heirs' her share would pass to her next of kin; and passages were cited from several cases in which 'heirs' of personal property has been held to mean next of kin. But that is because the persons entitled to succeed to the personal property ab intestato were in those cases the next of kin. In the present case it is the husband who is so entitled. It is well settled that a widow, although not strictly a next of kin, takes her share in cases of this kind. Why should not a husband take, when he is the person who is entitled on his wife's death to her personal estate? I therefore hold that, in the events that have happened, S.'s husband is entitled to her share."

If I may say so, with respect, I share the feeling of the learned judge in that case. Why should not a husband take when he is the person who is entitled on his wife's death to her personal estate? I appreciate, however, that it is not strictly accurate to say that a husband takes by succession, and if a substitutionary gift of this kind means either the persons who take by succession or the persons who are entitled under the statutes of distribution, in either case the husband is excluded. At any rate, I do not think that in the circumstances it is open to me to decide otherwise than in accordance with the view expressed by Wood, V.-C., which appears to be founded upon the decision in *Re Walton's Trust* (2). The Irish case is one which is not binding upon me, although, of course, I must treat it with every respect and, as I say, had I thought the matter free from authority I should have been tempted to follow that decision. Under the circumstances I do not think it would be right for me so to decide, and, accordingly, I must hold that the husband is not entitled to participate.

Solicitors: *Sharpe, Pritchard, & Co.*, for *Wootten & Wallis*, Cambridge; *Finnis Downey, Linnell, & Chessher.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

RAAHE O/Y OSAKEYTIO *v.* GODDARD

[KING'S BENCH DIVISION (Lewis, J.), November 20, 1935]

[Reported 154 L.T. 124; 80 Sol Jo. 93]

Sale of Goods—Rejection—Defective quality—Part of goods defective—"Each item of this contract to be considered a separate interest"—Sale of Goods Act, 1893 (56 & 57 *Vict., c.* 71), *s.* 30 (3).

A contract for the sale of timber contained a clause dealing with allowances for overshipment and undershipment, concluding with the words "each item of this contract to be considered a separate interest." The buyer rejected the whole of the goods on the ground that part of them did not comply with the contract specification.

Held: that the stipulation that each item was to be treated as a separate unit was applicable only to disputes with respect to quantity and not to disputes with respect to quality, and that, as part of the goods were defective in quality, the buyer was entitled to reject the whole, in accordance with the provisions of s. 30 (3) of the Sale of Goods Act, 1893, which enacts that where goods which do not comply with a contract are delivered mixed with others which do so comply the buyer may refuse to accept delivery of any part of the contract goods.

Notes. As to buyer's rights on a delivery of mixed goods see 29 HALSBURY'S LAWS (2nd Edn.) 128, and for cases see 39 DIGEST 566, 567. For Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 985.

Case referred to:

(1) *White Sea Timber Trust, Ltd.* v. *North, Ltd.* (1932), 148 L.T. 263; 49 T.L.R. 142; 77 Sol. Jo. 30; 18 Asp. M.L.C. 367; Digest Supp.

Special Case stated by arbitrator.

By two f.o.b. contracts the sellers sold to the buyer consignments of Finnish timber. The contracts were in the form known as "Uniform 1933 contract (f.o.b. form), 1933," adopted by the Timber Trade Federation and by Swedish and Finnish associations. In each contract there appeared, at the end of a clause dealing with questions of overshipment and undershipment, the words: "Each item of this contract to be considered a separate interest." The buyer rejected the goods on the ground that part of them did not comply with the specifications in the contracts.

By the Sale of Goods Act, 1893, s. 30 (3) it is provided that where goods which do not comply with a contract are delivered mixed with other goods which do so comply, the buyer is entitled to reject the whole.

The question in issue was whether that rule applied notwithstanding the express provision of the contracts that each item was to be considered a separate interest.

Le Quesne, K.C., and *H. L. Parker* for the sellers.

Sellers, K.C., and *Gething* (*A. T. Miller, K.C.*, with them) for the buyer.

LEWIS, J. [after dealing with other questions not material to the point here reported, continued:]—Now comes question five, and I have been told I think by both counsel, that as far as they know the point which is raised by this question has never been argued. The question is: Is each of the contracts to be treated as an indivisible whole or are the various items of unsorted redwood and fifths included in the shipment under each contract to be taken as separate or divisible items.

I am told, I think I am right in saying, by both counsel, but certainly counsel for the buyer told me so and counsel for the sellers has not produced any authority to contradict it, that where this expression is to be found in a contract, and, apparently, it is to be found in contracts of this nature, nobody has ever argued that that means that each item in the contract is to be treated as a separate contract. The nearest attempt to any argument of that sort seems to have been made in *White Sea Timber Trust* v. *North* (1). There when the matter came before the court counsel sought to argue that the contract was divisible in the sense that each item formed a separate contract, but MACKINNON, J., pointed out that the point had never been taken before the arbitrator and did not arise to be argued. At all events, nothing more happened and no mention was made of it by MacKinnon, J., in his judgment.

The matter has never been raised expressly before me and was raised expressly before the arbitrator and appears in the arguments as set out in this Case on the part of the sellers, and I confess that I find very great difficulty in saying what those words, "Each item of this contract to be considered a separate interest," mean. Counsel for the sellers argued this point quite properly, and his argument would have to go as far as this—that, if all the items in the contract except one were not in accordance with the specification, the buyer would be compelled to take the one which was. I hope I am not doing any injustice to counsel's argument when I say that I think he was bound to go as far as that. To reduce it to the terms of the present contract and looking at the contract of March 20 it would work out in this way. There were thirteen items under the category of unsorted redwood, one of which, namely, two standards of $1\frac{1}{4}$ in. by 10 in., was entirely without reproach. Two of the others had small percentages of fifth quality, which for the purposes of what I am saying now may or may not render them blameless. I think all the fifth quality or discoloured redwood in the March 20 contract was according to the contract, and if counsel for the sellers is right it means that the buyers would be compelled to take the fifth quality, and the two standards of $1\frac{1}{4}$ in. by 10 in. and possibly the $\frac{7}{8}$ in. by $5\frac{1}{2}$ in. and the 3 in. by 4 in. which only contained 2 per cent. of fifth quality, but would be entitled to reject all the remainder of the parcel.

That may be the answer, but it does strike one as a little curious that where you get goods which are not the goods specified owing to their not coming up to the description or their not being of the dimensions, or in the case of the tins not being packed with a sufficient number of tins in the case or too many tins in the case—that in a matter of that sort the buyer should be bound to take that part of the contract which may only be one item out of 100, but should be entitled to reject the remaining ninety-nine. I heard counsel for the buyer state that it was obvious that the buyers never wanted the fifth quality. I do not know whether that is so or whether it is not; all I know is that it does appear on the correspondence that the sellers were saying: "We are not going to give you the unsorted redwood unless you take the fifth quality," and I am doing no more than forming an inference from the correspondence that it is admitted that the fifth quality would be unfit for joinery purposes. That goes without question, and, as the buyer was wanting timber for joinery purposes I should think it highly probable he did not want the fifth quality. However that may be, it does seem to me to be a curious result if the provision that each item of this contract must be considered as a separate item means that each item is to be looked at separately for all purposes. If it means that, you may get the curious position of a man being compelled to take something which he has only taken into the contract as a makeweight and is useless to him without the rest of the contract. He is entitled to reject the remainder of the contract although he may want to get the goods which are in the contract and may be the only things he does require. That is only speculation, but it does show the curious result of this clause if it means what it has been argued it means, namely, that each of these items is to be looked upon for all purposes as a separate contract and is to be dealt with separately.

I need not say more with regard to it than this. It is, of course, perfectly clear that under ordinary circumstances a contract for a parcel or parcels of goods of this sort is an entire contract. A reference was made to Benjamin on Sale, and I think it is conceded by everybody that in ordinary circumstances it is all one entire contract. Of course, there is nothing to prevent parties agreeing, where they are buying half a dozen commodities, or may I say a commodity in half a dozen different lengths and sizes, to treat each length and each size as a different contract. What I have to decide is whether the parties in this case have done that which it is contended they have done.

If that expression in the contract means what it is suggested it does, it is a little difficult to see why it was necessary to have cl. 16 in the contract which deals with claims as to quality. Counsel for the sellers in answer to the point made by counsel for the buyer in regard to that says: "Oh, but cl. 16 only draws a distinction between cases of what I may call complaint as to quality and complaint as to discoloration—that is to say, where you get one parcel, a part of which is discoloured, you may deal with that part of the parcel which is not discoloured, but where you are dealing with a complaint as to quality of a parcel, you have to put that parcel, so to speak, on one side and keep it intact but still you may go on and deal with the others." I do not think that that argument convinces me or that it is an answer to the point counsel for the buyer makes, namely that, if each of these parcels or items are separate contracts why was it necessary to put in cl. 16?

Although I find considerable difficulty in making up my mind about this, I cannot help thinking that the real answer is that the words: "Each item of this contract to be considered a separate interest," only refers to quantity. That is to say, when you are dealing with the quantity of each item, each item has to be looked upon as a separate contract. I have not been referred to any authority on the matter, and I feel certain if there had been any authority I should have been referred to it. I have to decide this case without the assistance of any authority, and I cannot help thinking that the real answer is as I have said, in view of the fact of the words "each item shall be a separate interest" are placed at the end of a paragraph which deals solely with the question of quantities shipped, overshipment or undershipment, and bearing in mind that there is at least one condition which would seem to be redundant if the clause "each item of this contract to be considered a separate interest," meant that for all purposes each item is to be a separate contract. I find that the contract is not separate or divisible for the purpose for which this matter comes before me. It is not a question of quantities shipped at all, but a question whether or not the sellers complied with the contract as to the condition or quality of the articles. I, therefore, find that the answer to question five is that the various items of the contract are not to be taken as separate or divisible items.

Solicitors: *Wm. A. Crump & Son*; *Blundell, Baker, & Co.*, for *Snowball, Kyffin, Taylor, & Pruddah*, Liverpool.

[*Reported by* V. R. Aronson, Esq., *Barrister-at-Law.*]

DUNN TRUST, LTD. *v.* FEETHAM

[Court of Appeal (Greer, Slesser and Roche, L.JJ.), May 22, 23, July 5, 8, 1935.]

[Reported [1936] 1 K.B. 22; 105 L.J.K.B. 52; 154 L.T. 53]

Moneylender—Memorandum—Sufficiency—Application by moneylender for rectification of error in memorandum—Bankruptcy of borrower in respect of previous loan transaction—New loan of £100 *at* 64 *per cent. interest granted on the terms that part of the loan should be retained by moneylenders as compensation for loss on previous loan—Memorandum setting out compensation term and stating loan was* £100 *and interest* 64 *per cent.—Default clause stating loan was* £140*—Moneylenders Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *ss.* 6, 15.

A borrower who had been adjudicated bankrupt in respect of loans which he had obtained from moneylenders was later granted by them a further loan of £100 upon the terms that £50 was to be retained by the moneylenders as compensation for the loss which they had incurred through his bankruptcy. In the memorandum and promissory note it was stated that the loan was £100 with interest at the rate of £64 per cent. per annum, payable by fourteen consecutive monthly instalments of £10 each, but in the default clause in the memorandum the amount of the loan was stated to be £140. The borrower defaulted and the moneylenders brought an action for the balance of principal and interest due on the promissory note. The borrower contended that the memorandum did not contain all the terms of the contract and as it did not show the amount of the principal of the loan, and the interest charged on the loan expressed in terms of a rate per cent. per annum as required by the Moneylenders Act, 1927, s. 6 (2). The moneylenders sought rectification of the statement as to the amount of the loan in the default clause.

Held: the memorandum did not comply with s. 6 (2), and the contract for repayment of the loan and payment of interest was, therefore, unenforceable, because (i) per Greer, L.J., the £50 retained by the moneylenders was "interest" within the definition contained in s. 15 (1) of the Act, and the rate of interest was, accordingly, more than the 64 per cent. stated in the memorandum; (ii) per Slesser and Roche, L.JJ., the £50 retained by the moneylenders was not actually lent to the borrower, the principal of the loan was, therefore, only £50, and neither the principal nor the interest was correctly stated in the memorandum.

(iii) per Slesser and Roche, L.JJ., the statement in the default clause that the amount of the loan was £140 made it impossible to say that all the terms of the contract had been included in the memorandum, and it was impossible for an application to be made to the court by a moneylender to rectify a mistake in a note or memorandum of the contract of loan required by the Moneylenders Act, 1927, or for a moneylender to talk of falsa demonstratio.

B. S. Lyle, Ltd. v. *Chappell* (1), [1932] 1 K.B. 691, distinguished.

Notes. Distinguished: *Re British Games, Ltd.*, [1938] 1 All E.R. 230.

As to the note or memorandum required by the Act, see 23 Halsbury's Laws (2nd Edn.) 190, para. 280. For the Moneylenders Act, 1927, ss. 6, 15, see 16 Halsbury's Statutes (2nd Edn.) 386, 397.

Cases referred to:

(1) *B. S. Lyle, Ltd.* v. *Chappell*, [1932] 1 K.B. 691; 101 L.J.K.B. 185; 146 L.T. 236; 48 T.L.R. 119, C.A.; Digest Supp.

(2) *Reading Trust, Ltd.* v. *Spero*, [1930] 1 K.B. 492; 99 L.J.K.B. 186; 142 L.T. 361; 74 Sol. Jo. 12; 46 T.L.R. 117, C.A.; Digest Supp.

(3) *Temperance Loan Fund, Ltd.* v. *Rose*, [1932] 2 K.B. 522; 101 L.J.K.B. 609; 147 L.T. 330, C.A.; Digest Supp.

Appeal by the plaintiff moneylenders from a decision of du Parcq, J.

The plaintiffs, the Dunn Trust, Ltd., were a firm of registered moneylenders. The defendant, Robert Feetham, the borrower, had, until February, 1932, been a member of a firm of stockbrokers, and had had many loan transactions with the moneylenders. In July, 1933, he was adjudicated bankrupt and the moneylenders proved in that bankruptcy for £257 in respect of principal and interest. No dividend was paid. In May, 1934, the borrower approached the moneylenders with a view to a further loan, and an arrangement was come to between the parties that the moneylenders would make a loan to the borrower of £100 on the condition that the borrower would give the moneylenders £50 in part satisfaction of the losses which the moneylenders had sustained by reason of the borrower's bankruptcy, and a loan was accordingly made on that footing.

The memorandum of the contract which was signed by the borrower was in the following terms:

> "The Dunn Trust, Ltd., 11, Princes-street, Hanover-square, London, W.1. Note or memorandum for the proposed advance to be made to me by you this 28th day of May, 1934, of the sum of £100 with interest at the rate of £64 per cent. per annum on a promissory note payable to The Dunn Trust, Ltd., 11, Princes-street, Hanover-square, W.1, or at such place as they may direct, by fourteen consecutive monthly instalments of £10 each, commencing on the 28th day of June, 1934, and the balance on the fourteenth month, and in the event of default in payment of any instalment or part thereof then the said The Dunn Trust, Ltd., shall be at liberty at their option to demand payment of the whole of the balance of the said sum of £140 remaining unpaid and interest at the rate aforesaid to the date of such demand thereupon the whole of the said balance with interest as aforesaid whether in respect of principal or interest shall bear simple interest on that sum at the rate of £64 per cent. per annum from the date of such demand until payment and until such demand continue to pay the said monthly instalments and to pay interest at the above rate upon all overdue instalments until payment and all moneys paid on account of the said advance and interest shall be applied firstly in payment of the interest due to that date and then to principal. I agree the above rate of interest as a fair rate of interest for the risk taken by you in advancing me the sum of £100 on the security of the promissory note. Dated this twenty-eighth day of May, 1934. Out of this advance please retain the sum of fifty pounds to compensate you for part of the loss you sustained by reason of my last bankruptcy. I acknowledge to have received a true copy of this Note or Memorandum and that it was signed before the money was advanced or the security above-mentioned given.
>
> (Signed) R. Feetham."

The promissory note, signed in accordance with the memorandum, was as follows:

> "London, May 28, 1934. I, Robert Feetham, of Hill Top, Warlingham, promise to pay The Dunn Trust, Ltd., of No. 11, Princes-street, Hanover-square, W.1, or at such other place as you may direct, the sum of £100 together with interest at the rate of £64 per cent. per annum by   consecutive monthly instalments of £10 each the first of such instalments commencing on the twenty-eighth day of June, 1934, and the balance on the fourteenth month and in the event of default in payment of any instalment or part thereof then The Dunn Trust, Ltd., shall be at liberty at their option to demand payment of the whole of the balance with interest as aforesaid to the date of such demand thereupon the whole of the said balance with interest as aforesaid shall immediately become due and payable and such balance of the said sum and interest so remaining due as aforesaid, and whether in respect of principal or interest shall bear simple interest on that sum at the rate of £64 per cent. per annum from the date of such demand until payment and until such demand to continue to pay the said monthly instalments, together with interest at the above rate upon all overdue instalments until payment and all monies paid on account of the said advance and interest shall be applied firstly in payment of the interest due to that date and then to principal. (Signed) R. Feetham, Hill Top, Warlingham."

Only one instalment of £10 was paid, and the date of that payment was July 2, 1934. A

On Sept. 1, 1934, the moneylenders brought an action against the borrower as the maker of the promissory note dated May 28, 1934, claiming £96 2s. 8d. as being the amount due, but unpaid, after giving credit for the instalment of £10.

Du Parcq, J., held, that the moneylenders were not entitled to recover because the provisions of s. 6 of the Moneylenders Act, 1927, had not been complied with. According to the evidence the amount lent by the moneylenders to the borrower was £50, B and that being so it followed that the note or memorandum did not contain all the terms of the contract. Both the amount of the principal and of the interest had been incorrectly stated. There must, therefore, be judgment for the borrower.

The Moneylenders Act, 1927, provides:

> s. 6: "(1) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender after the commencement of this Act, C or for the payment by him of interest on money so lent, and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memor- D andum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be; (2) the note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as E calculated in accordance with the provisions of the First Schedule to this Act."
>
> s. 15: "(1) In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say:
>
> "Interest does not include any sum lawfully charged in accordance with the provisions of this Act by a moneylender for or on account of costs, charges, or expenses, but save as aforesaid, includes any amount, by whatsoever name called, F in excess of the principal, paid or payable to a moneylender in consideration of or otherwise in respect of a loan.
>
> "'Principal' means, in relation to a loan, the amount actually lent to the borrower."

The moneylenders appealed.

G

Croom-Johnson, K.C., and *R. F. Levy* for the moneylenders.
Harold S. Simmons for the borrower.

GREER, L.J.—Several difficult questions have been raised in the course of this appeal, but on one ground I am quite clear that the judgment of the learned judge below was right and that this appeal should be dismissed. The action was brought for money lent and interest. The Dunn Trust, Ltd., are moneylenders, and as such are H subject to the stringent provisions of the Moneylenders Act, 1927. In many cases borrowers, having obtained money by way of loan from moneylenders, have refused to pay the money back, relying on some technical provision in the Act. That does not seem to me to be entirely in accord with my abstract sense of justice. The statute, however, now states in its various provisions the requirements of the legislature as to how a moneylending business should be conducted in this country, and those provisions I must be complied with.

In this case the relevant facts are these: The borrower Feetham had been a stockbroker for a number of years, and was well acquainted with the manner in which interest is calculated. He had had several moneylending transactions with the moneylenders before the present one, extending over a period of several years, and had escaped from liability upon the last of those previous moneylending transactions by his bankruptcy in July, 1933. As he had not obtained his discharge the moneylenders could not call upon him to repay the money advanced by them; all they could do was to prove in

A bankruptcy against his estate for a dividend. Not having paid anything in respect of the earlier transactions the borrower went to the moneylenders and wanted to borrow some more money. According to the evidence of Kerman, the managing director of the moneylenders' company, which the judge accepted, the borrower arranged that if £100 were lent to him by the moneylenders he would agree to pay to the moneylenders £50 out of the £100 to compensate them for the loss they had previously incurred through B the borrower's bankruptcy.

One of the questions involved in the case is whether the note or memorandum which was signed by the borrower accurately states the transaction between the parties in the way required by s. 6 of the Moneylenders Act, 1927. Subsection (2) of that section provides that

> C "the note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act."

D It is to be noted that, under the provisions of s. 6 (1), not only must the note or memorandum be signed personally by the borrower before the money is lent, but also a copy of such note or memorandum must be sent to the borrower within seven days of the making of the contract. Unless both of these events happen the contract for the repayment by the borrower of money lent to him by a moneylender is unenforceable.

The question here, then, is whether, when the memorandum is looked at, it is right E to regard the £50 as being a payment of interest within the meaning of s. 15. If so, then there is no true statement in the memorandum of interest at a rate per cent. per annum. The question, therefore, to be determined is whether an agreement by the borrower that, in consideration of being lent £100, the lender might retain £50 out of the £100, and so to that extent compensating him for a loss on a previous transaction, does not make the £50 interest within the meaning of the Act. If it is interest then F there was no true memorandum of the contract within the meaning of s. 6 of the Act. Section 15 of the Act contains a definition of the term "interest." It provides that

> "'Interest' does not include any sum lawfully charged in accordance with the provisions of this Act by a moneylender for or on account of costs, charges, or expenses."

G It cannot be suggested that the £50 comes within those words. The section goes on to provide:

> "but save as aforesaid, includes any amount, by whatsoever name called, in excess of the principal, paid or payable to a moneylender in consideration of or otherwise in respect of a loan,"

and it is said that the £50 comes within those words. I find it impossible to come to H any other conclusion than that the £50 retained by the moneylender was an amount in excess of principal paid to the moneylender in consideration of a loan. If that be so, it concludes the case in favour of the borrower. The learned judge below decided that there was a loan for £50 only, and that, therefore, the amount of the principal was not truly stated in the memorandum. I am inclined to disagree with the judge's decision that the loan was not a loan of £100 but only of £50, but this is a matter of no con- I sequence, as in either case the memorandum untruly stated the rate of interest.

The learned judge also dealt with the question whether the interest was correctly stated, and came to the conclusion that the interest charged on the loan was not truly expressed in the note or memorandum in terms of a rate per cent. per annum. It is, however, not necessary to enter into a discussion of that question.

I am also inclined to the view that the statement in the memorandum that in the event of default in payment of any instalment or part thereof the moneylenders could "demand payment of the whole of the balance of the said sum of £140 remaining unpaid" was not a mere slip of the typist in typing the document, but that the person who typed the document intended to insert £140 in the memorandum in the case of a default. I have some difficulty in coming to a clear decision as to the truth with regard to this matter, and I do not base my decision in the case on this point. The cases cited by counsel do not seem to me to have any application to the facts of the present case. Even if the argument that the aid of the court can be sought in order to rectify the mistake be accepted, and rectification of the document were at all possible, inasmuch as the seven days after the making of the contract, within which a copy of the note or memorandum of the contract must be sent to the borrower, have elapsed, the contract, even if the memorandum were rectified, would nevertheless be unenforceable.

I ought, perhaps, to refer to the decision of the Court of Appeal in *B. S. Lyle, Ltd.* v. *Chappell* (1). In that case the borrower agreed with the moneylender that the money lent on the loan in question should be applied in repayment of an existing debt of the borrower to the moneylender. The contract gave the moneylender nothing more than he was entitled to apart from the contract. That fact distinguishes that case from the present case where the moneylender was getting something from the borrower which he could not get except under the contract for the loan.

In my view, the decision of the learned judge in the court below was correct, and this appeal must be dismissed.

SLESSER, L.J.—I have come to the conclusion, having regard to the provisions of the Moneylenders Act, 1927, that no more than £50 was actually lent to the borrower, and that, therefore, the principal of the loan was only £50. That being so, it is impossible to say that the interest was accurately stated in the memorandum as being £64 per cent. per annum, and, therefore, as neither the principal of the loan nor the interest charged on the loan was accurately stated in the memorandum the contract for the repayment by the borrower of the loan cannot be enforced.

Speaking for myself, I have come to a clear determination with regard to the insertion of £140 in the body of the memorandum instead of £100. In my view, owing to the fact that £140 was inserted in the body of the memorandum, it is impossible to say that all the terms of the contract have been included in the memorandum. I do not think it is necessary to inquire whether the insertion of £140 in the memorandum was due to a clerical error or any other kind of error, but only whether the insertion of that amount is material. SCRUTTON, L.J., in *Reading Trust, Ltd.* v. *Spero* (2), said ([1930] 1 K.B. at p. 505):

> "It was said in the first loan that the note of the contract was for payment of £200 and £60 per cent. interest by consecutive monthly instalments of £20 each, the first payable on Feb. 13, and the balance in the fourteenth month. Such a contract, a loan for thirteen months, would need thirteen consecutive instalments; that is to say, £260, and a balance to discharge it. The promissory note said so, but it was said the contract ought to have said 'thirteen' and did not. This difference is too trivial to notice."

SCRUTTON, L.J., referred to that case in *Temperance Loan Fund, Ltd.* v. *Rose* (3), and said ([1932] 2 K.B. at p. 527):

> "In *Reading Trust, Ltd.* v. *Spero* (2), I said that the particular difference there relied upon was too trivial for notice. Of course that again must in each case turn upon what the particular variation is."

The test, therefore, is whether the error in the memorandum is too trivial for notice, or whether it is a material error. In the present case we have had the evidence on affidavit of the lady who typed the document as to how she came to make the mistake. I do not think, however, that her evidence deals with the substance of the matter. A clerical error may be very serious. In the present case the error was a material error, as it is impossible to say that the insertion of £140 in the memorandum as being the amount of the principal sum due, instead of £100, was an error too trivial for notice.

It has been suggested that this was a case of a mutual mistake, and that the court has power to rectify the mistake, and reference was made to the jurisdiction of the court to rectify mistakes in documents in cases under the Sale of Goods Act, 1893, and the

Statute of Frauds. But I do not think that the analogy of cases under those Acts applies to the present case. It is impossible for an application to be made by a moneylender to the court to rectify a mistake in a note or memorandum of the contract of loan required by the Moneylenders Act, 1927, or for a moneylender to talk of falsa demonstratio. I express no opinion with regard to the policy of the law as to moneylenders. That is not a relevant matter for this court to consider. It is a matter for the legislature to deal with. For these reasons I agree that this appeal must be dismissed.

ROCHE, L.J.—I agree that this appeal should be dismissed, inasmuch as there was a failure by the moneylenders to set out in the memorandum of the contract required by s. 6 of the Moneylenders Act, 1927, a true statement as to the amount of the principal of the loan, namely, the amount actually lent to the borrower, or as to the interest charged on the loan according to the definition of "interest" in s. 15 of that Act, and consequently under s. 6 (1), of the Act the contract for the repayment by the borrower of the money lent to him by the moneylenders is unenforceable. I only desire to add a few words as to the distinction between *B. S. Lyle, Ltd.* v. *Chappell* (1) and this case, as I understand it. In that case the memorandum truly represented the transaction between the parties. The borrower who owed money to the moneylender borrowed more money from the same moneylender, and agreed that the moneylender should retain sufficient money out of the second loan to repay the amount due and unpaid on the first loan, whereas in the present case the memorandum did not truly represent the contract between the parties, and the £50 which was paid by the borrower to the moneylenders to compensate them for the loss they had sustained by reason of the borrower's bankruptcy was not paid in respect of any debt which the moneylenders could enforce, as the only right which the moneylenders had was to prove in the bankruptcy against the borrower's estate for a dividend. I do not accept counsel's argument that payment by the borrower to the moneylenders of the £50 was not part of the consideration for the loan. In my opinion, it was part of the consideration. I think that the judgment of the learned judge in the court below was right on that ground. As to the point with reference to the insertion in the body of the memorandum of £140 instead of £100, I entirely agree with the observations of SLESSER, L.J.

Appeal dismissed.

Solicitors: *Woolfe & Woolfe*; *John J. Hands.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

EYRE *v.* MILTON PROPRIETARY, LTD.

[CHANCERY DIVISION (Lord Wright, M.R., Romer and Greene, L.JJ.), December 18, 1935]

[Reported [1936] Ch. 244; 105 L.J.Ch. 121; 154 L.T. 120; 52 T.L.R. 208; 80 Sol. Jo. 15]

Company—Director—Retirement—Determination by ballot—" Ballot"—Lot.

Article 85 of the articles of association of the defendant company provided that one-third of the directors were to retire annually, but were eligible for re-election at the ordinary general meeting of the company, throughout which they should act as directors, and continued: " The directors to retire in the year 1925, . . . shall be determined by ballot. In every subsequent year the directors to retire shall be those who have been longest in office, and when two or more of such directors shall have served for an equal period, then their retirement shall be determined by ballot." In 1932 the plaintiff became a director of the company, and at that time there were seven other directors, two of whom were additional directors appointed under art. 90 which empowered the board to appoint such directors, but provided that any director so appointed should hold office " only until the next following ordinary general meeting of the company, and shall then be eligible for re-election." By art. 101 the managing director was not liable to retire by rotation.

Held: (i) on the true construction of art. 85 " ballot" meant " lot"; (ii) in view of the terms of art. 90 the two additional directors would cease to hold office as soon as an ordinary general meeting began, and, therefore, the number of directors at such a meeting to be taken into consideration for the purposes of art. 85 was five (the ordinary directors other than the managing director).

Notes. The wording of art. 90 of Table A scheduled to the Companies Act, 1948 (which reproduces art. 74 of the Table scheduled to the Companies Act, 1929), is somewhat similar to art. 85 in the present case, the word " lot" being used instead of " ballot": see the judgment of LORD WRIGHT, M.R., infra.

As to retirement of directors see 6 HALSBURY'S LAWS (3rd Edn.) 319, 320, and for cases see 9 DIGEST (Repl.) 551, 552. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

(1) *Re Tewkesbury Gas Co., Tysoe* v. *Tewkesbury Gas Co.*, [1912] 1 Ch. 1; 80 L.J.Ch. 723; 105 L.T. 569; 28 T.L.R. 40; 56 Sol. Jo. 71; 18 Mans. 395, C.A.; 10 Digest (Repl.) 807, *5242*.

Appeal by plaintiff from an order of EVE, J.

The facts and arguments appear in the judgment of LORD WRIGHT, M.R.

Sir Stafford Cripps, K.C., and *Gordon Brown* for the plaintiff.

Cyril Radcliffe, K.C., and *Heckscher* for the defendants.

LORD WRIGHT, M.R.—This is an interlocutory appeal from an order of EVE, J., and it raises a point of some interest, and, indeed, of some difficulty under the articles of association of this company.

The plaintiff is a director of the company. He was elected in February, 1934, and the question has arisen whether, under the articles of association and on the facts of the case, he is a retiring director at the end of the current year. The articles of association provide for a certain number of directors. They are at present six in number, the chairman and five others, and there are in addition two other directors, who are called additional directors. The article in question is art. 85, and it is in these terms:

> " At the ordinary meeting in the year 1925, and in every subsequent year, one-third, or the nearest number next below one-third, of the whole number of directors, shall retire from office, and the meeting shall elect qualified members in their place. A

> retiring director shall be eligible for re-election at the meeting at which he retires, and shall act as a director throughout that meeting. The directors to retire in the year 1925, unless the directors agree among themselves, shall be determined by ballot. In every subsequent year the directors to retire shall be those who have been longest in office since their last election, and when two or more of such directors shall have served for an equal period, then their retirement shall be determined by ballot."

The points which arise on the construction of that article are two. One point was not taken before Eve, J., and it is taken now for the first time, and that is what is meant by "the whole number of directors," one-third of whom, or the nearest number next below one-third of whom, are to retire from office in the manner prescribed by the article.

The second point is what is meant by the word "ballot," if there are two or more directors to whom the article would apply in the absence of a determination as to who are to retire. The position is that the plaintiff and the chairman are both primâ facie liable to retire under this rule. They have served for an equal period, and if the number of directors who, under art. 85, are to retire from office in the current year are two, then a conflict will arise between the plaintiff and the chairman, Mr. Clough. If, on the other hand, the number of directors, who, under art. 85, have to retire is not two but one, then that one will not be the plaintiff, but will be Mr. Knox, another director. The directors are contemplating deciding the matter on the footing that there are these two directors, the plaintiff and Mr. Clough, who are liable to retire, and they are proceeding to determine as between these two which of them is to retire by a secret vote, because that is the meaning which they attach to the word "ballot." That is the second question, and it is the question on which Eve, J., gave his decision. He held that the word "ballot" meant a secret vote, whereas it is contended on behalf of the plaintiff that it means, not a secret vote, but a drawing by lot. Both these questions are questions of some nicety, and either of them would be decisive of this appeal, but I think it better, as both points have been argued, to deal with both of them, especially as the first point was not before the learned judge.

As to the second point, which is the point of more general interest, that is to say, whether the word "ballot" means a secret vote or a drawing by chance, the word itself is clearly capable of either meaning, and after hearing the references to the history of this word in the course of company legislation, and also after being referred to a number of other Acts in which the word has been used, the first conclusion at which I arrive is that the meaning of the word must be determined, wherever you have a company using a set of articles of its own instead of Table A, by the construction of the articles as a whole. We have been referred to the Building Society Acts and to the Militia Acts. I do not deal with them, because they relate to an entirely different subject-matter from that which has to be dealt with now in dealing with this company. We have been referred to the Companies Clauses (Consolidation) Act, 1845, where the word "ballot" was used in s. 88. It provides there:

> "The directors appointed by the special Act" [and others in their place] "shall retire from office at the times, and in the proportions following: the individuals to retire being in each instance determined by ballot among the directors."

So the word "ballot" starts in this connection at a very early period of company legislation. In Table A in the Companies Act, 1862, there is a very similar provision in art. 59.

> "The one-third or other nearest number to retire during the first and second years ensuing the first ordinary meeting of the company shall, unless the directors agree among themselves, be determined by ballot; in every subsequent year the one-third or other nearest number who have been longest in office shall retire."

That is very similar in terms in effect and in language to the article here. In 1906 the Board of Trade, acting under the powers given to them by the Act of 1862 to alter the tables, altered among other things the language of that article which I have just read, substituting the word "lot" for the word "ballot," and so the term has been used

in the Companies Acts, and now appears in art. 74 of Table A, scheduled to the A
Companies Act, 1929:

> "The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot."

The word "ballot" clearly may cover a case in which the decision depends on chance B
or by lot. We have been referred to *Re Tewkesbury Gas Co.*, *Tysoe* v. *The Co.* (1). There is no decision on this point, but the language there, which I imagine is quite usual, was to be found in a debenture, and the clause was:

> "The debentures to be paid off will be determined by ballot, and six calendar months' notice will be given by the company of the debentures drawn for payment," C

so that there the word is clearly used, as it well may be used, in the sense of the name or a little ball or a piece of paper or whatever it is being put into some receptacle, mixed up with others, and drawn out. That is, of course, a matter of chance. That is a "lot," and it is chance in such circumstances which determine what the result is to be. The word "ballot" has been, undoubtedly, used in other circumstances as indicating a
secret vote, but when I look at the language of art. 85 in this case, and consider the D
circumstances, the view at which I have arrived is that the language here "by ballot," and the proper construction of the words "by ballot," is "by lot." No doubt, it is purely an administrative matter for the directors to ascertain in the case of doubt or conflict which of the possible directors is to retire at any particular time, but art. 85 contains no provision at all as to who is to determine the ballot, if by "ballot" is meant
a vote. It is perfectly true that it might be implied that the persons to ballot would be E
and must be the directors, but, on the other hand, if it is the directors who are to vote, if the matter is to be determined by a vote of the directors, whether secret or not, it is clear that very serious administrative difficulties would arise. There might, for instance, be an equality of vote, and then there is no provision at all for who is to give the casting vote. There would be an absolute impasse without any provision being made in the
articles, and that difficulty is peculiarly illustrated by the provision relating to the year F
1925. It is provided that the directors, who shall retire in the year 1925, unless the directors agree among themselves, shall be determined by ballot. If, in such a case, "ballot" means a secret vote, there has been a failure to agree and that failure may be produced in the secret vote, and, as I have said, nobody would be able to settle the difficulty in the case of an equality of votes.

As I read these words, they presuppose first an attempt among the directors to agree, G
and then the determination of the question who is to retire by something other than the agreement or the choice of the directors, and that can only be by the decision of the lot or by chance, and then in every subsequent year the same thing is to happen in a different way. You have, first, to ascertain who have been longest in office since their last election. If there are two or more of such directors who have served for an equal
period, then their retirement is to be determined by ballot. Although the language is H
capable of either meaning in the abstract, I think that when regard is had to the precise terms used and to the reason, probabilities, and practical advantages of the one interpretation as contrasted with the other, of the two meanings to be put on the word "ballot," the right one is the word "lot." That is what the plaintiff contends for.

The other point, as I have said, is what is meant by the words "of the whole number
of directors" in art. 85, because it is essential to ascertain that in order to determine I
what is the number of directors who have to retire in any particular year. On the one side it is contended that the number of directors constituting the whole number for this purpose is seven. That is the defendants' contention. On the part of the plaintiff it is contended that "the whole number of directors" is not seven, but five. On the former view the number of retiring directors would be two; on the other view the number of retiring directors would be one. It is clear that the total number of directors for this purpose does not include the managing director. That is clear under art. 101, because art. 101 expressly says:

A

> "A managing director shall not, while he continues to hold that office, be subject to retire by rotation, and he shall not be taken into account in determining the rotation of retirement of directors."

Therefore, that reduces the possible number to either seven or five. The question whether seven or five is the correct number is to be ascertained by taking into consideration the terms of art. 90, which provides:

B

> "The board may from time to time appoint additional directors, but so that the total number of directors shall not exceed the prescribed maximum, but any director so appointed shall hold office only until the next following ordinary general meeting of the company, and shall then be eligible for re-election."

The point to be considered depends for its answer on the introductory words of art. 85 C as compared with the words of art. 90, and also certain later words of art. 85. There must be some point of time at which it must be ascertained who are "the whole number of directors" to whom must be applied the provision relating to retirement, and the time is to be at the ordinary general meeting. At the ordinary general meeting it is clear under art. 90 that the two additional directors will not be in office. They are to hold office "only until the next following ordinary general meeting of the company," that is D to say, at the moment when the next following ordinary general meeting of the company begins they are no longer in office, whereas the other five directors, whether retiring or not, are to act as directors throughout the meeting, and there is no express provision as in art. 90 that their office is to cease until—that is to say, just before—the ordinary general meeting. It follows from that, in my opinion, that when you take the critical time, the commencement of the ordinary general meeting, the number of directors that E you have to consider are the directors, exclusive not only of the managing director, but also of the two additional directors. That being so, the number to be considered is only five and "one-third, or the nearest number next below one-third," of five is obviously one, and it is not disputed that if there is only one director who, under the articles, is to retire, that director is not the plaintiff, but it is Mr. Knox.

On both these grounds, therefore, it seems to me, in my judgment, that the appeal F should be allowed, and an order made in the terms asked for. The exact words of the order which the court makes may be considered at the end of the judgments.

ROMER, L.J.—The position at the time when this motion came before EVE, J., was thought to be this, that Mr. Knox, who had been the longest in office, was due to retire, but that the plaintiff and Mr. Clough, who had been an equal time in office, not both G were to retire, but one of them was to retire. The dispute between the parties was whether it was Mr. Clough or whether it was the plaintiff who should join Mr. Knox. That is, as I understand it, the position with regard to the retirement. Accordingly, the notice of motion before EVE, J., was in these terms:

> "Take notice that this honourable court will be moved," and so on, "for an order restraining the defendant company from stating in the notice convening its ordinary H general meeting about to be convened or in any report accompanying such notice that the plaintiff and not the defendant Clough is one of the directors retiring by rotation, unless and until the question which of them is the director so retiring shall have been determined by drawing of lots and also restraining the defendant Clough, as chairman, from submitting and the defendant company from passing at such ordinary general meeting any resolution appointing or purporting to appoint any I other person to be a director in the place of the plaintiff, as being the director retiring by rotation at such meeting, unless the plaintiff shall have first been selected as the director to retire thereat by a drawing of lots."

When the matter comes before us, however, the plaintiff had thought this over further with his advisers, and had come to the conclusion that it was possible that neither he nor Mr. Clough would have to retire at the ordinary general meeting. Accordingly, the notice of appeal asks, in the first place, for an injunction

> "restraining the defendant Clough as chairman of the defendant company from submitting, and the defendant company from passing, until after judgment in this

> action or further order, at the ordinary general meeting of the defendant company convened for Dec. 19, 1935, or at any adjournment thereof any resolution appointing or purporting to appoint any other person to be a director in the place of the plaintiff, as being a director retiring by rotation at such meeting," A

and he only asks in the alternative for the relief that he had asked for before EVE, J., so that if he be right in the point with which the MASTER OF THE ROLLS has just dealt, B this relief must be given in accordance with the first part of the notice of appeal. If, however, he be wrong on that point, but right on the first point with which the MASTER OF THE ROLLS dealt in his judgment, then the plaintiff would be entitled to the alternative relief that he asks for in the notice of appeal.

I have come to the same conclusion as that to which the MASTER OF THE ROLLS has come upon both those points. Art. 85 provides as follows, and I am reading now the C last sentence of the article: "In every subsequent year the directors to retire shall be those who have been longest in office since their last election, and when two or more of such directors shall have served for an equal period, then their retirement shall be determined by ballot." "Subsequent year" means, subsequent to the year 1925, and if those words had not been preceded by a sentence which I will read in a moment, I do not think that anyone would have suggested, or at any rate could have suggested with D any chance of success, the "ballot" there meant a secret vote, because the secret voters are not determined. Nothing is said whether the secret voters are to be the two or more directors who have been an equal time in office, or whether the secret voters are to be the whole body of directors, or whether they are to be the whole body of directors excluding the two or more who have been longest in office, or whether the secret voters are to be the shareholders of the company in general meeting. In these circumstances, E it seems to me impossible to think that the word "ballot" there meant anything more than by lot, but the sentence with which we have to deal in this case, and which I have just read, is preceded by these words:

> "The directors to retire in the year 1925, unless the directors agree among themselves, shall be determined by ballot."

EVE, J., thought that those words, "unless the directors agree among themselves," F were sufficient to show that the ballot was to be a ballot amongst the directors themselves, the people who had been unable to agree. In his judgment he said this:

> "In my opinion, art. 85 indicates first that certain things are to be done if the directors are unanimous, that is to say, if there is no difference of opinion amongst them, certain things will be done as prescribed in the first part of the clause. If G they do not agree, I am of the opinion that the point in dispute is to be submitted to a secret vote where the names of the directors voting are concealed from the individuals who are ultimately to be turned out."

That, of course, was construing the sentence that I have just now read, and if in that sentence the word "ballot" meant a secret vote, of course "ballot" in the last sentence of art. 85 must, in accordance with the ordinary rules of construction, be given the same H meaning, but with the greatest deference to EVE, J., I am unable to arrive at the conclusion that by the use of those words, "unless the directors agree among themselves," the parties to the articles of association have shown that by "ballot" they meant a secret vote amongst the directors themselves. I confess that the words "unless the directors agree among themselves" have just the opposite effect on my own mind. They strongly suggest to me that if the directors cannot agree, then the directors are I to have nothing more to do with it at all, and the matter is then to be determined by chance.

Upon the other question which has been raised for the first time in this court, I have nothing to add to what the MASTER OF THE ROLLS has said. I agree that in the circumstances the number of directors to be considered is the number of directors existing at the moment when the ordinary general meeting begins, and inasmuch as at the particular moment that it begins the two directors elected under art. 90 cease to be directors, the number of directors then must be taken to be five and not seven.

GREENE, L.J.—I agree on both points. With regard to the point that was first argued before us, it appears to me that arts. 85 and 90 show a clear distinction in the status of additional directors appointed under art. 90, and directors who retire by rotation under art. 85 at the relevant moment. The status of those appointed under art. 90 when the ordinary general meeting opens is that they are not directors. On the other hand, at the moment when the meeting opens a director retiring by rotation is entitled to be present in his capacity as director, notwithstanding that he is to retire, and may retire, at the next moment.

On the second point, the argument is that "ballot" must mean a vote by a constituency which consists only of the directors. I should have thought myself that if the word "ballot" was intended to imply a vote the constituency to be considered would be the constituency of the members of the company present at the meeting rather than the board alone. It is at the meeting that the retirement is to take place, and if that retirement was to be decided by a vote, one would have thought that, on the language used, the persons to vote would have been the shareholders. It is, to my mind, impossible to suppose that a matter of that importance should have been left in doubt, which, to say the least of it, would be the result on the construction submitted by the company. I further call attention to this fact, that it is admitted that the construction contended for by the company might, in circumstances which might very easily occur, lead to an impasse. In construing a document of this kind, which is intended to provide for the smooth and effective running of the machinery of the company, I think that it is legitimate to rely, and to lay stress, upon that matter. It is also right, I think, to point out that from the year 1862 down to the year 1906, with regard to all companies which had adopted Table A, or which had adopted that part of Table A which referred to this matter—and there were many of them certainly which adopted Table A—if all those companies were, whenever this occasion arose, deciding the question by a vote, in 1906 the procedure of those companies was changed. In view of the fact that an impasse is a thing which would be quite likely to arise, it does seem difficult for me to believe that companies in all those years, if they were deciding this matter by vote, would not have found themselves, sooner or later, in a state of impasse which would have involved some person bringing the matter before the courts. It is further to be observed that, so far as I have been able to discover, no textbook writer on the matter appears to attach any significance to the change in language which was introduced in 1906, and, had the change in language had the important result which is suggested, I cannot myself think that it would have escaped attention. The real fact of the matter is, in my opinion, that when in Table A of the original Companies Act of 1862 the word "ballot" was used it was used in the sense of the word "lot," and the change introduced in 1906 was not a change in the meaning of the word, but a change in language in order to preclude any possibility of doubt as to what was intended by the legislature.

Appeal allowed.

Solicitors: *Willis & Willis*; *Mayo, Elder, & Rutherfords.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*

MOORE *v.* TWEEDALE

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Humphreys, JJ.), April 2, 1935]

[Reported [1935] 2 K.B. 163; 104 L.J.K.B. 594; 153 L.T. 96; 99 J.P. 221; 51 T.L.R. 437; 79 Sol. Jo. 288; 33 L.G.R. 216; 30 Cox. C.C. 229]

Shop—Hours of closing—Early closing day—Customers being attended to in shop before closing hour and remaining thereafter—Shops Act, 1912 (2 *Geo.* 5, *c.* 3), *s.* 4 (1), (2), (7).

Under an early closing order made by a local authority pursuant to s. 4 (2) of the Shops Act, 1912, a hairdresser's shop was required to be closed for the serving of customers not later than 1 p.m. on Tuesday of each week. On a particular Tuesday two women were in the shop for the purpose of having their hair "permanently waved," in one case from 10.15 a.m. to 2.15 p.m., and in the other case from 11 a.m. to 4 p.m. Both had attended on appointments previously made, and there was evidence that three-and-a-half to four-and-a-half hours was the time required to complete a permanent wave. At 1 p.m. the outer doors of the shop were closed, and the assistant employed therein left, and, apart from the two women, no customer was in the shop after 1 p.m. An information was laid against the hairdresser charging him with a breach of the above statute and order. Section 4 (7) provided that "the occupier of a shop shall not be guilty of an offence against this Act when a customer is served at any time at which the shop is required to be closed under this section if he proves . . . that the customer was in the shop before the time when the shop was required to be closed."

Held: the justices were entitled to dismiss the information, as the women who were in the shop after the closing time were both genuine existing customers and had come to the shop for the purpose of having something definite done, and the hairdresser was, accordingly, protected by the above proviso.

Salford Cattle Market Salerooms, Ltd. v. *Osborne* (1) (1923), 92 L.J.K.B. 686, distinguished.

Notes. The Shops Act, 1912, was repealed by the Shops Act, 1950, s. 1 (1), (2) and (7) of which re-enact s. 4 (1), (2) and (7) of the Act of 1912.

As to shop hours see 17 HALSBURY'S LAWS (3rd Edn.) 194 et seq., and for cases see 24 DIGEST 928, et seq. For the Shops Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 186.

Cases referred to:

(1) *Salford Cattle Market Salerooms, Ltd.* v. *Osborne* (1923), 92 L.J.K.B. 1018; 129 L.T. 686; 87 J.P. 134; 21 L.G.R. 468; 27 Cox. C.C. 515, D.C.; 24 Digest 930, *209*.

(2) *Cope* v. *Doherty* (1858), 2 De G. & J. 614; 27 L.J.Ch. 600; 31 L.T.O.S. 307; 4 Jur. N.S. 699; 6 W.R. 695; 44 E.R. 1127; 42 Digest 637, *400*.

(3) *Parry* v. *Croydon Commercial Gas Co.* (1863), 15 C.B.N.S. 568; 3 New Rep. 212; 9 L.T. 694; 28 J.P. 86; 10 Jur. N.S. 172; 12 W.R. 212; 143 E.R. 908, Ex.Ch.; 42 Digest 732, *1539*.

Case Stated by Lancashire justices.

The appellant, Moore, the town clerk of Bury, preferred an information against the respondent, Tweedale, under the Shops Act, 1912, and the Bury Hairdressers' and Barbers' Early Closing Order of July 5, 1923, charging him that on July 15, 1934, at 32, Crostons-road, Bury, he unlawfully failed to close his hairdresser's shop for the serving of customers not later than one o'clock in the afternoon of that day.

The following facts were proved or admitted on the hearing of the information.

The respondent was a hairdresser carrying on business at 32, Crostons-road, Bury. In accordance with the provisions contained in the above-mentioned statute and order, the shop must be closed for the serving of customers not later than 1 p.m. on Tuesday of each week. On Tuesday, May 15, 1934, a police-constable saw one Alice Taylor leave the shop at about 2.15 p.m. She was questioned by the police officer and admitted that she had been in the shop for the purpose of having her hair permanently waved and was only just leaving. The constable then entered the shop and found there one Charlotte Goodman, and the respondent admitted that he was "doing her hair." Alice Taylor had attended at the shop on this day at 10.15 a.m. on an appointment made previously. Charlotte Goodman, who had also attended pursuant to a previous appointment, had arrived at 11 a.m. and left at 4 p.m. Immediately after Alice Taylor arrived the respondent and his wife were working on her permanent wave. After they had finished she took tea with the respondent and his wife and left at 2.15 p.m. Immediately after Charlotte Goodman arrived at 11 a.m. the respondent and his wife were working on her hair and continued to do so until she left at 4 p.m. It was proved that it took from three-and-a-half to four-and-a-half hours to complete a "permanent wave," the time varying according to the texture of the hair. The respondent employed an assistant who, on this day, closed the outer doors and left the shop at 1 p.m. No other customer entered the shop.

On the part of the appellant it was contended that s. 4 (7) of the Act did not operate to protect the respondent, as the proviso to that section was intended only to apply to the case of a customer who accidentally failed to complete an intended purchase before the closing hour, and did not extend to protect a shopkeeper who deliberately allowed a customer to enter his premises before the closing hour with the full knowledge that, in order to complete the work required by that customer, he would have to carry on his business for a long period after the closing hour. He relied on *Salford Cattle Market Salerooms, Ltd.* v. *Osborne* (1). On the part of the respondent it was contended that he had not acted contrary to the provisions of the order. The customers were both in the shop before the time when the shop was required to be closed, and the fact that it took a long time after the hour for closing to complete the service did not destroy the protection given by s. 4 (7).

The justices held that, inasmuch as the customers were in the shop and were being served some hours before the time when the shop was required to be closed, the protective provision of s. 4 (7) of the Shops Act, 1912, was operative and that the defendant had not been guilty of any breach of the order. They, accordingly, dismissed the information, and the appellant appealed to the Divisional Court.

The Shops Act, 1912, provides:

> s. 4: "(1) Every shop shall . . . be closed for the serving of customers not later than one o'clock in the afternoon on one weekday in every week. (2) The local authority may, by order, fix the day on which a shop is to be so closed. . . . (7) In the case of any contravention . . . of this section, the occupier of the shop shall be guilty of an offence against this Act . . . Provided that the occupier of a shop shall not be guilty of an offence against this Act when a customer is served at any time at which the shop is required to be closed under this section if he proves either that the customer was in the shop before the time when the shop was required to be closed. . . ."

J. C. Jolly for the appellant.
Herbert Malone for the respondent.

LORD HEWART, C.J.—In my opinion this appeal ought to fail. I think the conclusion of the whole matter is reasonably clear.

Under s. 4 (7) of the Shops Act, 1912, the occupier of a shop is not to be found guilty of an offence against the Act if he proves that the customer was in the shop before the time when the shop was required to be closed. Those words are somewhat vague and general. They must mean that the customer remains in the shop after the closing hour, and not merely that he had been in the shop before the closing hour and returned to it afterwards. The principles for the interpretation of a statute such as this are beyond dispute and are set out in *Cope* v. *Doherty* (2) and *Parry* v. *Croydon Commercial Gas Co.* (3), and as a physical fact it is obvious that the customer here was in the shop before the closing time and that the shop was closed at that time and after that time was not re-opened.

Much has been said about *Salford Cattle Market Salerooms, Ltd.* v. *Osborne* (1). I have a clear recollection of that case, which was heard in 1923 and dealt with an Act passed in 1920. Twelve years have now gone by, and I observe that every member of the court took pains to guard against construing the words of that statute as applying to all the infinitely various circumstances of human life. I myself said (129 L.T. at p. 688):

> "I am not attempting to imagine, much less to lay down, an exhaustive description of what is permitted by para. 2,"

and SHEARMAN, J., said:

> "I do not want to lay down any general principles on certain things, which, if the matter should come up, will be more specifically determined."

I accentuate the stress we all laid on the word "customer." If I may be permitted to do so, I will refer to the words I used on that occasion:

> "You have suggested a contrast between a general keeping open of a shop in order to invite persons to become customers, and, on the other hand, a serving in an emergency of a particular existing customer who happens to be caught in the shop, so to say, by the coming of the closing hour."

There is all the difference between keeping a shop open for the purpose of inviting persons to become customers, and serving customers in a closed shop who were present before the closing hour arrived. I do not think, therefore, that the judgment in the *Salford Case* (1) is conclusive of the present case.

On the facts of this case, I think that the justices were entitled to come to the conclusion to which they did come. The customers were genuine existing customers and were not stray persons from the street who entered in order that they might become customers. On the contrary, they had come for the purpose of having something definite done. One had arrived at 10.15 a.m., pursuant to an appointment previously made, and the other at 11 a.m., in similar circumstances. The respondent and his wife could not finish the work which they had undertaken to do before the shop closed. In those circumstances I cannot read into the subsection any words which made it obligatory on the justices to say that the statute had been infringed. It may be that cases will arise where the contract made necessarily involves that the shop must be kept open after hours, but that is not this case. There is to my mind much force in the observation of counsel for the respondent that in 1912, when this statute was enacted, it could not have been foreseen that "permanent waving" would have become so universal and essential. I think the justices came to a correct conclusion and that this appeal must be dismissed.

AVORY, J.—I am of the same opinion. In my view, it is clear that the proviso to sub-s. (7) of s. 4 of the Act of 1912 applies. On the facts of this case there can be no doubt that the two women were customers in the shop before the time when the shop was required to be closed, and there is, therefore, a clear distinction between this case and the *Salford Case* (1), in which the whole point of the judgment was based on the fact that the persons in the shop were not customers, but persons who had been invited to become customers before the shop closed. I agree with my Lord that there may be cases which come within the mischief of the Act, but, apparently, are protected by the words of the proviso. To meet those cases, it would be necessary that there should be an amendment of the words of the proviso. Until that amendment is made I can see no ground for saying that the justices were wrong.

HUMPHREYS, J.—I also am of the same opinion. This is a case in which justices have dismissed an information, and we cannot upset that finding of not guilty unless we are satisfied that they misdirected themselves in law. The justices have found that the respondent was serving customers after the closing hour of 1 p.m. and that they were in the shop being served some time before that hour, and they state that in their view the respondent has not been guilty of the offence charged. Their finding, therefore, amounts to an acquittal, and it appears to me impossible to say that they were wrong in failing to convict in those circumstances. I agree that the case has disclosed the possibility of an undesirable state of things which may amount to breaches of the intention of the Act, though not a breach of its letter, and therefore not punishable. But that is a matter for Parliament to deal with. I agree with the judgments which have been delivered.

Appeal dismissed.

Solicitors: *Lewin, Gregory, Torr, Durnford, & Co.*, for *Richard Moore*, Town Clerk, Bury; *Sharpe, Pritchard, & Co.*, for *F. A. Bradley*, Bury.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

Re VERNON HEATON CO., LTD.

[CHANCERY DIVISION (Bennett, J.), December 16, 1935]

[Reported [1936] Ch. 289; 105 L.J.Ch. 115; 154 L.T. 374; 52 T.L.R. 156; 80 Sol. Jo. 33; [1934–5] B. & C.R. 305]

Company—Winding-up—Transfer of proceedings—Transfer from High Court to county court—Capital of company exceeding £10,000—*Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 165 (1).

Under the Companies Act, 1929, s. 165 (1) the High Court has jurisdiction to transfer to the county court proceedings for the winding-up of a company, no matter what the amount of its capital.

Notes. The Companies Act, 1929, s. 165, was repealed by the Companies Act, 1948, and re-enacted by s. 219 (1) of that Act.

As to transfer of winding-up proceedings see 6 HALSBURY'S LAWS (3rd Edn.) 700, et seq., and for cases see 10 DIGEST (Repl.) 1028, 1029. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Case referred to:

(1) *Re Real Estates Co.*, [1893] 1 Ch. 398; 62 L.J.Ch. 213; 68 L.T. 24; 41 W.R. 157; 9 T.L.R. 118; 37 Sol. Jo. 102; 3 R. 192; 10 Digest (Repl.) 1028, *7106*.

Summons

By s. 163 (3) of the Companies Act, 1929, concurrent jurisdiction with the High Court is given to the county court to wind-up companies of which the capital does not exceed £10,000. The High Court having made an order transferring to the county court the winding-up of Vernon Heaton Co., Ltd., a company with a paid-up share capital exceeding £10,000 the county court judge refused to deal with an application in the winding-up made to him by a creditor, and gave as his reason that he had no jurisdiction to deal with the winding-up of companies the capital of which exceeded £10,000. The creditor thereupon applied to the High Court for the proceedings to be re-transferred to the High Court.

Andrew Clark for the applicant creditor.

J. B. Lindon, for the liquidator.

BENNETT, J.—I decide that the court has jurisdiction to transfer winding-up proceedings from the High Court to any court which has jurisdiction to wind-up companies. This decision is the only possible one in view of the orders that have been made since the Companies Act, 1929, came into force. *Re Real Estates Co.* (1) is only applicable in a case where the court to which the proceedings are proposed to be transferred has no court to which the winding-up proceedings were ordered to be transferred has jurisdiction to wind-up companies. If the county court judge has said that he is not going to deal with the matter because he has no jurisdiction, the remedy is not to transfer the proceedings back to the High Court, but to apply for a mandamus. I hold that there was jurisdiction under s. 165 to transfer the winding-up proceedings to the county court following, as I have said, numerous orders made by judges of the High Court who since the Act of 1929 came into force have had charge of the company work. The application must, therefore, be refused.

Solicitors: *Gregory, Rowcliffe, & Co.*, for *Clutterbuck, Trevenen, & Mawson*, Carlisle; *Stafford Clark & Co.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

SYMONS *v.* SOUTHERN RAIL. CO.

[Court of Appeal (Lord Hanworth, M.R., Roche, L.J., and Swift, J.), April 9, May 16, 1935]

[Reported 153 L.T. 98; 51 T.L.R. 491; 79 Sol. Jo. 434]

Railway—Accommodation works—Fence—Payment to owner, on purchase of land by company, of compensation for fencing—Occupier subsequently becoming owner—Right to compensation for company's failure to maintain fence—Merger—Railway Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 20), *s.* 68, *proviso.*

In 1885 the North Cornwall Railway, predecessors of the defendant company, purchased from the owners of R. Farm four acres of its land adjoining the railway for £727 13s. 0d., which, the conveyance stated, was to be the purchase price of the land and also compensation for all fences and things whatsoever by the side of the railway which the vendors might otherwise be entitled to claim. At that time the plaintiff's father was in occupation of the farm as a yearly tenant, and with him the railway company entered into no agreement. Fences were erected by the railway company, and from 1885 until the present action they were maintained by the company. In 1911 the plaintiff's father purchased the farm, and on his death in 1932 it was conveyed to the plaintiff in fee. On Aug. 13, 1934, sheep of the plaintiff, owing to a defective fence, strayed on to the railway, and two were killed. On a claim by the plaintiff against the defendant company for the value of the sheep,

Held: the agreement contained in the conveyance of 1885 was effective against the owners of the farm under the proviso to s. 68 of the Railway Clauses Consolidation Act, 1845, but not at that time against the plaintiff's father; in considering whether there was a merger in law of the occupier's interest when, in 1911, he became the owner of the fee the court would be guided by the occupier's intention, and, in the absence of express intention, would look to the benefit of the plaintiff's father as the person in whom the two estates became vested; there appeared to be no intention on the part of the plaintiff's father to give up any rights hitherto owned by him, and so there was no such merger as to deprive him of his right to have the fences maintained by the defendants; that right became vested in the plaintiff in 1932; and, therefore, he was entitled to recover.

Notes. As to the obligation of a railway company (now the British Transport Commission) to maintain accommodation works see 27 Halsbury's Laws (2nd Edn.) 57 et seq., and for cases see 38 Digest 280 et seq. For the Railway Clauses Consolidation Act, 1885, see 19 Halsbury's Statutes (2nd Edn.) 590.

Cases referred to:

(1) *Lawrence* v. *Jenkins* (1873), L.R. 8 Q.B. 274; 42 L.J.Q.B. 147; 37 J.P. 357;

(2) *Corry* v. *Great Western Rail. Co.* (1881), 7 Q.B.D. 322; 50 L.J.Q.B. 386; 44 L.T. 701; 29 W.R. 623; 45 J.P. 712, C.A.; 38 Digest 36, *213*; 290, *230*.

(3) *Dixon* v. *Great Western Rail. Co.*, [1897] 1 Q.B. 300; 66 L.J.Q.B. 132; 75 L.T. 539; 45 W.R. 226; 13 T.L.R. 107, C.A.; 38 Digest, 289, *225*.

(4) *Salmon* v. *Swann* (1621), Cro. Jac. 619; 79 E.R. 529; 38 Digest 759, *919*.

(5) *Stephens* v. *Bridges* (1821), 6 Madd. 66; 56 E.R. 1015; 35 Digest 617, *3541*.

(6) *Lord Dynevor* v. *Tennant* (1888), 13 App. Cas. 279; 57 L.J.Ch. 1078; 59 L.T. 5; 37 W.R. 193, H.L.; 31 Digest (Repl.) 593, *7119*.

(7) *Capital and Counties Bank, Ltd.* v. *Rhodes*, [1903] 1 Ch. 631; 72 L.J.Ch. 336; 88 L.T. 255; 51 W.R. 470; 19 T.L.R. 280; 47 Sol. Jo. 335, C.A.; 31 Digest (Repl.) 591, *7094*.

(8) *Chambers* v. *Kingham* (1878), 10 Ch.D. 743; 48 L.J.Ch. 169; 39 L.T. 472; 27 W.R. 289; 31 Digest (Repl.) 592, *7110*.

(9) *Ingle* v. *Vaughan Jenkins*, [1900] 2 Ch. 368; 69 L.J.Ch. 618; 83 L.T. 155; 48 W.R. 684; 31 Digest (Repl.) 590, *7092*.

(10) *Buxton* v. *North Eastern Rail. Co.* (1868), L.R. 3 Q.B. 549; 9 B. & S. 824; 37 L.J.Q.B. 258; 18 L.T. 795; 32 J.P. 661; 16 W.R. 1124; 38 Digest 353, *584*.

(11) *Ricketts* v. *East and West India Docks Rail. Co.* (1852), 12 C.B. 160; 7 Ry. & Can. Cas. 295; 21 L.J.C.P. 201; 19 L.T.O.S. 109; 16 Jur. 1072; 138 E.R. 863; 38 Digest 288, *221*.

(12) *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Wallis* (1854), 14 C.B. 213; 7 Ry. & Can. Cas. 709; 3 Saund. & M. 13; 23 L.J.C.P. 85; 22 L.T.O.S. 286; 18 J.P. 138; 18 Jur. 268; 2 W.R. 194; 139 E.R. 88; 2 C.L.R. 573; 38 Digest 288, *222*.

Appeal by the defendant company from a judgment of His Honour JUDGE LIAS in the Launceston County Court of Cornwall.

The following statement of the facts is taken from the judgment of the county court judge:

The plaintiff, who is the owner of Ridgegrove Farm, near Launceston, claims £5 from the Southern Railway, the value of two sheep, which strayed through a gap in a fence adjoining the railway and were killed on the defendants' line on Aug. 13, 1934.

On Aug. 14, 1885, about four acres of the land of which Ridgegrove Farm then consisted was purchased from the then owners by the North Cornwall Rail. Co., now the Southern Rail. Co., for £727 13s. 0d. The plaintiff's father was in occupation of the farm as a yearly tenant at the date of the purchase. The conveyance stated that it had been agreed that the purchase money should include a compensation for all fences and that the conveyance was intended to operate and take effect "as a conveyance made as near to the form in Sched. A to the Land Clauses Consolidation Act, 1845, as the circumstances will admit, and also in every other mode in which the same may operate or take effect independently." Fences were erected by the railway company and have been maintained by them ever since. On June 24, 1911, Ridgegrove Farm was conveyed to the plaintiff's father by the successors in title of the vendors to the railway company. The only reference to the land conveyed to the railway contained in the conveyance was in the list of contents in the first schedule, which read: "Deduct parts of Numbers 1051, 1047, 1052, 1032 sold to North Cornwall Railway 4 acres and 1 pole." The plaintiff's father died, and on June 24, 1932, his personal representatives conveyed to the plaintiff the land occupied by him, the only reference to the land conveyed to the railway company being the same as in the previous conveyance.

The plaintiff and his father were in occupation of the land for more than seventy years as yearly tenants until June, 1911, and they have been in possession as owners since that date. The plaintiff states, and it is not disputed, that for nearly fifty years neither he nor his father was ever asked or allowed by the railway company to maintain or repair the fences. The invariable practice was for the railway company to maintain them. If the plaintiff or his father found that repair was required they had to report to the railway company's ganger, and he did the repairs. For some unexplained reason for two years before last summer the hedges were not pruned. Last summer [i.e., in

1934] they were pruned rather severely, with the result that gaps were left in the hedges. The plaintiff called the attention of the ganger, whose duty it was to repair the hedges, to their defective state, and warned him that, if his sheep got through, he would hold the railway company responsible. The ganger replied that he knew the hedges were defective, but that he was unable to get the material with which to repair. A few days later, on Aug. 13, 1934, seventeen of the plaintiff's sheep strayed on to the railway through a weak place in a hedge and two were killed. The hedge was repaired next day, and the plaintiff was told that he could re-stock his land. The damages subject to the question of liability are agreed.

The county court judge gave judgment for the plaintiff for the amount claimed, with costs, and the defendant company appealed.

F. W. Beney for the company.
Ernest Hancock for the plaintiff.

The arguments sufficiently appear from the judgments.

Cur. adv. vult.

May 16. The following judgments were read.

LORD HANWORTH, M.R.—This is an appeal from a judgment of His Honour JUDGE LIAS, given on Feb. 20, 1935, at the county court at Launceston, whereby he decided that the plaintiff was entitled to recover £5 from the defendants, as the value of two sheep which strayed through a gap in a fence adjoining the railway and were killed on the defendants' line on Aug. 13, 1934.

The defendants deny liability, and the question to be decided is whether the railway company are responsible for the maintenance of the fence in a proper condition to prevent sheep and cattle from being able to enter upon the defendants' land. There is no dispute about the facts. The question is as to the law applicable to them. On Aug. 14, 1885, about four acres of the land of which the farm, Ridgegrove Farm, then consisted, was purchased from the then owners by the North Cornwall Rail. Co. for the sum of £727 13s. At that time the plaintiff's father was in occupation of the farm as a yearly tenant. By the terms of the conveyance it

> "is hereby agreed and declared that the said sum of £727 13s. shall be taken not only as the purchase money of the said lands and hereditaments and estates and interests of the said trustees and of the said Thomas Archer Bewes therein free from incumbrances but also in full satisfaction and compensation for all damage, whether permanent or otherwise, loss or inconvenience, occasioned by severing the said pieces of land and hereditaments hereby conveyed from the other lands or property subject to the uses or limitations contained in the said will of the said Thomas Bewes, deceased, or by otherwise injuriously affecting such other lands or property, in the exercise of the powers of the North Cornwall Railway Act, 1882, and the Acts incorporated therewith, and which sum it has also been agreed shall include compensation for the temporary occupation by the company of the lands coloured brown on the said plan drawn at the end of these presents required for the construction of accommodation roads, and for all communication gates bridges culverts ditches drains fences ways passage works and things whatsoever either over under across or by the side of the said railway (save and except such as are hereinafter more particularly specified) which the said trustees or the said Thomas Archer Bewes might otherwise be entitled to claim."

No agreement was entered into with the occupier, the plaintiff's father. The defendants are the successors of the North Cornwall Rail Co.

[His Lordship then stated the facts as they were set out in the judgment of the county court judge.]

It is clear that at common law owners of adjoining closes are not bound to fence, either against or for the benefit of each other; but in the absence of fences each owner is bound to prevent his cattle or other animals from trespassing on his neighbour's premises. That proposition is clearly laid down in *Lawrence* v. *Jenkins* (1), in the judgment of the court consisting of COCKBURN, C.J., MELLOR and ARCHIBALD, JJ.

The liability of the railway to fence is statutory, and is imposed by s. 68 of the Railway Clauses Consolidation Act, 1845. By s. 6 of that Act the construction of the railway was subject to the provisions of that Act and the Lands Clauses Consolidation Act, and s. 68 provided:

> "The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway . . . sufficient . . . fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout . . . Provided always, that the company shall not be required . . . to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead of the making them."

It was contended on behalf of the plaintiff before this court that the proviso was not operative because the owners and occupiers are to be dealt with conjointly, and that, unless an agreement had been made with both, there was no release which enured to the railway company—the proviso remained inoperative. I cannot accept this construction of the section. The owner's interests and the occupier's interests are several and distinct, and an agreement made with one of them is none the less operative because no agreement has been reached with the other. This construction is, I think, that which was adopted by the Court of Appeal in *Corry* v. *Great Western Rail. Co.* (2). In that case an agreement had been made with the owner of the land, but BRAMWELL, L.J., points out (7 Q.B.D. at p. 325):

> "His landlord cannot be taken to have given up any right which the plaintiff had as his tenant, and I think there would be a hardship upon the plaintiff if it were otherwise, because he, the plaintiff, was no party to the agreement by which the landlord gave up the right to fencing."

There is no suggestion there that the agreement being with the landlord only, was ineffective, and that the proviso did not operate as against him. BAGGALLAY, L.J., definitely says the contrary (7 Q.B.D. at pp. 326, 327):

> "An agreement was come to with the owner of the lands which in effect deprived him of the right of insisting upon either the original making or the maintaining of any such fence as this."

There is another point which must be noted in the section. The railway is required to make these sufficient fences for the accommodation of the owners and occupiers of lands adjoining the railway, not only for the preservation of the cattle of the owner or occupier from straying from the lands not taken, but also for "protecting (the lands not taken) from trespass by reason of the railway." They are to prevent the railway from becoming a means of access to the adjoining lands not taken. Also I attach no importance to the distinction pointed out that s. 68 in its opening has the words "make" and "maintain," whereas the proviso refers only to making. By the proviso, if operative, the railway are excused from making, and by parity of reasoning from maintaining the fence. The making of the fences by the railway company under s. 68 is to be carried out forthwith if so required and otherwise as conveniently may be. By s. 73 there is a time limit of five years to any requisition for accommodation works, though that does not diminish the duty of a railway company to make and maintain the necessary fences in cases where the proviso is not operative by reason of no agreement having been entered into within its terms: see *Dixon* v. *Great Western Rail. Co.* (3).

In the present case, however, there was an agreement made which was effective as against the owners under the proviso, and which, in accordance with the decision in *Corry* v. *Great Western Rail. Co.* (2), barred any claim being made by them, but did not bar a claim by the occupying tenant.

The plaintiff rests his claim upon his being, as his father was before him, the occupier and thus in the position that was given effect to in *Corry's Case* (2). But then comes the question—not an easy one—upon which the defendants rely, namely, whether there was a merger in law of the occupier's interest as tenant from year to year when in

1911 the plaintiff's father became owner of the fee. Thereafter the father was, and his son became, and now is, the freeholder. Have their rights as tenants been lost by this coalescing of the tenancy in the freehold? It is a clear principle that at law a term merges by union with the reversion, and that the right to the estate subject to the term cannot subsist separately in the same person. A

BLACKSTONE (2 COMMENTARIES ON THE LAWS OF ENGLAND, p. 177) puts the doctrine thus: B

> "It may be proper to observe that whenever a greater estate and a less coincide and meet in one and the same person—without any intermediate estate, the less is immediately annihilated: or in the law phrase is said to be merged, that is, sunk or drowned in the greater";

and illustrations of the operation of the doctrine may be found in *Salmon* v. *Swann* (4) *Stephens* v. *Bridges* (5), and *Lord Dynevor* v. *Tennant* (6). The learned judge says that he was not convinced upon this point, but it is one upon which the plaintiff's rights in my judgment turn. C

This rule of law as to merger was modified in equity, and both as regards the merger of a less estate in a greater and a merger of a charge on the land the question was held to depend upon the intention, actual or presumed, of the person in whom the interests become united. That doctrine was given effect to by the Judicature Act, 1873, s. 25 (4), which is now replaced by s. 185 of the Law of Property Act, 1925, which declares: D

> "There is no merger by operation of law only of any estate the beneficial interest in which would not be merged or extinguished in equity."

That the question of merger or no merger depends upon intention, and applies to the case of a merger of a term in the reversion, appears clear from the decision in the *Capital and Counties Bank, Ltd.* v. *Rhodes* (7) (see per LORD COLLINS, M.R., [1903] 1 Ch. at p. 648), and in *Chambers* v. *Kingham* (8), and also per FARWELL, J., as he then was, in *Ingle* v. *Vaughan Jenkins* (9). In the latter case the learned judge definitely says that the court, in considering merger or no merger, is guided by the intention; and, in the absence of express intention, the court looks to the benefit of the person in whom the two estates become vested. E F

Applying these principles to the present case, it appears to me that there was no merger such as to deprive the father of the plaintiff of his right to have the fence maintained and that right still remains in the plaintiff. From 1885 to 1911 the defendants or their predecessors maintained the fence, as they were bound to do "for the accommodation of the occupier" with whom they had come to no agreement of release and also for two other reasons—one the duty, already referred to, to protect the adjoining lands, not taken, from trespass, and the second, the necessity of exercising reasonable care to prevent cattle straying upon their line, in default of which they might be held liable for an injury by accident to one of their passengers if caused by the collision of the train in which he was being carried with a bullock that had strayed on the line, as in *Buxton* v. *North Eastern Rail. Co.* (10). G H

The learned judge accepts the evidence that the defendants, in fact, repaired the fence whenever asked so to do and refused to allow the plaintiff, or his father, to repair it, and that this practice or system prevailed as well after as before 1911 and has continued throughout twenty-four years since that date.

Upon these facts it appears to me that the conclusion must be that the plaintiff's father accepted and acted upon the status quo ante, and intended that no change should be made—in other words, that there should be no merger of rights which would certainly have been to his disadvantage and not to his benefit. I

If, then, merger does not prevail to have taken away the plaintiff's rights, he is in the same position as the plaintiff in *Corry's Case* (2), and the judgment of the county court judge in his favour must be affirmed. In this view of the case it is unnecessary to deal with the other grounds upon which—somewhat tentatively—the learned judge was prepared to base a judgment in favour of the plaintiff. With regard, however, to an assessment, I will say this. The maintenance of the fence may be—indeed, ought

A to be—referred to the fulfilment of the statutory duties imposed on the railway company, and not to any action by a servient owner in favour of the plaintiff as dominant owner. The origin of the maintenance of the fence being thus explained, there is no room for the doctrine that the right or title to have it maintained was gained by prescription.

For these reasons I am of opinion that the appeal fails, and must be dismissed with B costs.

ROCHE, L.J.—I agree that this appeal should be dismissed.

The facts have been so fully and clearly stated by my Lord that it is unnecessary to refer to them in detail. It is sufficient for the purposes of my judgment if I recall the following facts and dates. In or shortly after 1885 the railway was constructed and a C fence was then made and maintained between the railway and the fields which remained part of Ridgegrove Farm. No compensation was agreed to be paid, or was, in fact, paid at that time or at all to Mr. Symons, father of the plaintiff, or to the plaintiffs who were then the occupiers of the farm. This was natural enough, as the railway company had evidently determined to make a fence. The conveyance of the land from the owners of Ridgegrove Farm to the railway company stipulated that the price paid D for the land included compensation for all the matters (other than certain specified matters), including fences, which the owners might otherwise be entitled to claim—that is to say, from the owners of Ridgegrove Farm to the railway company. Accordingly, such owners could not have insisted on the making of a fence, but, as such fence was about to be made and was made, the stipulation had not, at the time, any practical effect on the situation. Thereafter the company always maintained the fence in question, E which was a quickset hedge, and made good any gaps. But in 1934 a gap was not filled up, and in consequence the plaintiff's sheep got on the line and two of them were killed. By that time the plaintiff had become the owner of the farm in succession to his father, who had bought the freehold in 1911, and had died in 1932.

The father and son continued as occupiers after the purchase in 1911 until the father's death, when the plaintiff became sole occupier and soon afterwards owner of the land F by conveyance from his father's executors. It was said for the defendants that, although up to 1911 they were bound to maintain the fence, yet after 1911 there was a merger of estates, and the fact of compensation having been paid to the owners in 1885 was an answer to the plaintiff's claim in this action. The defendants' contention is not, in my opinion, well founded. It is unnecessary to decide what would have been the rights and position of the parties if the merger relied upon was in fact effected. Speaking for G myself, I attach more importance than my Lord to the fact that, even as regards the owners of this land, the language of the present compensation clause, unlike that in *Corry* v. *Great Western Rail. Co.* (2), contained no mention of maintenance of fences. I am disposed to think that in this state of facts, although the owners could not have claimed that such a fence as is now in question should be made, yet when it was made and maintained pursuant to s. 68 of the Railway Clauses Consolidation Act, owners as H well as occupiers and the licensees of both of them had a right to complain if they suffered damage by inefficient maintenance of the hedge—see *Ricketts* v. *East and West India Docks* (11) and *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Wallis* (12). But it is not necessary to decide this point. Admittedly the occupiers, as distinct from the owners, had in 1885 and subsequently a right to have the fence maintained, and I agree with the conclusion of my Lord that there was no extinction by merger of such I rights. I agree also with the reasons which my Lord has assigned for that conclusion. All the evidence seems to be opposed to a conclusion that there was at any time an intention to give up (or merge in the greater estate) any rights or advantages acquired by the occupiers. In addition to the matters of evidence referred to in this connection by my Lord, it is to be observed that in 1911 and before the occupiers of the land were the plaintiff's father and the plaintiff, whereas the conveyance of the fee simple in 1911 was to the plaintiff's father alone. It was not until 1932 that the plaintiff, who was by that time sole occupier by reason of his father's death, became the owner of the fee simple.

For these reasons I am of opinion that the appeal should be dismissed with costs.

SWIFT, J.—I agree.

Appeal dismissed.

Solicitors: *W. Bishop, Hancock & Willis,* for *Graham-White & Co.,* Launceston.

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

Re HECTOR WHALING, LTD.

[Chancery Division (Bennett, J.), December 2, 1935]

[Reported [1936] Ch. 208; 105 L.J.Ch. 117; 154 L.T. 342; 52 T.L.R. 142; 79 Sol. Jo. 966]

Company—Special resolution—"Twenty-one days' notice"—Computation—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 117 (2).

By s. 117 (2) of the Companies Act, 1929: "not less than twenty-one days' notice" is required to be given specifying the intention to propose a resolution as a special resolution at a general meeting of a company.

Held: (i) that the phrase "not less than twenty-one days" in the subsection means not less than twenty-one clear days exclusive of the day of service of the notice and exclusive of the day on which the meeting is held; (ii) a company cannot validly by its articles of association curtail the length of time which Parliament has said must elapse between the date on which the notice is served and the date on which the meeting is held.

Notes. The Companies Act, 1929, was repealed by the Companies Act, 1948. Section 117 (2) of the 1929 Act is reproduced in s. 141 (2) of the Act of 1948. Reduction of share capital is dealt with in the Act of 1948 in s. 66 et seq.

As to reduction of capital see 6 Halsbury's Laws (3rd Edn.) 154 et seq., and as to resolutions see ibid. 345 et seq., and for cases see 9 Digest (Repl.) 149 et seq. and 618, 619. For Companies Act, 1948 see 3 Halsbury's Statutes (2nd Edn.) 452.

Cases referred to:

(1) *R.* v. *Turner,* [1910] 1 K.B. 346; 79 L.J.K.B. 176; 102 L.T. 367; 74 J.P. 81; 26 T.L.R. 112; 22 Cox, C.C. 310; 3 Cr. App. Rep. 103; 54 Sol. Jo. 164; 14 Digest (Repl.) 580, *5797*.

(2) *Chambers* v. *Smith* (1843), 12 M. & W. 2; 13 L.J.Ex. 25; 2 L.T.O.S. 101; 7 Jur. 1019; 152 E.R. 1085; 42 Digest 656, *290*.

Petition for confirmation of reduction of capital of a company.

At the hearing of the petition a question arose whether the provisions of s. 117 (2) of the Companies Act, 1929, had been complied with. S. 117 of the Companies Act, 1929, provided as follows:

> "1. A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members as, being entitled so to do, vote in person or, where proxies are allowed, by proxy, at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given. (2) A resolution shall be a special resolution when it has been passed by such a majority as is required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one days' notice, specifying the intention to propose the resolution as a special resolution, has been duly given. . . . (6) For the purposes of this section, notice of a meeting shall be deemed to be duly given and the meeting to be duly

A held when the notice is given and the meeting held in manner provided by this Act or the articles."

The relevant articles of association were as follows:

"133. A notice or other document may be served by the company upon any member either personally or by sending it through the post in a prepaid letter B addressed to such member at his registered address.

"138. Any notice or other document if served by post shall be deemed to have been served on the day following that on which the letter containing the same is put into the post, and in proving such service it shall be sufficient to prove that the letter containing the notice or document was properly addressed and put into the post office as a prepaid letter or prepaid registered letter as the case may be.

C "139. Where a given number of days' notice or notice extending over any other period is required to be given, the day of service shall be counted in such number of days or other period."

The notice convening the extraordinary general meeting was dated May 8, 1935, and the meeting at which the resolution was passed was by the notice convened for May 30, 1935. The notice was thus, under the articles, deemed to have been served on May 9, D 1935.

Lionel Cohen, K.C., and *T. D. D. Divine* for the company.

BENNETT, J.—The first point to be decided is what is meant by the phrase "not less than twenty-one days' notice," contained in s. 117 (2) of the Companies Act, 1929. In the interests of everybody it is of importance that there should be no doubt as to E the meaning of a phrase in a section of almost daily use. I do not think there is any doubt about its meaning, and I propose to found my decision on *R.* v. *Turner* (1) and *Chambers* v. *Smith* (2) and to decide that the phrase means twenty-one clear days exclusive of the day of service and exclusive of the day on which the meeting is to be held.

The question then arises whether the effect of s. 117 (6) is to enable the company to F say that the statutory requirement of sub-s. (2) that there was to be twenty-one clear days' notice has been cut down by the provisions of art. 139. In my judgment, that article has nothing to do with the service of the notice and nothing to do with the manner in which the notice is given. It is concerned entirely with the way in which time is to be measured, and I can see no ground on which I can properly decide that a company can by its articles of association curtail the length of time which Parliament G has said must elapse between the date on which the notice is served and the date on which the meeting is held. Sub-s. (6) is concerned solely with the method of giving notice. Therefore, I come to the conclusion that art. 139 is irrelevant for the purpose of the question which I have to decide.

In my view, the petitioning company has failed to prove that the special resolution was properly passed. I will, therefore, adjourn the further hearing of the petition to H enable the company to call a fresh meeting.

Solicitors: *Lawrance, Messer, & Co.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

A

WILLIAM DENBY & SON, LTD. *v.* MINISTER OF HEALTH

[KING'S BENCH DIVISION (Swift, J.), December 16, 1935]

[Reported [1936] 1 K.B. 337; 105 L.J.K.B. 134; 154 L.T. 180; 100 J.P. 107; 80 Sol. Jo. 33; 34 L.G.R. 61, D.C.]

Housing—Clearance Order—Public local inquiry—Right of objectors to see report of inspector. B

Constitutional Law—Minister of Crown—Administration of statute—Duty to act according to dictates of justice.

A person objecting to the confirmation of a clearance order made under s. 1 of the Housing Act, 1930, is not entitled to see the report made to the Minister of Health by the inspector who has conducted a public local inquiry pursuant to Sched. I., para. 4, to that Act. C

Per Curiam: A Minister or other officer of State who has to administer an Act of Parliament is not a judicial officer. He is an administrative officer carrying out the duties of an administrative office and administering the provisions of particular Acts of Parliament. From time to time in the course of his administrative duties he has to perform acts which require him to interfere with the rights and property of individuals, and in doing that he must act fairly and reasonably, not capriciously, but in accordance with the ordinary dictates of justice. He does not occupy the position of judge. The inspector who holds a public local inquiry under the Housing Acts is an administrative officer helping in the administration of the Acts, but he comes more nearly to the position of a judicial functionary, or as nearly to that position as the Minister himself does. In the discharge of his duties he must be bound by the dictates of natural justice, and his inquiry must be fair to all parties interested. He must hear everything which any of them desires to say, and should not hear anything without giving an opportunity to the other parties interested to answer that which has been said. D E

Notes. Schedule I to the Housing Act, 1930, was repealed by the Housing Act, 1936, and the provisions of para. 4 are reproduced in para. 5 of Sched. III to the Act of 1936. The Minister concerned is now the Minister of Housing and Local Government. F

As to clearance orders, see 26 HALSBURY'S LAWS (2nd Edn.) 536 et seq., and for Housing Act, 1936, see 11 HALSBURY'S STATUTES (2nd Edn.) 444.

Cases referred to:

(1) *Errington* v. *Minister of Health*, [1935] 1 K.B. 249; 104 L.J.K.B. 49; 152 L.T. 154; 99 J.P. 15; 51 T.L.R. 44; 78 Sol. Jo. 754; 32 L.G.R. 481, C.A.; Digest Supp. G

(2) *Board of Education* v. *Rice*, [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 27 T.L.R. 378; 55 Sol. Jo. 440; 9 L.G.R. 652, H.L.; 19 Digest 602, *290*.

(3) *Sharpe* v. *Wakefield*, [1891] A.C. 173; 64 L.T. 180; 60 L.J.M.C. 73; 39 W.R. 551; 55 J.P. 197, H.L.; 42 Digest 621, *216*.

(4) *Rooke's Case* (1598), 5 Co. Rep. 99 b; 77 E.R. 209; 41 Digest 62, *447*. H

(5) *Re Grosvenor and West End Terminus Hotel Co., Ltd.* (1897), 76 L.T. 337; 13 T.L.R. 309; 41 Sol. Jo. 365, C.A.; 9 Digest (Repl.) 627, *4187*.

(6) *R.* v. *Local Government Board, Ex parte Arlidge*, [1914] 1 K.B. 160; 83 L.J.K.B. 86; 109 L.T. 651; 78 J.P. 25; 30 T.L.R. 6; 58 Sol. Jo. 10; 11 L.G.R. 1186; Reversed: [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 30 T.L.R. 672; 12 L.G.R. 1109; 38 Digest 97, *708*. I

(7) *Marriott* v. *Minister of Health* (1935), 154 L.T. 47; 52 T.L.R. 63; 79 Sol. Jo. 942.

Application under s. 11 of the Housing Act, 1930.

The applicants, William Denby & Son, Ltd., sought an order of the court to quash two clearance orders made by the respondents, Baildon Urban District Council, on June 12, 1934, and confirmed by the Minister of Health on Aug. 25, 1934, in which orders certain houses belonging to the applicants were scheduled for demolition. The applicants complained that the Minister had refused to disclose to them the contents

A of the report made by the inspector who had conducted the public local inquiry held pursuant to para. 4 of Sched. I, to the Act, and contended that the Minister, as a quasi-judicial officer, was bound to disclose to the parties interested any information in his possession bearing on the matters in issue.

The Housing Act, 1930, provides (by s. 1 (1)) that a local authority may pass a resolution declaring an area to be a clearance area, and (by s. 1 (3)), that thereupon the B local authority may make, and the Minister of Health may confirm, a clearance order in respect of that area. By Sched. I, para. 4:

> "If no objection is duly made by any of the persons upon whom notices are required to be served, or if all objections so made are withdrawn, the Minister may, if he thinks fit, confirm the order with or without modification; but in any other C case he shall, before confirming the order, cause a public local inquiry to be held and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order, either with or without modification. . . ."

H. A. Hill for the applicants.

The Solicitor-General (*Sir Donald Somervell, K.C.*) and *R. C. Essenhigh* for the D respondents.

SWIFT, J.—On June 12, 1934, the urban district council of Baildon made two clearance orders under Part I of the Housing Act, 1930. Messrs. William Denby and Sons, Ltd., were owners of properties affected by such orders, and they duly caused notice of objection against the inclusion of their properties in the orders to be lodged E with the Minister of Health. On July 17, 1934, the Minister, in pursuance of para. 4 of Sched. I to the Act, caused a public local inquiry to be held by Mr. J. S. Todd. The company were represented at that inquiry by a solicitor and evidence was given on the one hand by the local authority in support of the confirmation of the clearance orders, and on the other hand on behalf of the company in support of their objection and in opposition to the confirmation of the clearance orders. A note of the evidence given F at such inquiry was taken by Mr. Todd, and after the close of the hearing of the evidence he visited and inspected all the properties included in the clearance orders. On Oct. 5, 1934, the Minister confirmed the clearance orders, only excluding therefrom a portion of the properties belonging to the company. The company applied to this court under s. 11 (3) of the Act of 1930, desiring to question the validity of those orders on the ground that they are not within the powers of the Act, or that some requirement of the G Act has not been complied with, the contention being that the confirming orders were made by the Minister without giving the company an opportunity of seeing the report made to the Minister by Mr. Todd, the person who held the public local inquiry. On their behalf it is alleged that as the Minister confirmed the clearance orders with the exceptions mentioned the company fears that the report contained adverse statements regarding the company's property, which adverse statements (if any) the company has H had no opportunity of contradicting or offering observations upon to the Minister. This application raises quite neatly the sole point whether a person whose property is affected by a clearance order made under the Housing Act, 1930, is entitled to see the report made to the Minister by the person whom he causes to hold a public local inquiry as required by Sched. I, para. 4, to the Act.

On behalf of the applicant, it is said that the Minister is a person exercising quasi- I judicial duties; that he has to decide as between the local authority and the property owners whether a clearance order shall be confirmed or not; that it is, therefore, his duty to hear both sides and not to receive anything behind the back of one side without giving him an opportunity of explaining or controverting such evidence; and that, if he receives a report from someone whom he has appointed to inquire, he must let the parties know what such report is before he acts upon it, so as to give them an opportunity of making such answer as they may desire. The applicants rely upon *Errington* v. *Minister of Health* (1) for the proposition that the Minister is a quasi-judicial officer bound by the rules ordinarily applicable to such an officer and that those compel him not to receive any information or to entertain any matter which is not open to all the parties to the dispute which he has to determine.

There is no doubt, as held by the Court of Appeal in that case and admitted before me in argument in the present matter, that once notice of objection has been given to a clearance order the Minister must be regarded as a person exercising quasi-judicial functions, and he is bound by the rules of conduct applicable to such a person as laid down in *Board of Education* v. *Rice* (2). In that case, Lord Loreburn, speaking of departments and officers of State invested with duties and powers of deciding questions involving the interests of citizens of the State, said ([1911] A.C. at p. 182):

> "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts"

—the Government department which was involved in that case was the Board of Education.

> "I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

I do not think, however, that this disposes of the matter. I do not think it is right to say that the Minister of Health or any other officer of the State who has to administer an Act of Parliament is a judicial officer. He is an administrative officer carrying out the duties of an administrative office and administering the provisions of particular Acts of Parliament. From time to time in the course of administrative duties he has to perform acts which require him to interfere with the rights and property of individuals, and in doing that the courts have said that he must act fairly and reasonably, not capriciously, but in accordance with the ordinary dictates of justice. The performance of those duties entails the exercise of the Minister's discretion, and I think that what was said by Lord Halsbury in *Sharpe* v. *Wakefield* (3) is important to consider with reference to the exercise of such discretion. He there said ([1891] A.C. at p. 179):

> "'Discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's Case* (4), according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself."

In order to describe the qualities which a Minister must exercise in carrying out such part of his administrative duties the courts have referred to them as "quasi-judicial." Although this is a convenient term for describing the principles by which he must be guided in performing certain of his duties, I do not think that it means that he at any time occupies the position of a judge, and what is true of him is, I think, equally true of persons whom he is empowered to obtain assistance from in the discharge of his duties. The Act by Sched. I, para. 4, says that he shall cause an inquiry to be held, and that he shall consider, among other things, the report of the person who held the inquiry, and shall then confirm or refuse the order.

It was argued before me that the person who held the inquiry was not a judicial functionary, but was merely a collector of information, which information the parties were entitled to see and to comment upon before the Minister made his decision. In support of this contention my attention was called to *Re Grosvenor and West End Terminus Hotel Co., Ltd.* (5) and to the observations of Hamilton, L.J., in *R.* v. *Local Government Board, Ex parte Arlidge* (6), where he says in his judgment ([1914] 1 K.B. at p. 194):

> "As the inspector does not perform any judicial function in reporting, the privilege which he could claim for his statements, if sued for libel, would be a qualified privilege only and not absolute."

I do not think that this is the right view to take of the position of the person who holds the inquiry. He is, in my opinion, an administrative officer helping in the administration of the Act, but he comes more nearly to the position of a judicial functionary, or as nearly to that position as the Minister himself does. It seems to me obvious that he, in the discharge of his duties, must be bound by the dictates of natural justice. His inquiry must be one which is fair to all parties interested. He must hear everything which any of them desires to say and should not hear anything without giving an opportunity to the other parties interested to answer that which is said; he should not receive anything from one behind the back of the other. And although he is not bound in any sense by the rules of evidence and procedure which apply to an ordinary court of law, he must, before making his report, comply with the ordinary dictates of natural justice as to the obtaining and consideration of the matters which go to form the opinions or conclusions which he expresses in his report. I have recently dealt with the position of the person holding such a public local inquiry in *Marriott* v. *Minister of Health* (7). I do not need to add anything to the views which I therein expressed, and unless and until those views are modified or corrected by some higher tribunal they express my opinion as to the position of such a person.

This being as I conceive it to be the position of the two officers, the Minister of Health and the person appointed by him to hold the public local inquiry, the question arises whether the parties are entitled to see the report which the latter makes to the former as the result of his inquiry. I should have thought that the matter was conclusively decided by the case of *Local Government Board* v. *Arlidge* (6), were it not for a distinction which is sought to be drawn on behalf of the applicants between the facts relating to the position of the Local Government Board in that case, and the Minister of Health in the present case. That case was decided upon s. 17 of the Housing, Town Planning, &c., Act, 1909, which gave to the owner of the dwelling-house dealt with under a closing order made under that Act a right of appeal to the Local Government Board. By s. 39 (1) of the Act, it was provided that the procedure on any such appeal should be such as the Local Government Board might by rules determine, provided that (s. 39 (1) (*b*)) the rules should provide that the board should not dismiss any appeal without having first held a public local inquiry. It was held in that case that an appellant to the Local Government Board was not entitled as of right as a condition precedent to the dismissal of his appeal either to be heard orally before the deciding officer or to see the report made by the Board's inspector upon the public local inquiry. By s. 39 (1) (*b*), the duty was placed upon the Board to hold the public local inquiry, and the House of Lords held that in holding such an inquiry the Board was an administrative officer to whom the decision of a question in dispute had been entrusted. Lord Haldane said in that case ([1915] A.C. at p. 132):

> "My Lords, it is obvious that the Act of 1909 introduced a change of policy. The jurisdiction, both as regards original applications and as regards appeals, was in England transferred from courts of justice to the local authority and the Local Government Board, both of them administrative bodies, and it is necessary to consider what consequences this change of policy imported. My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of

> a court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organisation with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently. I agree with the view expressed in an analogous case by my noble and learned friend Lord Loreburn. In *Board of Education* v. *Rice* (2), he laid down that, in disposing of a question which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on everyone who decided anything. But he went on to say that he did not think it was bound to treat such a question as though it were a trial. The Board had no power to administer an oath, and need not examine witnesses. It could, he thought, obtain information in any way it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. If the Board failed in this duty, its order might be the subject of certiorari, and it must itself be the subject of mandamus."

Although the statute imposes on the Local Government Board the duty of determining the appeal, it was recognised that the ordinary procedure of the Board necessitated the actual holding of an inquiry before some individual and Lord Haldane went on to say ([1915] A.C. at p. 133):

> "My Lords, I concur in this view of the position of an administrative body to which the decision of a question in dispute between the parties has been entrusted. The result of its inquiry must, as I have said, be taken, in the absence of directions in the statute to the contrary, to be intended to be reached by its ordinary procedure. In the case of the Local Government Board it is not doubtful what this procedure is. The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all that is done in his Department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a judge in a court he is not only at liberty, but he is compelled to rely on the assistance of his staff. When, therefore, the Board is directed to dispose of an appeal, that does not mean that any particular official of the Board is to dispose of it. This point is not, in my opinion, touched by s. 5 of 33 & 34 Vict., c. 70, the Act constituting the Local Government Board to which I have already referred. Provided the work is done judicially and fairly in the sense indicated by Lord Loreburn, the only authority that can review what has been done is the Parliament to which the Minister in charge is responsible. The practice of the Department in the present case was, I think, sufficiently shown by Sir Horace Monro's affidavit to have been followed. In accordance with that practice the Board, in order to obtain materials with which to decide, appointed one of its health inspectors to hold a public inquiry. This was in accordance with the rules it had made under the section of the statute which I have quoted and with its usual practice. It is said that the report of the inspector should have been disclosed. It might or might not have been useful to disclose this

> A report, but I do not think that the Board was bound to do so, any more than it would have been bound to disclose all the minutes made on the papers in the office before a decision was come to. It is plain from Sir Horace Monro's affidavit that the order made was the order of the Board, and so long as the Board followed a procedure which was usual, and not calculated to violate the tests to which I have already referred, I think that the Board was discharging the duty imposed on it in B the fashion Parliament must be taken to have contemplated when it deliberately transferred the jurisdiction, first, from a court of summary jurisdiction to the local authority, and then, for the purposes of all appeals, from quarter sessions to an administrative department of the State."

Under the statute which I am now considering the burden is not put upon the Minister C of Health of himself holding the inquiry. His obligation is to "cause a public local inquiry to be held" (Sched. I, para. 4, of the Act of 1930) and to consider the report made to him as the result of such inquiry. It is contended that the legislature meant to draw a distinction between the position of the Local Government Board under the Act of 1909 and the Minister of Health under the Act of 1930 and a distinction so marked that the report passing from an inspector under the earlier Act differs from the D report made to the Minister of Health under the later Act. I do not think that any such distinction can properly be drawn. It seems to me that in altering the phraseology the legislature meant to make clear that, as was said in *Arlidge's Case* (6), the Minister was not bound to hold the public local inquiry himself, but I do not think that they have used language which implies that there should be any alteration in the nature of the report made upon such an inquiry. The Minister, like the Local Government Board, E is an administrative officer who has imposed on him the duty of deciding whether an order of the local authority shall or shall not be effective. In deciding this matter, the Minister of Health, like the Local Government Board, must act in accordance with the dictates of natural justice which have been laid down by the courts. If, either by the necessities of their office or the instructions of the statute creating and empowering them, some of their duties have to be carried out by other persons, those other persons F are bound by the like considerations, but I do not think that there is anything in the changed phraseology of the Acts creating these two different authorities which either obliges or entitles me to hold that whilst the report made by one subordinate to his principal is not subject to disclosure, the other is.

I think it was as true to say in 1930 as it was to say in 1915 and as was said by LORD SHAW in *Arlidge's Case* ([1915] A.C. at p. 136):

> G "My Lords, how can the judiciary be blind to the well-known facts applicable not only to the constitution but to the working of such branches of the executive. The Department is represented in Parliament by its responsible head. On the one hand, he manages its affairs with such assistance as the Treasury sanctions, and on the other he becomes answerable in Parliament for every Departmental act. His board—that is, all the members of it together—may never meet, or they may only H be convened on some question of policy; but a determination, signed and sealed and issued in correct form, stands as the deliverance of the Board as such, for which determination the president becomes answerable to Parliament. This is the general rule, acknowledged and familiar, of departmental action and responsibility. With regard to the making of this rule, however, and on the assumption that the grotesque demand to individualise the Department for private purposes is put on I one side, the next proposition is this, that when a public local inquiry has been held in compliance with statute, the person whose interests are affected is entitled to something more, namely, a disclosure of the views of the inspector written out by him, in jottings or otherwise, for the guidance or consideration of the Department in dealing with the case. My Lords, it is here (and the matter is not a strictly legal one) that I venture to hold an opinion somewhat different from that of LORD SUMNER. I incline to hold that the disadvantage in very many cases would exceed the advantage of such disclosure. And I feel certain that if it were laid down in courts of law that such disclosure could be compelled, a serious impediment might

> be placed upon that frankness which ought to obtain among a staff accustomed to elaborately detailed and often most delicate and difficult tasks. The very same argument would lead to the disclosure of the whole file. It may contain, and frequently does contain, the views of inspectors, secretaries, assistants, and consultants of various degrees of experience, many of whose opinions may differ but all of which form the material for the ultimate decision. To set up any rule that that decision must on demand, and as matter of right, be accompanied by a disclosure of what went before, so that it may be weakened or strengthened or judged thereby, would be inconsistent, as I say, with efficiency, with practice, and with the true theory of complete parliamentary responsibility for departmental action. This is, in my opinion, implied as the legitimate and proper consequence of any department being vested by statute with authority to make determinations."

LORD MOULTON said ([1915] A.C. at p. 150):

> "In the present case, however, the legislature has provided an appeal, but it is an appeal to an administrative department of State and not to a judicial body. It is said truthfully, that on such an appeal the Local Government Board must act judicially, but this, in my opinion, only means that it must preserve a judicial temper and perform its duties conscientiously, with a proper feeling of responsibility, in view of the fact that its acts affect the property and rights of individuals. Parliament has wisely laid down certain rules to be observed in the performance of its functions in these matters, and those rules must be observed because they are imposed by statute, and for no other reason, and whether they give much or little opportunity for what I may call quasi-litigious procedure depends solely on what Parliament has thought right. These rules are beyond the criticism of the courts, and it is not their business to add to or take away from them, or even to discuss whether in the opinion of the individual members of the court they are adequate or not. In the present case they appear to me to be abundantly sufficient to secure that the Local Government Board shall be fully seised of the facts of the case in which it is called in, and that it can and will get all necessary guidance as to the law. But even if my opinion were the reverse it would only indicate that I disapproved of the legislation. It could not give rise to any question as to the statutory procedure conforming or not conforming to any notions of my own as to 'natural justice.' I shall not, therefore, deal specifically with any of the points on which the majority of the Court of Appeal have criticised the procedure of the Local Government Board on abstract grounds, but there is one point which needs notice, namely, the claim that the respondent was entitled as of right to see the report of the inspector who held the public inquiry. No such right is given by statute or by an established custom of the Department. Like every administrative body, the Local Government Board must derive its knowledge from its agents, and I am unable to see any reason why the reports which they make to the Department should be made public. It would, in my opinion, cripple the usefulness of these inquiries. It is not for me to express my opinion of the desirability of an administrative department taking any particular course in such matters, but I entirely dissociate myself from the remarks which have been made in this case in favour of a department making reports of this kind public. Such a practice would, in my opinion, be decidedly mischievous."

Taking, therefore, the view as I do that both the Minister of Health and the person whom he causes to hold the inquiry are persons who in arriving at their decision must act judicially in the sense I have mentioned above, I see no reason for holding that such a report is liable to disclosure; on the contrary, I am of opinion that it is not. This being the only point to be determined in this appeal, I am of opinion that the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors: *Twiner & Co.*, for *W. B. D. Shackleton*, Bradford; *Solicitor to Ministry of Health.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

PAPADOPOULOS *v.* PAPADOPOULOS

[Probate, Divorce and Admiralty Division (Sir Boyd Merriman, P.), December 19, 1935]

[Reported [1936] P. 108; 105 L.J.P. 21; 154 L.T. 242; 52 T.L.R. 190; 80 Sol. Jo. 56]

Divorce—Judicial separation—Desertion—Separation after marriage declared void by foreign court on agreement of parties—Order of foreign court held to be illegal in England.

The parties were married in London in 1912. In 1913 the husband, a Cypriot domiciled in Cyprus, left the wife and went to Cyprus. In 1914 the wife sued him in the District Court of Nicosia, Cyprus, for a declaration of validity of the marriage and for maintenance. On May 19, 1914, by consent of the parties the court decreed that the marriage was void, as being contrary to the law of the domicil regarding the essential conditions of marriage, and that the husband should pay the wife £380 in settlement of her claims. In 1929, when the husband was resident in London, the wife obtained from a metropolitan magistrate a maintenance order for £2 a week. The husband appealed on the ground that there had been no marriage, and the Divisional Court held ([1930] P. 55) that the Nicosia court had no jurisdiction to annul the marriage and that the agreement that it should be set aside was unlawful. In answer to a petition by the wife for a decree of judicial separation on the ground of the husband's desertion it was submitted on the husband's behalf that, though the agreement embodied in the Nicosian decree had been declared void, there was, nevertheless, an actual agreement to separate in 1914 for a consideration, that it had been acted upon until 1929, and that, therefore, desertion must be negatived.

Held: the separation of the parties between 1914 and 1929 being due to an agreement which had been held to be illegal according to English law, the husband had been in desertion without cause for two years or more, and the wife was entitled to a decree.

Notes. Section 185 of the Supreme Court of Judicature (Consolidation) Act, 1925, was repealed by the Matrimonial Causes Act, 1950, and re-enacted by s. 14 of that Act.

Distinguished: *Joseph* v. *Joseph*, [1953] 2 All E.R. 710; Referred to: *Jordan* v. *Jordan*, [1939] 2 All E.R. 29.

As to desertion and judicial separation see 12 Halsbury's Laws (3rd Edn.) 241 et seq., 285–287, and for cases see 27 Digest (Repl.) 333 et seq. For Matrimonial Causes Act, 1950, see 29 Halsbury's Statutes (2nd Edn.) 388.

Cases referred to:

(1) *Papadopoulos* v. *Papadopoulos*, [1930] P. 55; 99 L.J.P. 1; 142 L.T. 237; 94 J.P. 39; 46 T.L.R. 44; 73 Sol. Jo. 797; 28 L.G.R. 73, D.C.

(2) *Fitzgerald* v. *Fitzgerald* (1869), L.R. 1 P. & D. 694; 38 L.J.P. & M. 14; 19 L.T. 575; 17 W.R. 264; subsequent proceedings (1874), L.R. 3 P. & D. 136; 27 Digest (Repl.) 334, *2784*.

(3) *R.* v. *Leresche*, [1891] 2 Q.B. 418; 60 L.J.M.C. 153; 65 L.T. 602; 56 J.P. 37; 40 W.R. 2; 7 T.L.R. 685; 17 Cox, C.C. 384, C.A.; 27 Digest (Repl.) 346, *2872*.

(4) *Bradshaw* v. *Bradshaw*, [1897] P. 24; 66 L.J.P. 31; 75 L.T. 391; 61 J.P. 8; 45 W.R. 142; 13 T.L.R. 82, D.C.; 27 Digest (Repl.) 694, *6637*.

(5) *Pulford* v. *Pulford*, [1923] P. 18; 92 L.J.P. 14; 128 L.T. 256; 39 T.L.R. 35; 67 Sol. Jo. 170, D.C.; 27 Digest (Repl.) 334, *2784*.

(6) *Huxtable* v. *Huxtable* (1899), 68 L.J.P. 83, D.C.; 27 Digest (Repl.) 339, *2811*.

Petition by the wife for a decree of judicial separation.

By her petition dated Oct. 27, 1934, the wife prayed for a decree of judicial separation, on the ground of desertion for not less than two years. By his answer the husband denied desertion and said that the wife and himself entered into an agreement on May 19, 1914, to live separate and apart. The wife, by her reply, denied that there

was such an agreement, and said, in the alternative, that the agreement relied on was A
obtained by fraud or on the misrepresentation by the husband or his agents that the
marriage had been a nullity, and that that agreement had been declared null and void
by a Divisional Court of the Probate Division in November, 1929: *Papadopoulos* v.
Papadopoulos (1). In the judgment of the Divisional Court it was stated that the
husband, a Cypriot domiciled in Cyprus, while a medical student, was married to the
wife in London in 1912. He was a member of the Greek Orthodox Church, and she B
was a Frenchwoman. After obtaining his medical diplomas he left for Cyprus late in
1913. The wife followed him there in 1914, and sued him in the District Court of Nicosia
for a declaration of validity of the marriage and for maintenance, and, in the event of
the marriage being declared invalid, claimed certain moneys. By consent of the parties
the District Court of Nicosia, on May 19, 1914, made a decree declaring the marriage
void as contrary to the law of the domicil of both parties regarding the essential conditions of marriage, and that the husband should pay the wife £380 in full satisfaction C
of all claims against him.

The wife received the money and went back to France. Meanwhile, the husband had
returned to England, and in 1929, when he was practising in London, the wife summoned him at Bow Street Police Court for maintenance. The magistrate made an
order against the husband for £2 a week. He appealed to the Divisional Court, which, D
in dismissing the appeal, held that the marriage in London in 1912 was valid, that the
agreement to set the marriage aside was unlawful and could not be set up in an English
court, and that the District Court of Nicosia had no jurisdiction to annul the marriage.

Under s. 185 of the Judicature (Consolidation) Act, 1925, a petition for judicial
separation may be presented on various grounds, including desertion without cause for
not less than two years. E

Noel Middleton for the husband.

Maurice Healy, K.C., and *Julian Fuller* for the wife.

Cur. adv. vult.

Dec. 19. **SIR BOYD MERRIMAN** read the following judgment. This is a wife's
petition for a judicial separation on the ground of desertion for two years or upwards. F
The matrimonial history of the parties has already been the subject of investigation
by a Divisional Court of this Division, on an appeal from a metropolitan magistrate
(*Papadopoulos* v. *Papadopoulos* (1)). It was then decided that, notwithstanding an
order made by consent in the District Court of Nicosia, in Cyprus, on May 19, 1914,
declaring the marriage void, the spouses were husband and wife in English law, and
that the magistrate had rightly made an order for maintenance at the rate of 40s. a G
week on the basis that the husband had wilfully neglected to maintain his wife. The
facts stated in that report must be taken as incorporated in this judgment, and it is,
therefore, unnecessary to re-state them at length. Issues are raised by the pleadings,
however, which were not dealt with on the former occasion, and I will state my findings
of fact with regard to these.

Both parties have given evidence before me. The events of which they were speaking H
occurred over twenty years ago. The wife had a very imperfect mastery of the English
language and gave her evidence partly in English and partly in French through an
interpreter. The parties were in violent conflict as to the circumstances of their marriage
at an English register office on Nov. 27, 1912, and as to the facts leading up to the
decree of the court in Cyprus in 1914. The husband asserted that the ceremony at the
register office had never been intended by either party to be a marriage at all, but was I
merely a form, known by both parties to be invalid and ineffectual, in order to provide
the wife, from whom he was about to part for ever by mutual consent, with some
documentary evidence to enable her to satisfy her mother that she had not been leading
an immoral life. He asserted, consequently, that her following him to Cyprus, in order
to assert her rights as a wife in that country, was an act of blackmail. He pleaded
the agreement of May 19, 1914, being the consent order of the District Court of Nicosia
of that date, as a valid and subsisting agreement for separation. The wife, on the other
hand, while admitting that she had made inquiries at the French consulate with regard

to the essentials for a marriage in Cyprus, asserted that the English marriage was intended to be a reality, and that, so far from there being any agreement to part, it was always understood that she should follow her husband to Cyprus so soon as he was in a position to receive her there. She pleaded, and asserted in the witness-box, that her consent to the order in the District Court of Nicosia was obtained from her by fraud.

For the reasons which I have given it is impossible to be certain that one can rely implicitly on the details of the evidence relating to matters which happened so long ago, but I feel able to come to a definite conclusion as to the truth of the matter, speaking generally, with regard to these issues. I find that both spouses intended, on Nov. 27, 1912, to go through a ceremony of marriage which they knew was binding in England, and I reject the suggestion that the whole proceeding was intended to be a mere sham. I find that when the husband returned to Cyprus he already intended to desert his wife, and that the letters written by him and on his behalf were intended to prevent her from rejoining him. I am satisfied that he took advantage of what is stated to be the Cypriot law to give effect to his purpose of leaving his wife. It is clear, however, that at the time when the Nicosian court made the order desertion had not lasted for the statutory period of two years.

With regard to the consent order, I find that both spouses, acting on the assumption that the husband was then domiciled in Cyprus, believed that the proceedings in the District Court of Nicosia were valid. I cannot accept the contention that the wife, advised as she was by the King's Advocate in Cyprus, was the victim of fraudulent misrepresentation. It is worth noting that, when the validity of these proceedings was the subject of the earlier litigation, there is no trace in the report of this contention, and I think it is too late to raise it now. Nor is it possible, as I was at one time inclined to think, to consider her consent to that order as having been based on a mistake of fact common to both parties. It was stated in the report of the case in the Divisional Court that it was common ground that the marriage was invalid according to the law of the Cypriot domicil of the husband, for the reasons given. The Cypriot law on the subject would, of course, be a question of fact in an English court, but as to this there was no mutual mistake. The mistake was with regard to the effect of the Cypriot law on the English marriage, but this was a mistake with regard to the law of England.

The result, therefore, in my opinion, is that in 1914 the spouses parted as a result of an agreement which, however unwilling the wife was to enter into it, both believed was validated by the order of the District Court. But it has already been decided that this agreement was illegal, as well as immoral, and cannot be set up by either of the parties in an English court (per LORD MERRIVALE, P., [1930] P. at p. 67).

I also find that from 1929, when she became aware of her rights in English law, the wife became determined to assert her position as a wife. Indeed, it is impossible to hold otherwise, as the proceedings which she took successfully in the English courts were the exact negation of the consent order in the Nicosian court. But I find that, so soon as the order in her favour had been upheld in the Divisional Court, the husband returned to Cyprus with the definite object, among others, of avoiding the demands of the wife. Indeed, she was obliged to pursue him to Cyprus to obtain the fruits of her order. Effect was given by the Cypriot Court, though I was not informed of the precise details, to the maintenance order, and I understand that the husband has paid regularly under the order. But it was not until 1934, when the husband returned to this country and set up in practice here, that the wife was in a position to begin proceedings for judicial separation. Her petition was filed on Oct. 27, 1934. I need only add that there has been no resumption of cohabitation in any sense of the word since the former proceedings. On the contrary, the husband, in May, 1919, "married" another woman in accordance with Cypriot law. He has had a family by her, he is still living with her, and intends to continue to do so.

On these facts counsel for the husband submitted, first, that there was no desertion at all. I have already found against him as regards the period before the order in the court of Nicosia. But on this assumption he submitted, in the alternative, that I could not, as a matter of law, find that there had been desertion for two years, seeing that nothing like that period had elapsed before that order and the consequent separation of the spouses. He founded his argument on the well-known passage in the judgment of Lord Penzance in *Fitzgerald* v. *Fitzgerald* (2) (L.R. 1 P. & D. at p. 698). He laid particular stress on the two sentences which read as follows:

> "No one can 'desert' who does not actively and wilfully bring to an end an existing state of cohabitation. . . . But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion,' in my judgment, becomes from that moment impossible to either, at least until their common life and home have been resumed."

He argued that the only remedy of the wife lay in a suit for restitution of conjugal rights, though he also maintained that the husband would have a complete answer to such a suit.

The passage in Lord Penzance's judgment in *Fitzgerald* v. *Fitzgerald* (2) and the corresponding decision in *R.* v. *Leresche* (3) have many times been discussed and considered. In both cases the point was that cohabitation had ceased with the full consent of the wife. In *R.* v. *Leresche* (3) there was a separation deed. In *Fitzgerald* v. *Fitzgerald* (2) the wife was deliberately refusing to live with the husband under what proved to be the mistaken assertion that he was living in adultery with another woman. It has been pointed out that the passage referred to in Lord Penzance's judgment, while completely accurate in the circumstances of that case, cannot be regarded as an exhaustive test of the meaning of desertion in all circumstances: see, for example, *Bradshaw* v. *Bradshaw* (4) ([1897] P. at p. 26) per Sir Francis Jeune, P.; *Pulford* v. *Pulford* (5) ([1923] P. at p. 20), per Lord Merrivale; and *Huxtable* v. *Huxtable* (6) (68 L.J.P. at p. 85). I have considered a great many of the decisions on this question. It is admitted that none of them are exactly in point. Indeed, the circumstances are wholly exceptional.

I think that the case most in point is *Pulford* v. *Pulford* (5). It is true that in that case the physical separation of the spouses began with the wife's removal to an asylum, and, therefore, was not consensual on her part. But she had been finally discharged from the asylum twenty years before proceedings which were the subject of the appeal to the Divisional Court, and for the last seventeen of those years there had been no communication of any sort between the spouses. Meanwhile, during her detention in the asylum, the husband had begun, and continued, an adulterous association with another woman. In those circumstances the wife, in 1922, took out, first, a summons for neglect to maintain, which at that time it was necessary to prove had caused her to live apart from him. No order was made on that summons, but it was succeeded immediately by a summons for desertion, on which the justices found the husband guilty, as from the date of the former hearing. Their decision was upheld by the Divisional Court, Lord Merrivale holding ([1923] P. at p. 22) that the effect of the husband's conduct, and of his adultery, was that the wife might complain of desertion during the whole period because there had been a complete renunciation by him of every conjugal duty.

In the present case I doubt whether the husband's original desertion has ever been interrupted, having regard to the fact that the separation during the period between 1914 and 1929 was due to an agreement which has been held to be invalid and illegal according to English law. However that may be, the wife re-asserted her rights in 1929. The husband has shown in the plainest possible way, and has asserted in the witness-box, that, except in so far as he is obliged to comply with the maintenance order, he does not recognise the wife's existence, and has wholly thrown in his lot with the woman with whom he went through the marriage ceremony in Cyprus in 1919. In these circumstances I hold that, taking the period from 1913 to the date of the petition as a whole, the husband has deserted the wife without cause for not less than two years.

It is to be observed that when this case was dealt with in the Divisional Court, both Lord Merrivale and Hill, J., laid stress on the point that there was no appeal as to amount, and that the magistrate had no jurisdiction in that connection to inquire into the conduct of the parties. Hill, J., anticipated the position which will arise on this decision when, at the end of his judgment ([1930] P. at p. 71), he said that the court would be free to consider the conduct of the parties—the fact that in 1914 the husband had paid the wife £380, and that from then until 1929 they had lived apart without any claim by the wife, and so forth. In the event of an alimony petition the registrar will no doubt take into account the fact that the circumstances of this case are wholly exceptional. I think that, as I have had the parties before me, it is desirable, in the event of either party challenging the registrar's decision in the matter, that any appeal should be reserved to myself.

There will be a decree of judicial separation, with costs.

Decree granted.

Solicitors: *Barry O'Brien & Co.*; *Kenneth Brown, Baker, Baker.*

[*Reported by* WILLIAM LATEY, ESQ., *Barrister-at-Law.*]

Re DAVIS AND COLLETT, LTD.

[CHANCERY DIVISION (Crossman, J.), June 5, 6, 1935]

[Reported [1935] Ch. 693; 104 L.J.Ch. 340; 153 L.T. 329; 79 Sol. Jo. 609; [1934] B. & C.R. 274]

Company—Winding-up—"Just and equitable"—Share capital held by petitioner and respondent in equal shares—Petitioner ousted from management of company—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 168 (6).

The D. and C. company was incorporated in 1932. The respondent was one of the two first directors and shareholders of the company and was appointed chairman. Subsequently, he invited the petitioner to become a director. The petitioner agreed, and pursuant to an arrangement between him and the respondent all the share capital of the company became vested in the petitioner and the respondent in equal shares. Subsequently, the respondent, having obtained the appointment of two of his friends as directors of the company, by their votes got himself appointed managing director, and immediately thereafter he ejected the petitioner from his room in the company's offices and ousted him from the management of the company. On a petition by the petitioner for an order for the winding-up of the company on the ground that it was just and equitable that it should be wound-up.

Held: in considering whether it was just and equitable that the company should be wound-up the court was left in the widest possible terms to consider what justice and equity required; as the petitioner and the respondent held the capital of the company in equal shares and were the only members of the company the court was bound to consider the position in the same way as if a question arose as to the right of two partners in a private partnership to have the partnership wound-up; and, the petitioner having been prevented from taking any part in the management of the company, it was just and equitable that the company should be wound-up.

Re Yenidje Tobacco Co. (1), [1916] 2 Ch. 426, applied.

Notes. The Companies Act, 1929, was repealed by the Companies Act, 1948, s. 222 (*f*) of which re-enacts s. 168 (6) of the earlier Act.

As to winding-up on the ground dealt with here see 6 HALSBURY'S LAWS (3rd Edn.) 534, 535, and for cases see 10 DIGEST (Repl.) 856 et seq. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Case referred to:

(1) *Re Yenidje Tobacco Co., Ltd.*, [1916] 2 Ch. 426; 86 L.J.Ch. 1; 115 L.T. 530; 32 T.L.R. 709; 60 Sol. Jo. 707; [1916] H.B.R. 140, C.A.; 10 Digest (Repl.) 864, *5683*.

Petition for compulsory winding-up of Davis and Collett, Ltd., based on the general grounds in s. 168 of the Companies Act, 1929, that it was just and equitable that the company should be wound-up.

The company was incorporated on Aug. 17, 1932. It had a capital of £200 divided into 400 shares of 10s. each. W. A. C. Davis, the respondent, who opposed this petition, and one H. Collett, were the first directors. As provided by art. 12 of the articles, each of these persons subscribed for one share in the company, and for some little time £1 appears to have been the only capital of the company. On Sept. 1, 1932, the first directors' meeting of the company was held and at that meeting a resolution was passed that Mr. Davis be appointed chairman. After certain changes in the directorship of the company, Mr. Davis approached Mr. Golding, the petitioner, with the suggestion that he should become a shareholder and director of the company. It was agreed between the petitioner and the respondent that the capital of the company should be increased, and as the result of negotiations between them they were to adopt an equal share basis. The petitioner was appointed a director in Oct., 1933, Collett then retiring and transferring the single share he held to the petitioner. The share capital of the company was subsequently increased, and as the result of allotments of shares to Mr. Golding and Mr. Davis, and ultimately of the transfer of one share on April 27, 1934, by Mr. Golding to Mr. Davis, on this date the entire share capital of the company was held by the petitioner and the respondent equally, each holding 400 10s. shares. Subsequently, Mr. Davis obtained control of the management of the company and prevented Mr. Golding from taking any part in its management. In these circumstances, Mr. Golding asked the court to make an order for the winding-up of the company on the ground that it was just and equitable that it should be wound-up.

A. F. Topham, K.C., and *Arthur Sims* for the petitioner.
John Buckley, for the respondent.

CROSSMAN, J. [after dealing with the formation of the company and the appointment and resignation of certain directors and various allotments and transfers of shares, the ultimate result of which was that Mr. Golding, the petitioner, and Mr. Davis, the respondent, from and after April 27, 1934, held all the shares of the company equally between them, continued:] After that we come down to the critical events. I gather from the evidence, and I suppose I may accept it, that things went at first smoothly, and then this followed. On April 15, 1935, notice of a board meeting for April 16 at 11 a.m., was given. I have here in the bundle of exhibits and documents the agenda of that meeting. It was: "Meeting of the board of directors of Davis and Collett Ltd., held at 50, Pall Mall, on Tuesday, April 16, at 11 a.m." The agenda was to confirm the minutes of the previous meeting. On the 16th the board meeting was held. As to the circumstances in which that was held, I am not prepared on the evidence before me to come to a definite conclusion. There is a conflict of evidence. I do not think it is necessary for me to decide it, but it is suggested on behalf of the petitioner that there was a trick played upon him with regard to the meeting. The suggestion of the other side is that it was above board. What happened at that meeting was that Mr. Desmond Davis, the brother of Mr. Davis, was elected a director, though at that date Mr. Desmond Davis held no share in the company, and, therefore, was not a qualified person within the meaning of the article which gives power to the directors to elect qualified persons as directors.

On the 16th a notice was given of a board meeting on April 17, at 2 p.m., and the agenda for that meeting is: "(i) Read and if approved confirm minutes of the last meeting; (ii) discuss and deal with banking arrangements; (iii) appointment of managing director; (iv) discuss and deal with drawing of profits; (v) any other business." The meeting was not held on the 17th; for some reason it was postponed until the 18th, the next day. On the 18th that meeting was held, and at that meeting the minutes were read and there was "proposed by the chairman, seconded by Mr. Desmond Davis, and carried, that Mr. R. O. Cary be elected a director of the company. Mr. R. O. Cary was invited into the board room and took his seat on the board. Mr. Golding objected to the resolution, but did not vote." The same observation as to the previous election of the director applies to that. Nothing was said on the agenda about the election of a director. It is suggested that for that reason there may be some invalidity in the resolution appointing the director. I do not think that, on the authorities, it can be held that it is necessarily invalid because it did not appear on the notice; but, at all events, it is a significant fact that nothing was said either in the notice of the meeting for April 16 or in the notice of the meeting of April 17 about the election of a new director. In each case they purported to elect directors, though neither of those directors was at the time a qualified person within the articles.

At the second meeting there was also a resolution approving a transfer of one share to Desmond Davis and to Mr. R. O. Cary. That was passed, and I am told that they were registered on the same day as holders of those shares, so they became qualified persons; but they were neither of them qualified persons at the moment when the resolutions appointing them directors were passed. The important point of that meeting is Mr. W. A. C. Davis's appointment as managing director. The resolution was "proposed by Mr. Desmond Davis, seconded by Mr. R. O. Cary, that Mr. W. A. C. Davis, the chairman, be appointed managing director of the company with full power as such, as provided in the articles of association, at a salary at the rate of £720 per annum for the period of three years." There were other subsidiary matters. "Mr. W. A. C. Davis refrained from voting. Mr. Golding objected to and voted against the resolution."

That is the end of the history of the matter, because the only other fact I have before me is that subsequently Mr. Davis, purporting to act as managing director, turned Mr. Golding out of the room which he occupied at the offices of the company, saying that he required it for Mr. Cary, who had been appointed a director, and, in fact, Mr. Golding gave up the room.

In those circumstances Mr. Golding asks the court to make an order for the winding-up of the company on the ground that it is just and equitable that it should be wound-up; and I have to consider the question between the parties. It seems to me that, in considering whether the matter is just and equitable, I am left in the widest possible terms to consider what justice and equity require; and I have to form, therefore, an opinion as to what was being done and what is being done with regard to this fact. I find here that Mr. Davis and Mr. Golding hold the capital of this company in equal shares. Their interest, therefore, in the company is exactly equal, and they are the only members—that is to say, it is a private company in the fullest possible sense. On the authorities, and particularly *Re Yenidje Tobacco Co.* (1), I am bound to consider the position in the same way as I should consider it if the question arose as to the right of two partners in a private partnership to have the partnership wound-up. The same circumstances which entitle a partner to require the winding-up of a partnership entitle a person who is equally interested with one other person in a company to have that company wound-up on the ground that the circumstances render it just and equitable. That, I think, is the effect of the *Yenidje Case* (1), and I think that the partnership principles apply here. I do not take the *Yenidje Case* (1) because the facts exactly agree with these, but because of the principles there laid down, where the statement of the law in LINDLEY ON PARTNERSHIP is applied to a company.

I have now to try to arrive at a conclusion as to what is the real position as between these parties. Counsel for Mr. Davis suggests to me that there is nothing wrong here in any way, and that I ought to leave the petitioner in the position in which he now is, turned out, as I think, substantially from anything to do with the management of the company and prevented from taking part in the management of the company, and that he has no remedy at all in this matter. That is a matter which I should be very sorry to find was the position in law—that a person could be treated as Mr. Golding has been treated, and have no remedy at all. I have come to the conclusion that, in effect, the object of the meetings on April 16 and April 18 was to put sufficient power into the hands of Mr. Davis to enable him to get himself appointed managing director, and thereby obtain complete control of the company. If that was the case, I think it may be that that was not effectual, because of the present view which I take of the case. The appointment of these two directors was not valid, they being persons not qualified. What weighs with me very much is that I find the next step he takes is to eject Mr.

A Golding from his room, treating him as a person who was to have no further part in the management of the company, though he was, in fact, a director. Looking at the matter all round, and considering the evidence on the whole, I cannot help coming to the conclusion that this is a case where it is just and equitable that the company should be wound-up. I do not think it is necessary for me to go into the details of the evidence here or to try to sum up the evidence, but I find here that this is a case where, as between partners, I should be bound to come to the conclusion that there ought to be a dissolution of the partnership. B

In those circumstances I think I ought to come to the conclusion that there ought to be a winding-up order made. The parties are not prepared to come to some arrangement between themselves by which they can prevent the company being wound-up, although they are only damaging themselves. In the absence of some arrangement of that sort I must make an order for the winding-up of the company in the usual form. C

Solicitors: *Turner, Osborn, & Chatterton*; *John B. Purchase & Clark.*

[*Reported by* Miss B. Bicknell, *Barrister-at-Law.*]

D

POWELL *v.* SHEFFIELD CORPORATION

E

[King's Bench Division (du Parcq, J.), January 24, 1935]

[Reported [1936] 1 K.B. 680; 105 L.J.K.B. 330; 154 L.T. 150; 100 J.P. 139; 52 T.L.R. 248; 80 Sol. Jo. 246; 34 L.G.R. 156]

Local Government—Superannuation—Contracting out—Legality—Extension of boundary—Compensation for loss of office held before extension—Effect on superannuation—Local Government and Other Officers Superannuation Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 50), *s.* 3 (1), *s.* 6 (1). F

In 1921, when the claimant was employed as a surveyor by an urban district council, part of the area of that council was taken over by the appellant corporation under a provisional order confirmed by an Act of that year. Thereafter the claimant was employed by the corporation as divisional surveyor, although it was never admitted by the corporation that the post he occupied was in fact that of divisional surveyor. In 1930 the corporation adopted the Local Government and Other Officers Superannuation Act, 1922, and passed a resolution designating the post of divisional surveyor as an established post within s. 3 of that Act. G

The corporation and the claimant were unable to agree whether the post occupied by the claimant was that of divisional surveyor, and on Oct. 3, 1932, an agreement was entered into between them whereby, in consideration of the corporation agreeing to continue to employ him, the claimant agreed that he held his employment at the pleasure of the corporation; that the post which he occupied was not, and was not to be deemed to have been, an established post for the purposes of the Act of 1922; and that he was not entitled to receive any superannuation from the corporation. H

In January, 1935, the respondent retired on attaining the age of sixty-five years, and claimed superannuation allowance, based on the period of his service with the district council and the corporation. I

Held: in fact, at the date of his retirement the claimant was occupying a post designated as an established post within s. 3 of the Act of 1922, and in those circumstances, when he agreed that the post was not, and was not to be deemed to have been, an established post, he was in effect contracting out of the Act, which he could not legally do, and, therefore he was entitled to superannuation.

Salford Union v. *Dewhurst* (1), [1926] A.C. 619, applied.

By the provisional order providing for the extension of the area of the corporation it was provided that "no officer shall be entitled to . . . receive both compensation for any direct pecuniary loss by abolition of office or by diminution of . . . salary and a superannuation . . . allowance in respect of the same period of service and the same pecuniary loss."

Held: the effect of the provisional order was that the period of the claimant's employment with the district council should be excluded for the purpose of calculating the amount of his superannuation.

Notes. The Act of 1922 was repealed by the Local Government Superannuation Act, 1937, which provides, by s. 1, for the maintenance of a superannuation fund, and, by s. 3, for the classes of persons who shall be entitled to participate in the benefits of the fund.

As to superannuation of local government officers, see Halsbury's Laws, Cumulative Supplement 1956, vol. 21, paras. 123–145, and for cases, see 37 Digest 214, 215. For Local Government Superannuation Act, 1937, see 14 Halsbury's Statutes (2nd Edn.) 619.

Case referred to:

(1) *Salford Union* v. *Dewhurst*, [1926] A.C. 619; 95 L.J.Ch. 457; 135 L.T. 514; 90 J.P. 179; 42 T.L.R. 657; 24 L.G.R. 477, H.L.; 37 Digest 215, *105*.

Special Case stated by an arbitrator.

The facts found by the arbitrator and set out in the case were as follows:

1. The claimant, Bernard Powell (respondent to the appeal), entered the service of the Erdington urban district in March, 1898, and remained in their employ until August, 1898, when he entered the service of the Birmingham, Tame, and Rea District Drainage Board, where he continued until August, 1901.

2. In June, 1901, the claimant was appointed engineer and surveyor to the Handsworth Urban District Council, and continued in their service until Nov. 9, 1921, on which day there came into operation the Ministry of Health Provisional Order Confirmation (Sheffield Extension) Act, 1921 (11 & 12 Geo. 5, c. lxix), whereby the boundaries of the city of Sheffield were extended so as to include the Handsworth urban district. The claimant's salary and emoluments amounted, at that time, on the average to £830 per annum.

3. On June 18, 1920, a memorandum of agreement was executed by the corporation of Sheffield (the present appellants) and the claimant, which recited that whereas it had been agreed between the corporation and the Handsworth Urban District Council that, in the event of the city of Sheffield being extended so as to include Handsworth, the corporation would provide adequate compensation for certain specified officials of the Handsworth Urban District Council (including the claimant), it was thereby agreed between the parties that such adequate compensation as aforesaid should be in the case of the claimant the sum of £300 per annum, "such annuity to become payable from the day on which the order for the inclusion of the Handsworth urban district within the city of Sheffield shall come into operation and to be in full discharge of all claims to which the said Bernard Powell shall or may become entitled in any respect whatsoever by reason of his said office or otherwise in relation to the said urban district of Handsworth. Provided always that such annuity shall be suspended while the said Bernard Powell shall hold any office under the corporation and shall become payable from the day on which the said Bernard Powell shall cease to be employed by the corporation."

4. In 1921 the corporation offered to the claimant and he accepted an appointment in the department of the city engineer and surveyor at a salary of £600 a year. In September, 1922, the services of the claimant were lent to the Minister of Transport for duties to be carried out in Sheffield, and he remained in that position until July, 1928, when he returned to work for the corporation. During the whole of this period his salary continued to be paid each month by the corporation, and the arbitrator found as a fact that there was no interruption of his employment by the corporation.

5. It was contended on behalf of the claimant that he occupied the position of

divisional surveyor throughout the period of his employment by the corporation. In A support of this contention he produced (*a*) official notepaper supplied to him for his use by the corporation on which were printed the words "Bernard Powell, Divisional Surveyor"; (*b*) letters written by him on Jan. 2, 1934, and Jan. 15, 1934, to the city treasurer signed on behalf of "Bernard Powell, Divisional Surveyor"; (*c*) printed statements or lists of the corporation's official staff issued by the town clerk's department in accordance with the corporation's classification and grading scheme for the years 1932 B 1933, and 1934, showing in each case an entry for "Powell, B., Divisional Surveyor"; (*d*) an extract from the minutes of the meeting of the Highways Committee, held on Oct. 19, 1934, stating that "the town clerk reported on the position of Mr. Bernard Powell, Divisional Surveyor in the City Engineer's Department. . . ." These minutes were confirmed by the city council on Dec. 5, 1934.

The claimant stated in his evidence that the actual appointment which he was to C hold was not specified when he was first engaged by the corporation, but that the city engineer proposed to him that he should be divisional surveyor of the eastern district of the city, and that he agreed to this proposal. The claimant stated that this district included not only Handsworth but also Darnall, Hillsborough, and various other places comprising the eastern side of the city. He further said that he was throughout his actual service with the corporation responsible for this district, although he was also D assigned certain other duties, such as private street works and telephone operations, for the whole city.

The corporation denied that the claimant was appointed divisional surveyor or occupied that office at any time while in their employment. The city engineer and surveyor (Mr. W. J. Hadfield) gave evidence to the effect that he disapproved of dividing the city into territorial divisions, and had abolished the offices of divisional surveyor, E which formerly existed. Mr. Hadfield stated that he merely requested the claimant to carry on in the Handsworth area for the time being, and that there was never any question of his being allocated to the eastern division of the city; indeed, he denied that such a division existed. The claimant's duties, he stated, were in no sense restricted to one side of the city, but were of a general nature.

The arbitrator found as a fact that the claimant occupied the position of divisional F surveyor throughout his period of employment by the corporation, and was at all material times officially recognised by them to be holding that position. It was admitted on behalf of the corporation that there was no person other than the claimant holding such a position.

6. On Feb. 25, 1930, a meeting of the finance committee of the corporation was held G at which the town clerk referred to a previous resolution of the committee instructing that notices be issued calling a special meeting of the council to consider the question of adopting the Local Government and Other Officers Superannuation Act, 1922, in respect of officers of the council as from April 1, 1930. According to the minutes of the committee, which were confirmed on March 5, 1930, by the city council, the finance committee resolved "that in the event of the council deciding to adopt the Act, the following H list of posts be designated posts, i.e., posts to which the Local Government and Other Officers Superannuation Act, 1922, shall apply." Then followed a "list of posts to be designated established posts for the purposes of the above Act," to which was prefaced a note stating that the posts designated were those occupied by persons appointed on the permanent official staff of the corporation. The list for the city engineer and surveyor's department expressly mentioned "divisional surveyor." I

7. On March 5, 1930, a special meeting of the Sheffield City Council was held at which the Local Government and Other Officers Superannuation Act, 1922, was adopted to come into operation on July 1, 1930. The council resolved that for the purposes of the Act the posts set out in the minutes of the finance committee meeting of Feb. 25, 1930, should be designated as established posts.

8. At a quarterly meeting of the city council, held on May 7, 1930, the council confirmed "the resolution of the council passed on March 5, 1930, adopting the Local Government and Other Officers Superannuation Act, 1922, and that the number of

established posts be in accordance with the schedule now submitted." The schedule repeated the note mentioned in para. 6 above and contained the following entry: "Divisional Surveyor.—The resolution with the schedule was forwarded by the town clerk on May 7, 1930, to the Minister of Health for approval."

9. The printed statements of the official staff submitted in accordance with the corporation's classification and grading scheme for the years 1932, 1933, and 1934, and which (as stated in para. 5 (*c*) above) included an entry relating to the claimant, indicated by means of a capital letter E against the claimant's name that he was an officer occupying an established post under the Local Government and Other Officers Superannuation Act, 1922.

10. On June 16 the city engineer sent to the claimant a circular letter in which he stated that the adoption by the corporation of the superannuation scheme necessitated the production by all officers of their birth certificates and certificates of previous service, if any, with other local authorities. When the claimant produced his birth certificate for inspection by the city engineer the latter informed him that he did not come under the new scheme as his superannuation was arranged in another way. When the claimant demurred to this he was referred to the town clerk. On Aug. 1, 1930, the deputy town clerk addressed a note to the claimant headed "Superannuation," in which he enclosed a certificate as to previous service with other local authorities and requested the claimant to fill in the particulars. The certificate was printed as follows: "I, the undersigned, being in your service and the occupier of a post designated by you as an established post for the purposes of the Act, hereby apply to you to reckon for the purposes of the Act my services with other local authorities set forth hereunder."

11. In July, 1930, the town clerk interviewed the claimant and made certain proposals to him. He asked whether he would modify the terms of the agreement of June 18, 1920, so as to reduce the £300 per annum payable thereunder to £156 per annum, and informed him that, if he would not agree to this, the corporation would consider the question whether he was an established officer. The claimant refused to consent to the proposed modification. He was then asked to agree that he was not the occupier of an established post, and in consequence not entitled to superannuation, under the Act of 1922. He was informed that, if he did not so agree, he would be dismissed from the service of the corporation. A sub-committee of the finance committee had made a recommendation to this effect.

12. The claimant protested throughout these negotiations that he was fully entitled to come under the provisions of the Local Government and Other Officers Superannuation Act, 1922, and declared repeatedly that the corporation had already recognised him as a designated officer for the purposes of the Act. As a result of the pressure which was brought to bear on him by the threat of dismissal he entered into a written agreement under seal with the corporation on Oct. 3, 1932. This agreement, after reciting (inter alia) that it was claimed by the claimant and denied by the corporation that the claimant was the occupier of an establishment post designated for the purposes of the Local Government and Other Officers Superannuation Act, 1922, and that the corporation had informed the claimant that they were not prepared to continue to employ him unless he withdraw the said claim, thereupon declared that it was agreed between the parties as follows:

> "In consideration of the corporation continuing to employ the said Bernard Powell as a surveyor the said Bernard Powell agrees as follows: (i) that he the said Bernard Powell holds the said employment at the pleasure of the council; (ii) that the post which the said Bernard Powell occupies is not and shall not be deemed to have been or to be designated as an established post for the purposes of the Local Government and Other Officers Superannuation Act, 1922; (iii) that he the said Bernard Powell hereby withdraws the claim he has made as hereinbefore recited and hereby agrees that he is not and shall not at any time as of legal right on resigning from or otherwise ceasing to hold his office or employment under the corporation be entitled to receive any superannuation whatsoever from the corporation and that he will not claim to be entitled to receive any such allowance."

13. On July 4, 1932, the claimant's solicitors wrote to the town clerk returning an approved copy of the draft agreement and asking whether the claimant could rest assured that there was no intention of disturbing his then existing employment. No answer was given by the corporation to this inquiry.

14. The claimant remained in the service of the corporation until Jan. 15, 1935, on which date he attained the age of sixty-five years.

15. The claimant stated in evidence that after signing the agreement he still regarded himself as occupying a designated post. On March 30, 1935, his solicitors wrote to the town clerk stating that the corporation had been under a misapprehension as to the claimant's position under the Local Government and Other Officers Superannuation Act, 1922, and asking what action the corporation proposed to take. The corporation replied that they proposed to take no action, and on April 17, 1935, the claimant's solicitors informed the town clerk that the claimant proposed to submit his claim to arbitration.

At the hearing before the arbitrator, on Oct. 23, and Oct. 30, 1935, it was contended by counsel for the corporation that, the question of the claimant's right to a superannuation allowance having been settled by the agreement of Oct. 3, 1932, there was no dispute in "default of agreement" which could properly form the subject-matter of an arbitration under s. 22 of the Local Government and Other Officers Superannuation Act, 1922. The arbitrator did not give effect to this contention on the ground that the words "in default of agreement" were not to be construed as meaning that the arbitrator had no jurisdiction where an agreement relating to superannuation was produced, but were intended to refer to a state of difference or dispute between the parties, regardless of whether such difference or dispute arose from agreement or purported agreement, or not.

It was contended by counsel for the corporation that the claimant was not the occupier of a designated post for the purposes of the Local Government and Other Officers Superannuation Act, 1922, at the time when the corporation adopted the Act or at any time thereafter. He further argued that a local authority might designate a post which was vacant at the moment and that that had been done in the present case. Counsel admitted, however, that, if the claimant was divisional surveyor at the time when the Act was adopted, he was designated for the purposes of the Act.

Having regard to his finding of fact in para. 5 to the effect that the claimant occupied the position of divisional surveyor at all material times, and taking into consideration the evidence set out above, the arbitrator found as a fact that the claimant was at all material times the occupier of a post which the corporation designated for the purposes of the Local Government and Other Officers Superannuation Act, 1922. Accordingly, he was an "officer" as defined in s. 3 thereof.

Assuming that the claimant was a designated officer the main question of law involved in the reference related to the agreement of Oct. 3, 1932. Counsel for the claimant put forward at the hearing the following contentions:

That the agreement was invalid in itself because the Local Government and Other Officers Superannuation Act neither provided for, nor permitted, a local authority to "de-designate" an officer who had once been designated for the purposes of the Act.

That a serving officer occupying a designated post could not have his status under the Act altered to his detriment either with or without his consent.

That while the Act left it within the entire discretion of the local authority to adopt a superannuation scheme, and, moreover, left the local authority free to designate such posts as they choose, it did not permit any contracting out of the Act in the case of an officer who has once been brought within its provisions.

That *Salford Union* v. *Dewhurst* (1) is authority for these propositions.

That what counsel called the common sense of the Act would point to a similar conclusion on grounds of practical expediency.

That no consideration was given or promised by the corporation in the said agreement since the claimant was liable to dismissal at any time and was accorded no assurance of or right to continue employment.

That the agreement could not be regarded as a valid compromise since in the first place it does not purport to be one, and in the second place does not embody a reciprocal abandonment of claim, there being no abandonment of any claim or right by the corporation.

It was contended by counsel for the corporation:

That contracting out of the Local Government and Other Officers Superannuation Act was not only permitted, but, indeed, contemplated by the statute, as shown by the words "in default of agreement" in s. 22.

That the decision in *Salford Union* v. *Dewhurst* (1) was not applicable since the Poor Law Officers Superannuation Act, to which that case referred laid down a compulsory system whereas superannuation under the Local Government and Other Officers Superannuation Act was voluntary and within the discretion of the local authority.

That the agreement of October, 1932, constituted a valid contracting out of the Act.

That as the agreement was under seal, no question of consideration could arise, but that if it did, good consideration was given by the corporation in that they continued to employ the claimant for a further period of three years which they would not otherwise have done.

That, alternatively, the agreement constituted a valid compromise since there was at the time when it was made a bona fide dispute between the parties whether the claimant occupied a designated post, which dispute was determined by an agreement that he was never inside the Act of 1922.

That, in deciding whether a compromise should be enforced or set aside, regard should be had to the honesty of the parties, and that here the claimant acted in bad faith since he never had any real intention of carrying out his professed intention of abandoning all claims to a superannuation allowance.

That an agreement of the kind was justified on grounds of public policy since its object was to avoid disputes, and that the agreement in question was equitable, in so far as it sought to prevent the claimants from receiving both compensation for loss of office and a superannuation allowance.

The arbitrator held, first, that the agreement of Oct. 3, 1932, was invalid, and, secondly, that the claimant was entitled to superannuation allowance calculated with reference to the whole period of his service with the Handsworth Urban District Council and the Sheffield Corporation.

By the Local Government and Other Officers Superannuation Act, 1922:

> s. 3: "'Officer' or 'servant' means an officer or servant in the permanent service of the local authority occupying a post designated as an established post for the purposes of this Act by a resolution of the local authority . . ."
>
> s. 6 (1): ". . . every officer or servant . . . who shall have attained the age of sixty-five years shall be entitled on resigning or otherwise ceasing to hold his office or employment to receive during life a superannuation allowance according to the scale by this Act provided."

Montgomery, K.C., and *Macfarlane* for the corporation.
Croom-Johnson, K.C., and *Davie* for the claimant.

DU PARCQ, J.—It is not necessary, I think, that I should state the facts in any detail. The facts have already been found by the learned arbitrator, and I have nothing to do with his decision upon them except to accept it. What I am asked to do and what I am bound to do is to say whether or not the learned arbitrator is right in his view of the law. I shall, therefore, only state enough of the facts to make what I say comprehensible.

The claimant was employed for some years under the Handsworth Urban District Council, having been previously employed by other public bodies. In the year 1920 a representation was made to the Ministry of Health by the city of Sheffield that the boundaries of that city should be altered so as to include neighbouring districts, including the urban district of Handsworth. I think it is plain that at that date it was anticipated that the legislature might give effect to the wishes of the city of Sheffield and that in due course there would be made a provisional order dealing with the Sheffield extension, which would be confirmed by the legislature; and I think it was anticipated, probably with very good reason at that time, that provision would be made by the legislature for the compensation of any officials of the Handsworth Urban District Council who either found themselves deprived of their employment by the abolition of office or deprived of some of their emoluments by diminution or loss of fees or salary.

On June 18, 1920, an agreement was entered into between the lord mayor, aldermen and citizens of Sheffield and the claimant, whereby, after reciting the fact that the representation to which I have referred had been made, and that an agreement had been made between the corporation of Sheffield and the Handsworth Urban District Council, and that the claimant had submitted particulars of his salary and emoluments to the corporation, it was agreed between the parties "that such adequate compensation as aforesaid"—that is to say, looking back at one of the recitals, adequate compensation for the official—"shall be the sum of £300 per annum, such annuity to become payable from the day on which the order for the inclusion of the Handsworth urban district within the city of Sheffield shall come into operation, and to be in full discharge for all claims to which the said Bernard Powell shall or may become entitled, in any respect whatsoever, by reason of his said office or otherwise in relation to the said urban district of Handsworth, provided always that such annuity shall be suspended while the said Bernard Powell shall hold any office under the corporation and shall become payable from the day on which the said Bernard Powell shall cease to be employed by the corporation." That agreement was under seal. In fact the claimant passed at once, without any interval of time, from the employment of the Handsworth Urban District Council to the employment of Sheffield Corporation.

In 1922 was passed the Local Government and Other Officers' Superannuation Act, which made provision for payment of superannuation allowances to certain officers. It was an adoptive Act, and in 1930 it was adopted by a resolution of the Sheffield Corporation of March 5 of that year, the adoption to come into force on July 1, 1930. In s. 3, which is the definition section of the Act, this definition occurs:

> "'officer' or 'servant' means an officer or servant in the permanent service of the local authority occupying a post designated as an established post for the purposes of this Act by a resolution of the local authority and whether in receipt of salary or wages."

The post of divisional surveyor was designated by a resolution duly passed as an established post for the purposes of the Act.

A dispute arose in July, 1930, between the claimant and the Sheffield Corporation. The claimant said that he was divisional surveyor, that that post was his, and that, therefore, he was occupying a post designated as an established post for the purposes of the Act of 1922. The council said that that was not so, and on Oct. 3, 1932, an agreement was entered into, such agreement being stated to be supplemental to the agreement of June 18, 1920, to which I have already referred. That agreement recited the Sheffield Extension Order of 1921, recited the fact that the claimant entered the service of the Sheffield Corporation at a salary of £600 a year, recited the adoption of the Local Government and Other Officers' Superannuation Act of 1922, and went on in this way:

> "And whereas it is claimed by the said Bernard Powell and denied by the corporation that he the said Bernard Powell is the occupier of a post under the corporation (and, therefore, entitled to superannuation as an established post for the purposes of the said Act) and the corporation have informed the said Bernard Powell that they are not prepared to continue to employ him unless he withdraws the said claim, Now it is hereby agreed as follows: In consideration of the corporation continuing to employ the said Bernard Powell as a surveyor the said Bernard Powell agrees as follows: (i) that he the said Bernard Powell holds the said employment at the pleasure of the council; (ii) that the post which the said Bernard Powell occupies is not and shall not be deemed to have been or to be designated as an established post for the purposes of the Local Government and Other Officers' Superannua-

> he had made as hereinbefore recited and hereby agrees that he is not and shall not at any time as of legal right on resigning from or otherwise ceasing to hold his office or employment under the corporation be entitled to receive any superannuation whatsoever from the corporation and that he will not claim to be entitled to receive any such allowance."

That agreement was under seal.

In 1935 the claimant attained the age of sixty-five. He was given notice that on attaining that age his employment would cease, as it would, I think, necessarily cease unless it was extended by the corporation, and he made a claim under the Act of 1922 to superannuation allowance. He was met with two answers. The first, if it is right, goes to the whole of his claim. The learned arbitrator has held that it is not an answer to the claim at all. The agreement of Oct. 3, 1932, was under seal, so that it is not necessary to consider whether or not there was consideration for it. Counsel for the corporation, however, says that there was consideration for it, because the corporation said: "At any rate, we shall not at once cease to employ you, as we should if you do not give up your claim." Treating it as an enforceable contract, counsel says: This is a case in which the corporation and the claimant were at odds: they did not agree as to a question of fact—it might possibly be in part a question of law; but it is, I think, in this case mainly a question of fact—whether the claimant was an officer occupying a post designated as an established post or not, and, in order to settle their differences, they entered into an agreement with him by which they gave some consideration and he agreed that the post that he occupied was not and should not be deemed to have been or to be designated as an established post.

On that point I agree with the learned arbitrator. One thing is plain, and counsel did not argue the contrary. A man who is entitled to a superannuation allowance under the Act of 1922—I am not limiting what I say to that Act, of course; but it is the only Act with which I have to deal to-day—has a vested and inalienable right to that superannuation allowance. He cannot, as it is sometimes put, contract himself out of that right. He cannot by entering into any agreement divest himself of that right. The principle is established in *Salford Union* v. *Dewhurst* (1), and, as I have said, counsel accepts that view of this case. He agrees that an agreement by which the claimant has given up his rights would be unenforceable and worthless. If the claimant had said: "Although I am an officer occupying a post designated as an established post, I will, for good consideration, abandon the right to superannuation allowance which that position gives me," it is not suggested that the agreement would be enforceable. I do not think that the distinction which counsel suggests can be drawn. At the date when the agreement was entered into the claimant either was or was not occupying a post designated as an established post. We now know that he was occupying such a post. That is the fact, and, even though he had doubts whether he was occupying such a post, and even though Sheffield Corporation may have felt no doubt that he was not occupying such a post, it does not affect the fact, which nothing can alter when it is once granted that it was the fact, that he was occupying such a post. In my view, if a man who does occupy an established post, if I may so call it for brevity's sake, says: "I am willing to agree that I am not occupying an established post or that I shall be deemed not to be occupying an established post," he is only saying in other words: "I am willing to give up the vested and inalienable right which the occupation of the post which, in truth, I do occupy gives me." I cannot draw the distinction which I was asked to draw between contracting out and contracting that you are not to be deemed to be in. I do not think that the distinction is one which ought to be drawn, and I do not think that the courts ought to try to find ways of enabling people to give up rights of such importance as the right to a superannuation allowance. Therefore, upon that point I agree with the contentions of counsel for the claimant and with the decision of the learned arbitrator.

The second point is this. Counsel for the corporation says that that agreement of June 18, 1920, provided for the payment of compensation for pecuniary loss by abolition

Order, confirmed by the Provisional Order Confirmation (Sheffield Extension) Act, 1921, which is in these terms:

> "Subject to the provisions of this order, no officer shall be entitled to claim or receive both compensation for any direct pecuniary loss by abolition of office or by diminution of loss of fees or salary and a superannuation or retiring allowance in respect of the same period of service and the same pecuniary loss."

This contention, which was also rejected by the learned arbitrator, does not provide a complete answer to the claimant's claim to superannuation allowance. He is claiming to be compensated with regard not only to his service to the Sheffield Corporation, but also his service to the Handsworth Urban District Council. Counsel says that he cannot have the latter; he is claiming or receiving under that agreement compensation in respect of the abolition of his office with the Handsworth Urban District Council or diminution or loss of fees or salary owing to his transfer to the Sheffield Corporation, and, that being so, he cannot in respect of that same period of service and the same pecuniary loss, to use the words of the Act of Parliament, which I think need a little gloss put upon them to be comprehensible, whichever view one takes of the section, have both compensation and superannuation or retiring allowance. That seems at first sight fairly plain. At least, so it seemed to me at first sight; but the matter is not a simple one, and needs consideration.

Counsel for the claimant says, first of all, that it is to be borne in mind that in 1920 when this agreement was entered into and in 1921 when the Provisional Order Confirmation (Sheffield Extension) Act, 1921, was passed, neither the claimant nor anyone else could have any claim to a superannuation allowance under the Act of 1922, which had not then been passed; he had no right, vested or otherwise, until 1922, and it may be that, apart from that Act of 1922, he would not have been entitled to any superannuation allowance at all under any Act. Counsel says that art. 52 of the Provisional Order of 1921, confirmed as it was by the Act of 1921, could not take away a right which only vested in the claimant in 1922, and that art. 52, when it provides that an officer is not to have both compensation and superannuation allowance, means compensation under the order assessed in accordance with the order, which, by reference, sends one back to sections of the Local Government Act, 1888, including s. 120 of that Act. He says that art. 52 means that, whereas an officer was entitled to say that he was to have payment forthwith of compensation and be at once compensated, he could not, if he had reached the age of sixty and done forty years' service, which would entitle him to superannuation allowance (assuming for this purpose that one has to consider what he became entitled to under the Act of 1922) go to the authority and say: "Now I am sixty; I have done enough service to entitle me to superannuation allowance; I will take it and my compensation, too." He says that that at the most is what the section means, and that it is only referring to compensation paid at once and in a lump, as I understand him, and calculated in accordance with the Act of 1922.

I have come to the conclusion that upon this part of the case the learned arbitrator has not taken the right view and that the contentions of counsel for the corporation are right. It is to be observed that the learned arbitrator, when dealing with the provisional order, which came into operation on Nov. 9, 1921, in para. 22, sub-para. (1) of the Case, says:

> "The corporation had in effect compounded in advance for any right to compensation which might be conferred by the provisional order and the confirming Act. It was not suggested at the hearing that there was anything illegal in the corporation taking this step, nor has either party to the dispute impugned the validity of the agreement of June 18, 1920."

I understand counsel for the claimant not to dissent from that view. Therefore, one starts with this, that the agreement of 1920, as is conceded, is one which could quite properly be made, on the assumption that it means that the corporation are, to use the learned arbitrator's phrase, compounding in advance for any right to compensation.

A agree with you what you are to have by way of compensation." There is nothing in that in the least comparable to an attempt to contract out of a right to superannuation allowance. On the contrary, when the provisional order was made and confirmed it was made clear that the corporation in the first instance, applying the Act of course, could say what compensation was to be payable, and, unless that was objected to by the claimant, the matter would remain there. It is plain enough, as I think I have said B already, that the parties knew pretty well what was going to happen or what was likely to happen, and I have no doubt, looking at this agreement, that they were saying: "The claimant will be entitled to compensation. If what we expect to happen does happen, we do not know exactly what compensation he will be entitled to" [though I dare say they might have added that they could make a fairly accurate surmise]. We may be giving him too much; we may be giving him too little; but, at C any rate, we agree that he is to have £300 a year, but that, while he is employed by us (if he does enter our employment) he shall not receive the £300 per annum." I am not concerned in the least, when once it is conceded that that is a legal and enforceable agreement, with the question whether the £300 a year, payment of which was suspended as it was suspended, was too little or too much—whether it was a provident or an improvident agreement for the plaintiff to enter into. Those questions are quite irrelevant. D Having entered into that agreement it appears to me that when in 1921 the provisional order was confirmed the claimant was in the position of having received, in the sense that he had an enforceable promise to pay money, and that he was in a position to claim and was intending to claim the compensation for direct pecuniary loss, and his position to-day is that he is receiving, I suppose, that compensation of £300 a year for the rest of his life. It seems to me that it is impossible to hold that "compensation" there E refers only to compensation assessed subsequently to and in accordance with the provisions of the Order and Act of 1921, and that it must also include compensation assessed in anticipation of such an order and in respect of the matters dealt with by art. 52.

Counsel for the claimant says that there is one conclusive answer to the contention put forward on behalf of the corporation, even if he is wrong on every other point. He F says: "Whatever was enacted in 1921 cannot affect a right which is vested in the claimant under the Local Government and Other Officers' Superannuation Act, 1922." Counsel for the corporation replies to that by referring me to s. 30 of the last-mentioned Act, which provides:

> "Nothing in this Act shall prejudice or affect any express provision contained in G any act of Parliament or any order confirmed by or having the effect of an Act of Parliament relative to any superannuation or retiring allowance or any other allowance of a similar character in the case of any officer or servant referred to in such provision."

I think counsel is right in saying that by that saving clause the legislature have made it H plain that, although the right to a superannuation allowance did not exist in 1921, a provision such as is contained in art. 52 of the Order of 1921 is to have the effect of preventing a man from getting superannuation allowance in respect of the period with regard to which he had already received compensation. I do not know that art. 52 is very happily worded, but I think it is reasonably plain that it means, as counsel for the corporation suggested, that, having regard to the fact that compensation is to be assessed I with reference to the length of period of service with a particular employer in accordance with the Local Government Act of 1888, when a man has had compensation in respect of such a period he cannot also have superannuation allowance in respect of that period in respect of which his pecuniary loss has already been made up to him.

For these reasons I think that the learned arbitrator was wrong as to the second point.

The result is that, dealing with para. 25 of the case, I say as to the question whether the agreement of Oct. 3, 1932, was valid and binding that it is not, and as to the question whether, if the claimant is entitled to superannuation, the period of his employment with the Handsworth Urban District Council should be excluded for the purpose of calculating the amount of his superannuation, I answer that it should be so excluded.

Solicitors: *Sharpe, Pritchard & Co.*, for Town Clerk, Sheffield; *Corbin, Greener & Cook*, for *Arthur Neal, Scorah & Co.*, Sheffield.

[*Reported by* V. R. Aronson, Esq., *Barrister-at-Law.*]

DANNEBERG *v.* WHITE SEA TIMBER TRUST

[Court of Appeal (Lord Wright, M.R., Romer, L.J. and Eve, J.), October 15, 16, 1935]

[Reported 154 L.T. 25; 52 T.L.R. 5; 79 Sol. Jo. 796; 41 Com. Cas. 60; 18 Asp. M.L.C. 542]

Shipping—Charterparty—Ice clause—Charterers to arrange for provision of icebreaking assistance—Liability of charterers where assistance intermittent and inadequate—Operation of exceptions clause where obligations under principal clause unsatisfied—Exception of charterers from responsibility for loss of time during passage through ice.

An ice clause in a charterparty provided, inter alia (by cl. (1)), that if the loading port were inaccessible by reason of ice or in case ice set in after the ship's arrival at the port, the charterers undertook to arrange for the provision by the port authorities of icebreaker assistance if required, and (by cl. (4)) that the charterers should not be responsible for any loss of time during passage through the ice and (or) any loss or damage caused to the ship by ice or for any detention on passage through ice. The ship was delayed because, although full icebreaker assistance was required, the port authorities gave only intermittent assistance. On a claim by the shipowners for damages, the charterers contended that (i) their obligation under cl. (1) was limited to the making of arrangements with the port authorities, (ii) they were excused responsibility by cl. (4).

Held: the shipowners were entitled to damages because (i) cl. (1) imposed an obligation to provide continuous and full icebreaker assistance throughout the ship's passage through the ice, and that obligation was not fulfilled by the making of ineffective arrangements with the port authorities.

Ugleexport Charkow v. *Anastasia S.S. Owners, Russian Wood Agency, Ltd.* v. *Dampskibsselskabet Heimdal* (1) (1934), 151 L.T. 261, considered.

(ii) as the shipowners had not fulfilled their obligations under cl. (1), cl. (4), being a subordinate exceptions clause, did not apply: dictum of Scrutton, L.J., in *Gibaud* v. *Great Eastern Rail. Co.* (2), [1921] 2 K.B. 426 applied. *The Cap Palos* (3), [1921] P. 458 followed.

Decision of Branson, J., affirmed.

Notes. As to the ice clauses in charterparties, see 30 Halsbury's Laws (2nd Edn.) 356, para. 534, note (*m*).

Referred to: *Vsesojuzuoje Objediheni Sorfracht of Moscow* v. *Temple S.S. Co.* (1945), 173 L.T. 373.

As to the construction of exceptions from liability in charterparties, see 30 Halsbury's Laws (2nd Edn.) 353, para. 533, and for cases on the subject, see 41 Digest 408, *2540–2542.*

Cases referred to:

(1) *Ugleexport Charkow* v. *Anastasia S.S. Owners, Russian Wood Agency, Ltd.* v. *Dampskibsselskabet Heimdal* (*The Asko*) (1934), 151 L.T. 261; 50 T.L.R. 361; 78 Sol. Jo. 297; 39 Com. Cas. 238; 18 Asp. M.L.C. 482, H. L.; Digest Supp.

(2) *Gibaud* v. *Great Eastern Rail. Co.*, [1921] 2 K.B. 426; 90 L.J.K.B. 535; 125 L.T. 76; 37 T.L.R. 422; 65 Sol. Jo. 454, C.A.; Digest Supp.

(3) *The Cap Palos*, [1921] P. 458; 91 L.J.P. 11; 126 L.T. 82; 37 T.L.R. 921; 15 Asp. M.L.C. 403, C.A.; 41 Digest 683, *5126*.

(4) *Lilley* v. *Doubleday* (1881), 7 Q.B.D. 510; 51 L.J.Q.B. 310; 44 L.T. 814; 46 J.P. 708; 3 Digest 77, *163*.

Appeal by charterers from a judgment of BRANSON, J., dated April 10, 1935. The facts are stated in the judgment of LORD WRIGHT, M.R.

H. I. P. Hallett for the charterers.
Cyril Miller for the shipowners.

LORD WRIGHT, M.R.—This is an appeal from a judgment of BRANSON, J., given on an award stated in the form of a special case for the opinion of the court by a very experienced city solicitor, Mr. Douglas Garrett. The case is one of a type which in the last few years has been frequently before the courts of this country, and I will indicate in the most general terms the nature of it. The appellants were the charterers of a vessel, owned by the respondent, called the *Spidola*. The appellants are the White Sea Timber Trust, Ltd. of Paris, and they were the charterers of the steamship *Spidola*, owned by P. Danneberg, of Riga. Both parties are foreigners, but the contract was entered into on the Chamber of Shipping Baltic Wood Charter, 1926, a form of contract prepared by the London Chamber of Shipping. The matter comes before the courts of this country because that contract contained an arbitration clause, cl. 39. For that reason it went before an arbitrator in the city.

The vessel was chartered in November, 1933, to proceed to Leningrad below Bridges and to load a cargo of timber to be delivered to Antwerp or Ghent. It is well known that, at that time of the year, or at least at the time of the year when the vessel was due outside the port, the port would be icebound, and equally it would be icebound when, having loaded her cargo in the ordinary way, the vessel was prepared to proceed to sea. In order to induce shipowners to send their vessels to Leningrad while it was icebound, a clause has been arranged called the ice clause; it is a clause which has taken different forms, but the object of that clause is to ensure that the shipowner will have the benefit of the assistance of icebreakers, in order to enable the ship to enter port with as little delay as possible, and to leave the port when the ship is loaded, also with as little delay as possible, and it provides that in certain events compensation, if there is undue delay, is to be payable to the shipowner by the charterer. In each case the precise rights and obligations of the parties must be determined by the exact terms of the clause which they have agreed upon. I am merely indicating the general nature of the position.

This vessel was delayed, or at least the owners complained that she had been delayed, because the requirements of the ice clause had not been properly fulfilled by the charterers, and thereupon proceedings at arbitration took place before two arbitrators and an umpire, and the umpire made his award in the form of a special case. Certain points which were raised in that award are not now material, but I shall read a few passages from the case which will indicate sufficiently, first, what are the findings on the part of the umpire, and, secondly, what are the questions of law upon which he has required the opinion of the court. The facts as stated by him may be summarised in this way. The vessel "arrived at the edge of the ice"—that means the point outside the harbour at which it becomes impossible to proceed through the ice without the help of an icebreaker—

> "in the Gulf of Finland at about midnight on Dec. 12, 1933. She did not arrive at her loading berth at Leningrad until 1.15 p.m. on Dec. 18, 1933, and the period intervening between these two times was occupied by her in getting through the ice in the Gulf of Finland and Kronstadt Bay with the intermittent assistance of an icebreaker supplied by the harbour master or port authority of Leningrad, which is a department of the People's Commissariat of Water Transport and a governmental organisation. The icebreaker *Ermak* arrived at the vessel's position at 6 a.m. on Dec. 13, 1933, but her assistance or attendance was intermittent, and

> during this period" [that is the period between her arrival at the edge of the ice and her arrival at the harbour] "the *Spidola* was frequently lying immobile in the ice. Exercising the best judgment I can upon the evidence, I find that the periods for which on the voyage to Leningrad the vessel was delayed owing to non-attendance or intermittent attendance upon her by the icebreaker and her consequent immobility in the ice were as follows," A

B and then he sets out the periods and finds a total delay of ninety-one hours, fifty minutes. Then he turns to the other part of the voyage, refers to the facts that the charterers did not produce the logs of any icebreakers, nor did they give any evidence in explanation of the delays which admittedly occurred in the vessel's passage through the ice, and says:

> C "As regards the voyage from Leningrad to the port of discharge, basing myself upon the evidence above mentioned, I find that the vessel began loading her cargo at 8 a.m. on Tuesday, Dec. 19, 1933, and completed her loading at 4.40 a.m. on Saturday, Dec. 23, 1933, and at 8 p.m. on the same date received her sailing orders from the shippers. As, however, no icebreaker assistance was then provided for her, the master took the opportunity of taking in some additional bunker coal, and this operation lasted from 9.45 p.m. on Dec. 23 until 4 a.m. on Dec. 24, 1933, D and I find that it was not until 7.30 p.m. on Dec. 24, 1933, that the vessel was actually ready to leave. She did not reach open water in the Gulf of Finland until 5.35 p.m. on Jan. 12, 1934, and much of the period intervening between these two dates was occupied in waiting for the icebreaker, whose assistance was again intermittent. I find that the periods at Leningrad and during the passage from Leningrad to open water for which the vessel was delayed owing to non-attendance E or intermittent attendance upon her by the icebreaker and her consequent immobility in the ice were as follows,"

and then he sets out a number of periods of delay amounting to 393 hours, 45 minutes. Later in the award the umpire finds that there was no evidence given by either party of the mutual relationships of the charterers, Sovtorgflot, Sovfracht, and Exportles, F nor of the connection (if any) of any of these bodies, with the Russian Government. That finding, in my judgment, although I quite appreciate why it was put in, is immaterial for the purposes of this case.

Those facts having been found by the umpire, he goes on to discuss at length the various contentions on one side and the other, and then the question he puts is this: "If the charterers' obligations under the ice clause had in fact attached and become G operative"—that clause may be disregarded because it is not now disputed that the obligations do in fact attach and become operative, whatever they are—"what were those obligations and have the charterers fulfilled them?" Then the umpire proceeds to hold, in cl. 16 of the case:

> "I hold, subject to the opinion of the court, that the words in para. 1 of the ice clause 'undertake to arrange for the provision by the port authorities of icebreaker H assistance if required by the captain free of expense to the steamer, the steamer complying with official instructions and rules issued by the authorities concerning icebreaker assistance' constituted an unqualified undertaking by the charterers to procure the port authority to provide icebreaker assistance, within the meaning assigned to that term by the House of Lords in *Ugleexport Charkow* v. *Anastasia (Owners), Russian Wood Agency, Ltd.* v. *Dampskibsselskabet Heimdal (The Asko)* (1), I to which I shall refer later, that is to say, assistance which should not be casual or intermittent, and that the latter part of the words quoted means that upon such assistance being provided the master must comply with the regulations. It does not appear to me to be material, having regard to the language of the clause, to consider what (if any) measure of connection with or control over the port authority existed in the charterers. The words above quoted are not, in my view, apt words to express nothing more than an obligation on the part of the charterers to give the instructions necessary to set in motion the free icebreaker assistance which

> existed by law at Leningrad, and which the master could have procured for the ship merely by complying with the regulations, and without the assistance of any express provision such as this in the charterparty. I further hold, subject to the opinion of the court, that by necessary inference from the ice clause and the charterparty as a whole, the object of assistance was to enable the vessel to reach her loading berth and after loading to reach open water, and that the assistance called for by the ice clause must be construed accordingly; as regards para. 4 of the ice clause, I hold, subject to the opinion of the court, that the effect of this is merely to protect the charterers from liability for any delay which might (and doubtless would) be inseparable from a passage through the ice even with non-intermittent icebreaker assistance."

Then the umpire proceeds to find that, if that view is correct, the charterers are to pay to the owner the sum of £252 11s. 4d.—I need not enter into the details as to how that sum is arrived at—and he asks the court to uphold that view if they think that the opinions on this question of law which he expresses are correct. Then he proceeds in the alternative to find that, if the court should be of opinion that "the obligations of the charterers under the ice clause were as contended for by them," that is to say, the contentions which he set out earlier and to which I shall refer

> "I find that the charterers are under no liability to the owner, and I hereby award that there is nothing due from the charterers to the owner."

That award as made by the arbitrator, subject to the opinion of the court, was upheld, in the form in which he made it, by Branson, J., and it is from his judgment that the matter now comes before this court.

In considering the ice clause it is necessary to bear in mind the decisions which had been given by Roche, J., the Court of Appeal, and the House of Lords on a form of ice clause which is similar to that now in question. Perhaps it would be convenient at this stage if I were to read the ice clause which is to be found in this charterparty and then to refer to such passages in the judgment of the House of Lords as seem to throw light upon its construction. The ice clause for present purposes contains four clauses. Clause (1) is:

> "In the event of the port of loading being inaccessible by reason of ice, or in case ice sets in after vessel's arrival at port of loading, the charterers undertake to arrange for the provision by the port authorities of icebreaker assistance if required by the captain, free of expense to the steamer, the steamer complying with official instructions and rules issued by the authorities concerning icebreaker assistance. . . . (2) Icebreaker assistance to be rendered free of expense to the steamer within forty-eight hours of receipt by the captain of port (at loading port)"—I think "of" is missed out here—"master's or owners' notification of arrival at the edge of ice, or when leaving port forty-eight hours after notification by the master of readiness to leave. (3) Time lost by the vessel in waiting for icebreaker assistance at the edge of ice, and when leaving the loading port in the excess of the time provided for in cl. 2 to count as demurrage and (or) detention and to be paid by charterers at the rate of £20 per day or pro rata, from which time days saved in loading and (or) discharging shall be deducted. (4) The charterers shall not be responsible for any loss of time during passage through the ice and or any loss or damage caused to the steamer by ice or for any detention on passage through ice."

The main arguments which have been put forward very clearly by counsel for the charterers may be summarised thus. He contends, first of all, that the obligation under cl. (1) is merely an obligation to arrange for the provision by the port authorities of icebreaker assistance; that is to say, they have to take steps which in the ordinary course would secure that provision, and once they have taken those steps, their responsibility is discharged and they are not in any way responsible for any delay, neglect, or default in the actual provision by the port authority of the icebreaker assistance. In other words he says that cl. (1) is limited to an obligation merely to do something towards the form of arrangement. He did not put any stress upon the words:

> "the steamer complying with official instructions and rules issued by the authorities concerning icebreaker assistance," A

because he frankly admitted that he could not distinguish the words, in the qualification in which they stood, from those which were discussed by the House of Lords in the case of the *Anastasia* (1), and which were held not to limit in any way the charterers' obligations. He further argued that the words, "icebreaker assistance," meant something different from "icebreaker assistance to enter or leave the port," and that they were B satisfied by the provision of an icebreaker which might or might not give assistance; in other words, he argued that there was no definition of the purpose or object for which the icebreaker assistance was to be provided, and a fortiori no provision which would involve any obligation if that purpose or object was not secured by the assistance which was provided. So much for cl. (1).

As to cl. (2), counsel for the charterers' contention was that it was not absolute or C peremptory in its terms; it was merely inserted as an answer to such obligation as might be embodied in cl. (1), and was to fix a time at which the icebreaker assistance—in the sense which I have just explained—was to be available.

Then with regard to cl. (3), "Time lost by the vessel in waiting for icebreaker assistance," there was no special argument advanced, except this, that cl. (3) was used in order to find a distinction between cl. (3) and cl. (4). Counsel for the charterers' con- D tention was that cl. (4) was absolute, not only in language, but in effect, and reading it with cl. (3) and also with cl. (1), it amounts to this: If there had been such an arrangement as he contemplated to be required under cl. (1), for such icebreaker assistance as he contemplated was involved on his construction, and that icebreaker assistance appeared and was available for the steamer within forty-eight hours of the receipt of the notification of arrival in the one case, and the notification of readiness to leave in the E other case, no delay of any kind, or due to any circumstance which occurred after the icebreaker assistance was rendered free of expense to the steamer, would involve any responsibility on the charterers, even though the delay and the loss of time and the detention—I put aside the damage as involving rather different considerations—was due to the fact that the icebreaker absented itself for indefinite periods, or indeed, went away altogether, because that was a matter which was foreign to the obligations or the F responsibility. Such is the argument of the charterers.

Before dealing with the contentions of counsel for the charterers in detail it may be convenient to look at the decision of the House of Lords in the cases of the *Anastasia* and the *Asko* (1) of which I have already given the reference. There were two appeals and they were heard together, I think I will sufficiently indicate the broad distinctions between the contract in those cases and the contract in the present case by pointing to G certain differences—I do not say there are no other differences—but the differences I am going to point to are sufficient. In the first case, the case of the *Anastasia* (1) the charterers undertook to provide

> "icebreaker assistance to enable the steamer to reach, load at, and leave loading port, steamer being free of expense for icebreaker assistance."

There the difference was obviously this: that the charterers undertook "to provide," H and not "arrange for the provision by the port authorities," and that icebreaker assistance is further defined as being to enable the steamer to reach, load at, and leave loading port. Then there is a clause in the *Anastasia Case* (1) which is identical with cl. (2) in the present contract, and there is a clause which is almost identical with cl. (3). In the other case, the case of the *Asko* (1) the clause was, so far as is material:

> "Charterers to supply the steamer with icebreaker assistance if required by the I captain to enable her to enter or leave the port of loading free of all expenses to the owners. . . . Icebreaker assistance to be rendered within forty-eight hours after steamer's arrival at the ice edge or readiness to leave the port of loading. Any time lost in waiting ice-breaking beyond forty-eight hours after readiness to proceed to be for charterers' account."

There again the differences, so far as material here, are comparable to those in the other case.

The principles which were laid down by the House of Lords for the construction of those words in those charterparties may be quite shortly summarised. In the first place, the House of Lords held that the language of cl. (2) to supply the steamer with icebreaker assistance is peremptory. It was said

> "That stipulation does not mean that the obligation is merely to make arrangements with the port authority or any other person for that supply. It is, I think, immaterial whether or not the charterers and the port authority can be treated as parts of one and the same juridical entity, whether the Soviet Government or any other person; as to this the evidence does not seem to me sufficient to justify my expressing any opinion; in either case the charterers have contracted to supply the assistance, and that, in my opinion, means either by themselves or by others, so that they cannot justify a failure to do so on the pretext that they had not the icebreakers under their control and could not get them supplied by those who controlled them. In that sense the obligation is absolute. The charterers assumed the obligation and the risk. It follows equally that the charterers' obligation is not limited to an obligation to do their best to supply. The language of the clause is peremptory."

The next point upon which I want to refer to the opinion of the House of Lords deals with another matter, and that is the position, in the opinion of the House of Lords, of the charterers in respect of the obligation to render icebreaker assistance after the specific time at which that obligation attaches; that is to say, forty-eight hours, in this case, after the notification, and, in the other cases, after readiness. There is, of course, a provision for the period of delay if icebreaker assistance is not rendered within the forty-eight hours, and in that respect I can see no difference between the cases which were before the House of Lords and the present case, and I do not think any is suggested. Then the opinion of the House of Lords goes on in this way:

> "But once the assistance has been supplied there is no stipulation as to time. The exact character of what is meant by the icebreaker assistance is not particularised save that it is to enable the ship to enter or leave the port free of all expense to owners. The judge has found in this case that for a period of six days after the *Oktober* first came the steamer had only icebreaker assistance for nine or ten hours, and that she then lay unassisted in Kronstadt Roads for three days, and again was left for some periods without icebreaker assistance between Jan. 9 and 12, 1931. The appellants did not explain why the assistance was so intermittent; in effect they contended that their obligation could not in any case be put higher than an obligation to do their best or to do what was reasonable, and that the onus lay on the respondents to show that they had not done their best or had not done what was reasonable. I think this contention is erroneous; there is in the clause a positive undertaking to render icebreaker assistance, which, I think, means primâ facie, assistance which is not casual or intermittent, and in order to justify a failure in that respect the charterers must show some excuse. The absence of icebreakers for such periods in the aggregate as the judge has here found is primâ facie a breach of the undertaking. I do not say that after the inception of the service absence of icebreaker assistance at some period or periods may not be justified; but I think the words of the clause are primâ facie not satisfied by intermittent assistance. I have already stated my opinion that it is immaterial whether or not the icebreakers are controlled by the charterers, because their responsibility is the same in either event. But it seems to me that there may be contingencies, such as perils of the seas, which, without anyone's fault, hinder or interrupt the service, without any liability attaching to the charterers in those respects. . . . The express obligation to render icebreaker assistance to the chartered vessel—that is, assistance sufficient or satisfactory for the specified purpose—involves a due regard both to her safety and her dispatch, and is paramount; hence the convoy system can only be justified so far as it can be reconciled with this paramount obligation."

Then there is a discussion with regard to proceeding in convoy, which is not material here, because no one has been told whether the absence from time to time of the icebreakers, which was found by the umpire, was due to the fact that they had too A many vessels in convoy or due to any other particular reason.

That was the decision of the House of Lords upon the construction of the contracts which they had before them, and although it is perfectly well recognised that the views of any tribunal, however exalted, upon the construction of a particular contract do not necessarily determine the construction of any other contract, because each contract is a thing by itself and has to be considered according to its own terms and B according to the totality of its conditions, yet in the present case, even if the two sets of contracts are not treated as identical, still there is such similarity in the general conditions under which they are entered into and such similarity in phraseology and their specific provisions, that the opinion of the House of Lords upon the construction of the contracts before them in the case to which I have referred, must afford great assistance in construing this particular contract. C

I have come to the conclusion that the views arrived at on the construction of this particular contract, both by the umpire and by the learned judge, are correct, and I find, in arriving at that conclusion, the greatest possible assistance by considering the previous decision of the House of Lords in the case to which I have referred. The first point which strikes one is a distinction in the language of cl. (1). I have, however, come to the conclusion that, according to its true construction, cl. (1) is quite clear and D unambiguous, and that it imports an obligation as absolute and peremptory as the obligation which was held to have been embodied in the cases of the *Anastasia* and the *Asko* (1). In the cases of the *Anastasia* and *Asko* (1) as I have already pointed out, the House of Lords held that the charterers had contracted to supply assistance either by themselves or by others. In this particular case they had undertaken to arrange for the provision of icebreaker assistance, if required by the captain. It is not unim- E portant to remember that there is, as was found in this case, a right under Russian law of any captain coming to the port to require himself icebreaker assistance. The provision, therefore, in cl. (1) is intended to give him a right against the charterers in excess of that right which he has at general law, and, in my opinion, the argument on behalf of the charterers would insert words qualifying "arrange." In my opinion "arrange for the provision of icebreaker assistance" means, not merely that the char- F terers are bound to take steps or to ask or to suggest to the port authorities that icebreaker assistance should be provided; they have to "arrange"—that means sufficiently or successfully—for the provision of icebreaker assistance; that means to secure the provision by the port authorities. If that is the true construction, then the obligation is on the charterers that that should be done—that the icebreaker assistance should be actually provided—and by that line of reasoning the result on the true construction G of cl. (1) is exactly the same as the result on the construction of the corresponding clauses in the cases of the *Anastasia* and the *Asko* (1). It is an obligation to provide icebreaker assistance, which, it is true, is not to be provided by the charterers personally, but they undertake that they will effectively and successfully arrange for that provision by the port authorities; that is to say, they undertake that, through the agency of the port authorities, icebreaker assistance will be provided. H

The next point which has been emphasised is that the words "icebreaker assistance" are used here without the addition of the words which are found in these other two cases, "to enable the vessel to enter or leave the port of loading." In my opinion, the absence of those words makes no difference. I think they are quite otiose. "Icebreaker assistance" means the assistance of an icebreaker, and not merely the physical presence of an icebreaker which does nothing; it means assistance for some purpose. I The only possible purpose under a contract of this nature and in those circumstances for which icebreaker assistance would be required to be given is to enable a vessel to enter or leave the port, and I therefore treat as quite immaterial the absence of those words. I think it constitutes no distinction at all.

Clause (2), in my judgment, strongly supports my conclusion that cl. (1) is clear and unambiguous. It is quite unqualified in its terms. It is peremptory in its terms:

> "Icebreaker assistance to be rendered free of expense to the steamer within 48 hours

> of receipt by the captain of port (at loading port) of master's or owner's notification,"

and so on. That is subject to no qualification at all. It does not say if the port authorities had been able to satisfy our request, then icebreaker assistance will be rendered, and if it is not rendered within forty-eight hours, we will pay certain compensation. It says in terms "icebreaker assistance is to be rendered free of expense to the steamer," and that is the whole of the clause, which is absolute in its terms. It is perfectly true that in the third clause there is a provision as to the damages or compensation which are payable in the event of cl. (2) not being complied with. Clause (3) is in these terms:

> "Time lost by the vessel in waiting for icebreaker assistance at the edge of ice and when leaving the loading port in the excess of the time provided for in cl. (2) to count as demurrage and (or) detention and to be paid by charterers at the rate of £20 per day or pro rata from which time days saved in loading and (or) discharging shall be deducted."

That is treating the obligation under cl. (2) as a firm obligation, not qualifying it in any way, but providing liquidated damages in the event of any breach being committed of that obligation. As I have said, I think the language of cl. (2) supports the view I have arrived at, that cl. (1) is clearly a peremptory clause imposing an obligation.

Then comes cl. (4), which has been very much relied upon by counsel for the charterers. He uses cl. (4) as showing that the obligations resting on the charterers under cl. (1) were limited to doing something by way of arrangement with the port authorities, and then he says that view is corroborated and confirmed by cl. (4), which, following out that idea, provides in terms that

> "the charterers shall not be responsible for any loss of time during passage through the ice and (or) any loss or damage caused to the steamer by ice or for any detention on passage through ice."

He does not hesitate to say that that clause is to be read in its full scope and meaning, without any qualification at all, and the result, therefore, would be that the charterers, having fulfilled, as he says, the conditions of cl. (1), and the icebreaker having appeared within forty-eight hours, no liability attaches to the charterers even though the icebreaker went away having broken a little ice and got the vessel inside the ice and on its passage through the ice, and even though under those circumstances the icebreaker went away and left the vessel peacefully in the ice until the spring came and released it. Of course, if those words are to be taken in their widest sense, without any qualification or any other limitation, then, no doubt, that view is right. "Any detention on passage through ice," if unqualified, would cover anything of that sort. However, not only do I disagree with the suggested construction of cl. (1), but I also think that cl. (4) is to be read subject to a qualification which is almost certainly, in the majority of cases, to be implied wherever you have an exceptions clause. I accept the statement of principle which was given by SCRUTTON, L.J., in *Gibaud* v. *Great Eastern Rail. Co.* (2), a case which on the facts is considerably removed from this case. Indeed, the statement by SCRUTTON, L.J., evidently cannot be regarded as anything but a matter of observation, but, coming from so great a lawyer, in any view what he says is worthy of serious consideration, and I venture to think that the passage I refer to is so well expressed as to be of great value in a case like this, which is different on its facts. SCRUTTON, L.J., said ([1921] 2 K.B. at p. 435):

> "The point argued here was that the appellant was not bound by the conditions relieving the company from liability, because the company had not kept the bicycle in the place in which they had contracted to keep it."

The question in that case was whether a bicycle could be kept in a cloakroom or could be kept in a station. The learned LORD JUSTICE goes on to say this:

> "The principle is well known, and perhaps *Lilley* v. *Doubleday* (4) is the best illustration, that if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract

> by not doing the thing contracted for in any way contracted for, or not keeping A the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it. In *Lilley* v. *Doubleday* (4) the defendant had contracted to warehouse certain goods at the main warehouse. He warehoused part of them at another place, and, without negligence on his part, they were lost from the other place. It was held that though he would have been B protected if the goods had been lost without negligence from the place where he had contracted to keep them, he lost that protection when he warehoused them in a place where he had not contracted to keep them."

ATKIN, L.J., in a later case, the *Cap Palos* (3) quoted these words with approval. That was a case where under a towage contract the vessel was lost because the defendant had either taken away the tugs, or not taken proper steps to send them back, and left the C sailing ship on the shore so that she was lost; at any rate he had temporarily given up any attempt to continue the towage, and left the performance of his duties to others. It was held in that case that a similar limitation to that expressed by SCRUTTON, L.J., must be put on the very sweeping words of exception in that contract.

In this case, if I am right in holding that cl. (1) is clear and unambiguous in the sense in which I have indicated, then it cannot be cut down by cl. (4), because from the very D nature of things cl. (1) is established as a dominant and overriding clause, and cl. (4) is merely a clause of exception and as such must be construed with that limitation, which always applies to a clause of exception in a case like this where it is sought to apply it to cases where the provisions of the dominant clause are not being fulfilled; in other words, cls. (1) and (4) must be read together so that they can receive harmonious effect. In other words, freedom from responsibility only applies to cases in which there E is a performance of, or an attempt to perform, the conditions of cl. (1). If the conditions of cl. (1) are not being complied with, then cl. (4) will not relieve from responsibility for any breach of cl. (1), because cl. (4) might have been quite differently expressed. However peremptory cl. (1) might be in itself, you might have in cl. (4) words of exception so precise and so sweeping as to excuse any breach whatever of cl. (1), but that is not the effect of cl. (4) in the present case. Again, it might be that if cl. (1) was ambigu- F ous and uncertain, then the language of cl. (4) might be brought in in order to explain the ambiguity and to give a more limited effect to cl. (1). Taking the view I do of the effect of both these clauses, I think they can only be read together by giving the dominant effect to cl. (1) and the more limited effect to cl. (4).

There is only one other point I need note, and that is that cl. (4), it was said by counsel for the charterers, is clearly supererogatory in view of the decision of the House of G Lords, in the passage to which I have referred to the *Anastasia Case* (1) indicating that there may be difficulties in performance, but which are not inconsistent with a due regard to cl. (1) in which no liability would attach to the charterers. That may or may or may not be so, but in any view the broad ruling which was given in the House of Lords was not given until this clause was settled. In effect, I do not question that the charterers have sought to minimise the liabilities which have been declared to attach H to them under the former ice clause, but no doubt they have had to deviate as little as possible from the language which the shipowners had accepted, and would be willing to accept, and I think the changes which have been made in the ice clauses in this case have not relieved them of the obligation under which the shipowners in the earlier cases were held to be.

In those circumstances, I think the appeal fails and should be dismissed with costs. I

ROMER, L.J.—The question which falls to be decided in this appeal is whether the obligation of the charterers, under the ice clause contained in the charterparty, is merely an obligation to arrange for the provision of icebreaker assistance at the ice edge when the ship is going into port and at the wharfside when the ship has completed her loading, or whether it is an obligation to arrange for the provision of continuous icebreaker assistance while the ship is passing in the first case through the ice to the wharfside, and in the second case from the wharfside to the open sea. If the obligation is the former

A of those two, then this appeal is entitled to succeed; if, on the other hand, the obligation is the latter of the two which I have mentioned, then I think it has failed. Having regard to the decision in the House of Lords in *Ugleexport Charkow* v. *Anastasia* (*Owners*) and *Russian Wood Agency, Ltd.* v. *Dampskibsselskabet Heimdal* (the latter case referred to as the *Asko*) (1), and the decision of the Court of Appeal in the *Cap Palos Case* (3) to which my Lord has referred, this appeal must be dismissed.

B If cl. (1) of the ice clause be ambiguous in its terms, that is to say, if it will admit of a construction which will place either the one or the other of those two obligations upon the charterers, there is a great deal to be said on the part of the charterers, because if there be that ambiguity it may well be argued that cls. (2) and (4), and probably (3), resolve that ambiguity in favour of the charterers. Clause (2) provides as follows:

> C "Icebreaker assistance to be rendered free of expense to the steamer within forty-eight hours of receipt by the captain of port (at loading port), master's or owner's notification of arrival at the edge of ice, or when leaving port forty-eight hours after notification by the master of readiness to leave."

It is quite plain that if the icebreaking assistance be of the continuous nature to which I have referred, it cannot possibly be rendered within forty-eight hours after the ship's D arrival at the ice edge, or within forty-eight hours after the ship has completed her loading. It might be said that that clause, therefore, indicates that the obligation of affording the icebreaker assistance required by cl. (1) is an obligation of the more limited assistance and not of the continuous and full assistance to which I have referred. That construction would then be assisted by a consideration of cls. (3) and (4) inasmuch as by cl. (3) it is found that sanctions are provided for in the event, and in the event E only, apparently, of a failure to render icebreaker assistance at the edge of the ice and at the wharfside, and that no express sanctions are mentioned in the event of failure on the part of the charterers to render continuous assistance until the ship has got through the ice, in the one case to the wharf and in the other case from the wharf to the open sea. On the contrary, cl. (4) in express terms provides that:

> F "The charterers shall not be responsible for any loss of time during passage through the ice and (or) any loss or damage caused to the steamer by ice, or for any detention on passage through ice."

That argument, if cl. (1) be ambiguous in its language, strikes me as being a very forcible one, but in my opinion cl. (1) is not ambiguous. It was indeed suggested at one time, that no two business people would agree that a charterer should provide means of assistance at the edge of ice and at the wharf, and that the shipowner should be G responsible for the provision of the giving of assistance during the passage through the ice. I do not myself understand that, because in the vast majority of cases the charterer has no more control over the icebreaking vessels than has the owner of a ship. I do not know why a priori the obligation should be thrown on the charterers rather than on the shipowners, but, however that may be, it appears to me that cl. (1), when properly read, admits of one construction, and one construction only. It says:

> H "In the event of the port of loading being inaccessible by reason of ice"

what does that mean? It means in the event of the ship being unable, by reason of ice, to reach the port. Then it goes on:

> "Or in case ice sets in after vessel's arrival at port of loading"

what does that mean? In case after loading, the ship is unable to reach the open sea I by reason of ice. Then:

> "The charterers undertake to arrange for the provision by the port authorities of icebreaker assistance"

what is that assistance? It must be the assistance to enable the ship to overcome the difficulties which are referred to in the words I have already read, difficulties arising from those two events. If, as I think is the case, those words are unambiguous—that is to say, if it is plain from that language that the obligation is to provide continuous assistance until the ship reaches the wharf in the one case, and the open sea in the other case—it is our duty as a court of construction to put such a construction on the subsequent clauses, if that construction is proper, as will not render them repugnant to cl. (1). A

Remembering that, I see whether it is possible to construe cl. (2) and cl. (4) so as not to be repugnant to the obligation in the plain terms imposed by cl. (1). Clause (2) says:

> "Icebreaker assistance to be rendered free of expense to the steamer within forty-eight hours,"

B

and so on. It is to be observed that it does not say: The icebreaker assistance which is referred to in cl. 1, but merely "icebreaker assistance." In other words, the assistance must begin at the ice edge within forty-eight hours of the arrival of the ship, and that icebreaker assistance must begin again when the ship is ready to leave the wharf. Clause (2) is not necessarily referring to the full assistance which has to be rendered under cl. (1). Then when we come to cl. (4) we are entitled and bound, I think, to put C a construction upon it which will have the effect of inserting in the clause the words: Performing their obligation. The words are these: "The charterers shall not be responsible," and so on. I think the proper construction of that clause, having regard to the decision in the *Cap Palos Case* (3) is: The charterers performing their obligations under cl. (1) shall not be responsible for any loss during passage through the ice and (or) any loss or damage caused, and so on. I will not read again the case of the *Cap Palos* (3), D but in the course of giving his judgment in that case Atkin, L.J., quoted a statement of a principle which is to be applied in such cases, which was a statement of principle made by Scrutton, L.J., in an earlier case. The Master of the Rolls read out that passage, and I do not propose to read it again. Applying that principle to cl. (4), as I think in the circumstances we are obliged to, it follows that this appeal fails, and must be dismissed.

E

EVE, J.—I agree entirely with the judgments which have just been pronounced, and the conclusions to which they take us, and I have nothing to add.

THE MASTER OF THE ROLLS.—I should have said that we attach no importance to the fact that in cl. (3) there is a specification with regard to the liquidated damages, and that there is no reference to the measure of damages in cl. (4). It is very common F in contracts of affreightment to append a clause with regard to liquidated damages with regard to one particular breach, and to say nothing about the damages in regard to another class of breach. The appeal will be dismissed with costs.

Appeal dismissed.

Solicitors: *Pettite, Kennedy, Morgan, & Broad*; *William A. Crump & Son.*

[*Reported by* Geoffrey P. Langworthy, Esq., *Barrister-at-Law.*] G

H

LOWTHORPE-LUTWIDGE *v.* LOWTHORPE-LUTWIDGE

[Probate, Divorce and Admiralty Division (Langton, J.), March 6, 7, April 17, 1935]

I

[Reported [1935] P. 151; 104 L.J.K.B. 71; 153 L.T. 103]

Will—Revocation—Will exercising power of appointment—General revocatory clause in later will—Effect on exercise of power—Burden of proof.

Although a general revocatory clause in a will does not of necessity revoke an earlier exercise of a power of appointment by will, the burden of proof to show that the clause does not revoke the exercise of the power is heavy upon the party who asserts such a proposition. There must be sufficient evidence to establish that the testator did not intend to revoke the previous exercise of the power.

Dictum of Hill, J., in *Gregson* v. *Taylor* (1), [1917] P. 256, 261, applied.
Smith v. *Thompson* (2) (1931), 146 L.T. 14, distinguished.

Notes. For subsequent examples of circumstances in which the burden of proving that the testator did not intend to revoke the earlier will, see *In the Estate of O'Connor*, [1942] 1 All E.R. 546, and *In the Estate of Wayland*, [1951] 2 All E.R. 1041.

As to express revocation by a later will or codicil, see 34 Halsbury's Laws (2nd Edn.) 78, para. 110, and for cases on the subject, see 43 Digest 321 et seq., *1542–1559*.

Cases referred to:

(1) *Gregson* v. *Taylor*, [1917] P. 256; 86 L.J.P. 124; sub nom. *Re Philpot, Gregson* v. *Taylor*, 117 L.T. 318; 33 T.L.R. 402; 61 Sol. Jo. 578; 44 Digest 570, *3876*.

(2) *Smith* v. *Thompson* (1931), 146 L.T. 14; 47 T.L.R. 603; 75 Sol. Jo. 555; Digest Supp.

(3) *Gladstone* v. *Tempest*, 2 Curt. Ecc. 650.

(4) *In the Goods of Oswald* (1874), L.R. 3 P. & D. 162; 43 L.J.P. & M. 24; 30 L.T. 344; 38 J.P. 425; 44 Digest 323, *1555*.

(5) *In the Goods of Moore*, [1892] P. 378; 62 L.J.P. 9; I.R. 454; 44 Digest 323, *1556*.

(6) *Collins* v. *Elstone*, [1893] P. 1; 62 L.J.P. 26; 67 L.T. 624; 9 T.L.R. 16; 41 W.R. 287; 1 R. 458; 44 Digest 323, *1558*.

(7) *Re Kingdon, Wilkins* v. *Pryer* (1886), 32 Ch.D. 604; 55 L.J.Ch. 598; 54 L.T. 753; 34 W.R. 634; 44 Digest 529, *3457*.

(8) *Sotheran* v. *Dening* (1881), 20 Ch.D. 99, C.A.; 44 Digest 528, *3456*.

(9) *Cadell* v. *Wilcocks*, [1898] P. 21; 67 L.J.P. 8; 78 L.T. 83; 46 W.R. 394; 14 T.L.R. 100; 44 Digest 335, *1650*.

(10) *Beech* v. *Public Trustee*, [1923] P. 46; 92 L.J.P. 33; 128 L.T. 616; 39 T.L.R. 88; 67 Sol. Jo. 145, C.A.; 44 Digest 305, *1359*.

Probate Action.

The plaintiffs, two children of the testator, propounded a will dated June 18, 1917, a codicil dated June 17, 1920, and a will of April 27, 1925, of Colonel Ernest Frederick Lowthorpe-Lutwidge, late of Holmrook Hall, Cumberland, and the Devonshire Club, Eastbourne, who died on Sept. 20, 1929. By the two former instruments the testator had exercised powers of appointment in favour of the plaintiffs. On June 2, 1924, the testator entered into a deed of family arrangement, and made other instruments all disposing of his property in a manner inconsistent with the earlier will and codicil. His only estate remaining at the date of the will of 1925 which was not affected by the earlier testamentary papers or the deed of family arrangement and other instruments executed in 1924 did not exceed £40 in value. The later will of 1925 was a holograph one as follows:

> "I revoke all former wills, this being my last will and testament. I give and bequeathe everything I die possessed of to Major Hugh Owen Swanston. Should he predecease me I give everything I die possessed of to my daughter, Mrs. Marjorie Spooner"

(one of the plaintiffs). No executor was named in this will, and on Nov. 12, 1929, administration with that will alone annexed was granted to the residuary legatee, Major Swanston, save and except settled land. On March 19, 1930, a grant of administration limited to the settled land vested in the testator at his death was granted to Major Swanston and certain other parties trustees of the settled land as executors thereof. Major Swanston died in 1933.

The first defendant, who was the eldest son of the testator and tenant for life of the settled land by his defence said that the earlier will and codicil was revoked by the later will of 1925. The other defendants, the executors of Major Swanston, by their plea, submitted to the judgment of the court.

Clifford Mortimer and *F. S. H. Bryant*, for the plaintiffs.—There was no animus revocandi as to the earlier testamentary papers when the testator made the will of 1925 with the assistance of lay friends, and therefore probate should be granted in respect of all three papers. The revocation clause in the will of 1925 did not operate to revoke

provisions in the earlier will and codicil which were of two kinds, an exercise of a power A
of appointment in a marriage settlement, and changes made in the will by the codicil for the benefit of the testator's younger children. It was held by his Lordship in *Smith* v. *Thompson* (2), that a revocatory clause in a will did not revoke the previous exercise in a former will of a special power of appointment. There it was sought to show that a general revocatory clause in a will which dealt with a merely nominal question of property revoked the previous exercise of a power of appointment over the bulk of the B
estate. It was a matter of intention whether it was in the mind of a testator to revoke a former provision. In *Gladstone* v. *Tempest* (3) it was laid down that probate might be granted of a testamentary paper which was earlier in date than a paper with a revocatory clause provided that the court was satisfied that there was no revocatory intention. The cases of *In the Goods of Oswald* (4) and *In the Goods of Moore* (5) also support my proposition. C

Roxburgh, K.C., and *H. W. Barnard*, for the first defendant.—The rule that a capable testator knows and approves of the contents of a will (*Gregson* v. *Taylor* (1)) so that clear evidence is required to exclude any part of it, has been extended to words of revocation in *Collins* v. *Elstone* (6). It has been finally established in *Re Kingdon; Wilkins* v. *Pryer* (7) that a general clause of revocation revokes an earlier exercise of a power of appointment by will. In that case KAY, J., relied on *Sotheran* v. *Dening* (8), D
in which BAGGALLAY, L.J., said:

> "It has been decided that a general revocation of wills does not necessarily revoke an appointment by will. . . . But it must be shown that it is entirely unreasonable that it should have that effect; otherwise it will be a revocation."

Both cases were approved by Sir F. JEUNE, P., in *Cadell* v. *Wilcocks* (9). *Smith* v. E
Thompson (2) is distinguishable, because there was evidence that the testatrix adhered to her intention to benefit the party in whose favour she had previously exercised the power. That case, in my submission, cannot be regarded as laying down a proposition contrary to the well-established principle.

Bush James, for the other defendants.

Bayford, K.C., and *W. T. Elverston*, for an investment company, incumbrancers on F
the interest of the first defendant.—I adopt Mr. Roxburgh's argument and refer to the judgment of SALTER, J., in *Beech* v. *Public Trustee* (10) in support of it. Further administration has already been granted, and the investment company has lent money on that basis.

T. Bucknill, for trustees of the will of the earlier settlor creating the powers exercised by the testator. G

Cur. adv. vult.

April 17.—**LANGTON, J.**, reviewed the facts and continued:

The point for determination, and the only point, is this: whether the testator, in the clause in the will revoking all former wills, intended to revoke a will of June 18, 1917, and a subsequent codicil of June 17, 1920. H

Now, it is convenient, in most cases, to establish the facts first and to apply the law afterwards; but in this case I think perhaps it will be convenient to reverse that procedure. A decision of my own in a case of *Smith* v. *Thompson* (2) was much pressed upon me by counsel for the plaintiffs, and quite properly so, as being an authority for what he wanted to do in the present case, that is to say, to establish that there was no animus revocandi on the part of Colonel Lowthorpe-Lutwidge on April 27, 1925. Now, I
upon that matter, I think it is most material to examine what has been laid down in this court upon that broad proposition, animus revocandi, and the first case which it is most important to keep in mind is *Gregson* v. *Taylor* (1), in which HILL, J. ([1917] P. at p. 261), said:

> "Assuming that it is no longer a binding rule in cases where there is no fraud or suspicion of fraud that a capable testator who reads or has read to him a testamentary paper which he thereafter executes must be taken to know and approve of its contents, yet the direction which a judge should give a jury or himself must

> be put at least as high as this, that when it is proved that a will has been read over to or by a capable testator and he then executes it, these circumstances afford a very grave and strong presumption that he knew and approved all the contents, a presumption which can be rebutted only by the clearest evidence. The presumption is that the words which have been read over to and then signed by a capable testator as his will do represent his will, his whole will, and nothing but his will. And if it is said that they represent his will and something more, then before that something more can be rejected as not being his will, it must be established beyond all doubt that it is not his will."

That is most material to bear in mind in dealing with this class of case.

What I said in the case of *Smith* v. *Thompson* (2), which was an unusual case in every way, was this (146 L.T. at p. 17):

> "For the defendants it was submitted that the court could not look inside the terms of the document and must not speculate on what was in the mind of the testatrix. I think in the main that principle is a safe guide, and the court should be very slow to endeavour to interpret words in an instrument which are not ambiguous in a sense contrary to natural sense. As was said in one case, that process comes very near to making a new will. But here the instrument omits to deal with what is practically the bulk of the testatrix's property. On the authority of the cases cited it is possible to look at the surrounding circumstances and consider whether the general revocatory clause was intended to revoke the earlier exercise of the power of appointment."

I think that counsel, for the defendants in this case, was a little nervous or apprehensive that that last statement goes a little too far, but, it must be taken in its context, was intended to apply to that case and to the facts of that case, and should not be taken out of it as being a general dictum that it is possible in every case to look at all surrounding circumstances and make a kind of vague and unlimited inquiry into what the testator intended. I then went on to say this: "Mr. Mortimer impressed on me the dictum of Sir Herbert Jenner in *Gladstone* v. *Tempest* (3)." I then cited what Sir Herbert Jenner said there. I have looked at it again, and I think that is as closely a worded statement as one could wish upon this matter, because what Sir Herbert Jenner said there was (2 Curt. at p. 653):

> "It has been over and over again laid down that probate of a paper may be granted of a date prior to a will with a revocatory clause, provided the court is satisfied that it was not the deceased's intention to revoke that particular legacy or benefit."

That is quite concisely stated and exactly what has been pressed upon the court here, that the court should say it was not the intention of the testator to revoke the legacies and benefits contained in the earlier will of 1917 and the codicil of 1920.

I think there is power to act in that way if the court is satisfied that it was not the intention of the testator to so revoke. The burden, in that case, however, is heavy. It is a heavy burden upon a plaintiff who comes into this court to say: I agree that the testator was in every way fit to make a will, I agree that the will which he has made is perfectly clear and unambiguous in its terms, I agree that it contains a revocatory clause in simple words; nevertheless, I say that he did not really intend to revoke the earlier bequests in earlier wills. I think quite obviously the burden must be heavy upon anybody who comes to assert a proposition of that kind.

I need not, perhaps, refer to *Collins* v. *Elstone* (6), a decision of Lord St. Helier in which he refused entirely to allow words of revocation to be, as it were, erased even though the testatrix had been specifically advised that they meant something different from what they really did mean. If it is necessary to make any distinction, it may be said that that case was more a statement of the law than of fact. It really is a question in each case for the court to decide: is there evidence, and sufficient evidence, to establish that the testator did not intend to revoke? I do not think really the law is more complicated than that. I hold as a fact in the present case that the deed of family arrangement was intended by the testator to be a final disposition of his property, and that he no longer intended when he made the will of 1925 that the bequests he had made by the earlier will and codicil should take effect. There was no evidence that the testator was incapable or that the document of 1925 was beyond his comprehension. It was also clear that he thought he had dealt in the deed of family arrangement with all his property except chattels of small value.

It would require strong evidence to assist the plaintiffs to discharge the burden on them, and the evidence, so far as I can approach it, is rather strongly the other way. I think the bulk of the evidence in this case, and the result of it is in favour of the defendants' contention. It is not necessary for them to establish that the testator intended to revoke. If I had to determine it, I should say that there was evidence, and quite strong evidence, to show that he did intend to revoke, and, whether or no he had the will of 1917 and the codicil of 1920 present to his mind, he intended what he said in his will of 1925. That being so, the plaintiffs, to my mind, fail to establish the burden that is upon them, and the action fails. I pronounce for the will of April 27, 1925, and against the two earlier dispositions.

Solicitors: *Royds, Rawstone & Co.*; *Woodroffes*, for *David Reynolds*, Winchester; *Blyth, Dutton, Hartley & Blyth*; *T. H. O'Connor & Co.*; *R. H. Douglas.*

[*Reported by* WILLIAM LATEY, ESQ., *Barrister-at-Law.*]

DRAGES, LTD. *v.* OWEN

[KING'S BENCH DIVISION (Porter, J.), November 7, 1935]

[Reported 154 L.T. 12; 52 T.L.R. 108; 80 Sol. Jo. 55]

Hire-Purchase—Distress—Notice to terminate hire-purchase agreement sent by post—Agreement terminable "thereupon"—Notice posted before, but received after, distress levied—Goods no longer comprised in hire-purchase agreement—Date from which notice speaks—Law of Distress Amendment Act, 1908 (8 *Edw.* 7, *c.* 53), *ss.* 1, 4 (1).

A hire-purchase agreement contained a clause entitling the owners of the goods hired to terminate the agreement in certain events (which had happened) "by written notice sent by post (or otherwise) to, or left at, the hirer's last known address" and providing that "thereupon the hirer shall no longer be in possession of the goods with the owners' consent."

Held: a notice sent by post pursuant to that clause operated to terminate the agreement from the moment when it was put in the post for delivery to the addressee, and, therefore, from that moment the goods were no longer comprised in a hire-purchase agreement within the meaning of s. 4 (1) of the Law of Distress Amendment Act, 1908, and so could not be distrained on by the hirer's landlord for arrears of rent.

Browne v. *Black* (1), [1912] 1 K.B. 316, distinguished.

Notes. In this case there was no evidence whether the goods were liable to distress as being "in the possession order or disposition of the tenant by the consent and permission of the true owner"; but in *Times Furnishing Co., Ltd.* v. *Hutchings*, [1938] 1 All E.R. 422, it was said, obiter at p. 428, that notice to the hirer, similar to that in this case, would determine any such consent or permission.

As to distress for rent on chattels comprised in hire-purchase agreements, see 16 HALSBURY'S LAWS (2nd Edn.) 534, para. 792, and for cases on the subject, see 18 DIGEST 306, *422–424*.

As to goods excluded from protection from distress, see 12 HALSBURY'S LAWS (3rd Edn.) 112, para. 179.

A For the Law of Distress Amendment Act, 1908, see 6 HALSBURY'S STATUTES (2nd Edn.) 172.

Cases referred to:

(1) *Browne* v. *Black*, [1912] 1 K.B. 316; 81 L.J.K.B. 458; 105 L.T. 982; 28 T.L.R. 119; 56 Sol. Jo. 144, C. A.; 42 Digest 145, *1436*.

B (2) *Hackney Furnishing Co.* v. *Watts*, [1912] 3 K.B. 225; 81 L.J.K.B. 993; 106 L.T. 676; 28 T.L.R. 417, D.C.; 18 Digest 306, *423*.

(3) *Jay's Furnishing Co.* v. *Brand & Co.*, [1915] 1 K.B. 458; 84 L.J.K.B. 867; 112 L.T. 719; 31 T.L.R. 124; 59 Sol. Jo. 160, C.A.; 18 Digest 306, *424*.

(4) *Smart Bros., Ltd.* v. *Holt*, [1929] 2 K.B. 303; 98 L.J.K.B. 532; 141 L.T. 268; 45 T.L.R. 504; 35 Com. Cas. 53; Digest Supp.

C (5) *Retail Dairy Co., Ltd.* v. *Clarke*, [1912] 2 K.B. 388; 81 L.J.K.B. 845; 106 L.T. 848; 76 J.P. 282; 28 T.L.R. 361; 10 L.G.R. 547; 23 Cox, C.C. 6, D.C.; 25 Digest 100, *235*.

Action

The plaintiffs, owners, Drages, Ltd., of Oxford-street, W., claimed the return of certain furniture and damages for its detention from the defendants, Mr. Owen, of D Stockwell-road, the landlord, and Mr. L. Samuel, of Newington-causeway, the bailiff.

The furniture in question had been let by the plaintiffs under a hire-purchase agreement to a Mr. Narciso, who was tenant of premises in Stockwell-road of which the first defendant was landlord. The agreement contained a clause which entitled the owners, in the events which had happened, to terminate it by sending a written notice by post to the hirer, and the question in issue was whether such a notice operated from the E moment when it was put in the post or only from the moment when it was received by the hirer. On June 26, 1934, the hirer was in arrears with his rent to the extent of £3 19s., and the landlord instructed Mr. Samuel, a certificated bailiff, to levy a distress. The bailiff did so at 8.5 a.m. on June 26, and seized and impounded certain furniture. The goods seized were the property of the owners and were, up to June 25, comprised in a hire-purchase agreement dated Feb. 9, 1934, made between the owners and the hirer. F On June 25 the hire-rent was more than seven days in arrear. The owners on that day signed a notice addressed to the hirer stating that "our agreement with you, dated Feb. 9, 1934, is absolutely determined and ended for all purposes pursuant to cl. 5 thereof," which notice was posted to the hirer at his last known address by registered post on that day. The registered letter was delivered at the premises in Stockwell-road at 8.20 a.m. on June 26—a quarter of an hour after the distress had taken place.

G By cl. 4 of the hire-purchase agreement the owners were entitled to terminate the hiring at any time without notice if, inter alia, the hire-rent was seven days in arrear. By cl. 5:

> "Whenever the owners be entitled to terminate the hiring . . . [they] may by written notice sent (by post or otherwise) to or left at the hirer's last known address forthwith and for all purposes absolutely determine and end this agreement as well H as the hiring hereby constituted and thereupon the hirer shall no longer be in possession of the goods with the owners' consent. . . ."

By the Law of Distress Amendment Act, 1908, s. 4 (1), the protection from distress given by that Act to the goods of third parties does not apply to goods comprised in a hire-purchase agreement, nor to goods in the possession, order, or disposition of the I tenant by the consent and permission of the true owner in such circumstances that he is the reputed owner thereof.

If, therefore, the hire-purchase agreement had been terminated at the moment the notice was put in the post the owners were entitled to recover the goods. But if the notice only operated from the moment of its delivery at the premises in Stockwell-road, the goods fell within s. 4 (1) of the Act of 1908 and the landlord and the bailiff were entitled to distrain on them.

H. L. Parker (*A. H. M. Wedderburn* with him) for the owners.

J. P. Eddy for the landlord and the bailiff.

PORTER, J.—This is an action brought by Drages, Ltd., the well-known furnishers, A
the owners of the goods here in question, and I suppose I may take judicial notice of the fact that they are accustomed to supply considerable quantities of furniture on the hire-purchase system. In this particular case their claim is in respect of certain furniture, which I need not specify, which was let on the hire-purchase system to a Mr. Narciso, the hirer, under an agreement dated Feb. 9, 1934. I will come to the terms of the agreement at a later stage, but the claim is made not against the hirer but against B
the two defendants, Mr. Owen the landlord and Mr. Samuel the bailiff. The claim arises in this way: the furniture which was so hired to the hirer was to be kept at his house in Stockwell-road, South-West London. That house belonged to the first-named defendant, Mr. Owen, who was the landlord. At a time when the hire-purchase agreement was still in force the rent of those premises fell into arrear, and the landlord was minded to distrain on the furniture in order to secure his rent. For that purpose he C
employed the second defendant, the bailiff, to seize the furniture and distrain for the rent. At the same time that the rent fell into arrear the payments under the hire-purchase agreement also fell into arrear, with the result that there were certain rights, which I will come to more particularly later on, vested in the owners, entitling them to determine the hire-purchase agreement.

The case has been argued without any evidence owing to the convenient arrangement, D
very properly made between the parties, by which certain admissions of fact were made. Those admissions specified the facts which I have stated, and they also specified that the levy for the rent was a levy for £3 19s.; that that levy was made by the bailiff at 8.5 a.m. on June 26, 1934; that the property seized was part of the furniture let under the hire-purchase agreement and belonged to the owners; that up to at least the day before the seizure—that is, up to June 25—those goods were all comprised in the hire- E
purchase agreement; that on June 25, the hirer, being in arrear with his payments, the owners had, as they were entitled to do under the hire-purchase agreement, signed a written notice determining the hire-purchase agreement and put it in the post. The admission of facts then adds that that particular notice, which was sent by registered letter, was not delivered at the premises of the hirer until 8.20 a.m. on June 26, 1934. That means that, although the notice was sent the day before the seizure under the dis- F
traint for rent, it was not delivered until fifteen minutes after that distraint had been put in force.

In those circumstances the question which I have to determine is whether the landlord was entitled to make the seizure and to retain the property, or whether the owners were entitled to the property as being theirs. No difficulties would have arisen before the Law of Distress (Amendment) Act, 1908, because before that time the landlord G
would have been entitled to seize property which he found on the premises and to hold it for his own, although it belonged to a third party. But the Act—if I may put it generally, without being considered to be entirely accurate in my statement, but sufficiently accurate for the case before me—allowed those third persons to avoid the difficulties of seizure of their furniture and to claim the furniture, despite the distress. There are, however, certain limitations on that right. One limitation is if the furniture H
be held under a hire-purchase agreement; another is that it does not apply to goods

> "in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof."

In this particular case there is no doubt that the owners were third parties whose I
property the goods were, but it is equally plain that at some time the property was held under a hire-purchase agreement, and it is claimed on behalf of the landlord and the bailiff that at the time of the seizure under the distress the property was held under a hire-purchase agreement, or was, to use the phraselogy of the Act, in the reputed ownership—if I may use that as a truncated phrase for the purpose of this judgment—of the hirer. So far as the ownership is concerned I indicated in the course of the argument of counsel that that must be proved in evidence, and that unless it was proved by evidence given on behalf of the landlord and the bailiff that part of the defence was

not established. The landlord and the bailiff elected thereupon not to give evidence and, in accordance with the view which I expressed in argument, I find it has not been proved that the goods were

> "in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner."

It may be—and as to this I do not express any final opinion—that the goods were being held under a hire-purchase agreement and were

> "in the possession, order, or disposition of such tenant by the consent and permission of the true owner,"

but the landlord and the bailiff have to go further and show that they were in such possession in such circumstances that the tenant was the reputed owner, and that, I think, has not been proved.

Now I come to the second and more difficult part of the case. What is the true view with regard to the hire-purchase agreement? Had that been determined before 8.5 a.m. on June 26, 1934? I ought to add this further fact to the statement of facts, that it is agreed that the furniture has found its way back into the possession of the owners. It is not agreed how it found its way back, but it has, and the position is that if the owners are wrong they agree that they should pay the sum of £3 19s. rent; but if they are right they say that they ought to pay nothing and are entitled to retain the furniture.

There is no doubt that the hire-purchase was determined, and was properly determined; but the question which I have to decide is at what time that determination took place. That must depend on the terms of the agreement between the parties. The agreement, by cl. 1, provides for the payment of hire by the hirer. Clause 2 provides that the hirer shall be the owner of the property on due performance of the agreement and payment of the whole amount of the sums payable. Clause 3 I need not trouble about except that it is a provision that the furniture shall be kept at the particular address given in the hire-purchase agreement. Clause 4 becomes more material because, after specifying that the hirer may, on giving seven days' notice in writing, terminate the hiring, it provides that with regard to the owner of the furniture he may at

> "any time without notice terminate the hiring if either (*a*) hire-rent be in arrears seven days or there be any breach of this agreement committed or suffered by the hirer."

So far as that is concerned, the hire-rent was in arrears for seven days and there was, therefore, a breach of the agreement. By cl. 4 the owner can terminate the hiring, but that clause does not terminate the whole agreement. It leaves open certain matters to be done, and it therefore leaves the agreement in force. So far as that is concerned, if that were the only clause, I should hold that the principles applied in *Hackney Furnishing Co.* v. *Watts* (2), and in the case of *Jay's Furnishing Co.* v. *Brand & Co.* (3), applied here and that the hiring was still in existence.

But the hire-purchase agreement goes on to deal, in cl. 5, with a further state of affairs, and it is on cl. 5 that my judgment must be given. That clause states:

> "Whenever the owners be entitled to terminate the hiring"

—and that is this case, because they were entitled to terminate the hiring—they may enter and seize, and so on. It then goes on, in words which require careful consideration:

> "Alternatively or if on any such entry the furniture be not delivered up the owners may by written notice sent (by post or otherwise) to or left at the hirer's last known address forthwith and for all purposes absolutely determine and end this agreement as well as the hiring hereby constituted, and thereupon the hirer shall no longer be in possession of the goods with the owners' consent nor shall either party thereafter have any rights hereunder."

The steps set out in cl. 5 were taken by the owners, the agreement was completely

terminated, and it seems to me that a complete ending of the hiring took place, so that A
there was no longer any hire-purchase agreement in existence.

In those circumstances, under the decision of *Smart Bros., Ltd.* v. *Holt* (4), there is no hire-purchase agreement, and, therefore, as soon as the date on which the hire-purchase agreement ended had been reached, the owners of the goods would be entitled to say: "You may not distrain on these goods because they are my own goods and there is no hire-purchase agreement in existence in respect of them." That, of course, leaves B
open the question at what moment the hire-purchase agreement ended. In considering that matter it is to be observed that primarily cl. 5 of the hire-purchase agreement is not dealing with time at all but with method. I think that is what the parties are there concerned with. They are concerned with the method by which the hiring may be terminated—that is to say, by the sending of a notice either by post or by leaving it at the hirer's last-known place of abode. But, of course, time is brought into the clause, C
because it goes on to say:

> "Thereupon the hirer shall no longer be in possession of the goods."

It has then to be determined what "thereupon" means—upon what? Reading that with the part of the clause which goes before, I think it means upon written notice by post or otherwise being sent to or left at the hirer's last-known address.

The question then is, so far as the words "sent to" are concerned, from what time those D
words speak. On behalf of the plaintiffs it is maintained that "notice sent to" must speak from the time at which the notice is sent; if it be put into the post, it is the moment at which it is put into the post; if it be otherwise sent, it is the moment at which it is dispatched. On behalf of the defendants it is said that the time at which they speak is the time at which either the notice reaches the address or the time at which in E
the ordinary course of post, if it is sent by post, or the ordinary course if sent by messenger, it will reach that address. I do not find myself able to speculate as to any question of what time it would take to reach the address if sent either by post or by messenger. I am impressed by the argument that it would be difficult to say at what moment either a letter or a message might be expected to reach the address at which the notice had to be delivered. I do not think I can go outside the words themselves, and, F
when the wording of the document says "sent to," I think that that means at the moment it is sent; just as when it uses the phrase "left at" that means the moment at which the notice in fact is left. I think that the true construction of "thereupon" would be—and upon the sending by post or otherwise of the notice or leaving it at the hirer's last-known address the rights under the agreement come finally to an end.

Certain cases have been quoted in the course of the argument on the matter. In the G
first, *Browne* v. *Black* (1), the question arose on the Solicitors Act, 1843, and the decision there was that

> "a bill is not 'sent by the post' to the party to be charged one month before action unless it was posted at such a time that it would in the ordinary course of post be delivered to the party to be charged one clear calendar month before the commencement of the action."

H

The decision there was made, as all decisions of construction must be made, in the light of the surrounding circumstances. I have always had a certain amount of sympathy for the decision of BUCKLEY, L.J., as he then was, but I am bound by, and must loyally follow, the decision of the other two members of the court in a case where that decision applies. But this case appears to me to differ from *Browne* v. *Black* (1) in that here there are no surrounding circumstances such as giving a notice so that the hirer of I
the goods might have a particular time in which to do something. Indeed, the whole object of cl. 5 of the hire-purchase agreement is to enable the owner to put an end to the hiring and to protect himself. Perhaps one of the matters from which he wants to protect himself is the seizure of the furniture by the landlord. I am not at all sure, although I do not found my judgment on this, that the primary object of the clause is not for that very purpose. In that case there is no particular reason that I can see in the surrounding circumstances for making the notice speak only as from the time when in the ordinary course it would be delivered at the address. In the case of *Browne*

A v. *Black* (1) there was good reason for that, because, although it could be shown that the notice under the Solicitors Act reached the client within one month from the date of the posting, it was decided that it was desirable to give him an opportunity of considering it for one month. It was from that angle that the decision in the case of *Browne* v. *Black* (1) was given, and it was for that reason that words which might normally speak at the time of the posting of the letter did not speak until the time at which the letter B would be received in the ordinary course of post.

I think that the present case much more nearly conforms to *Retail Dairy Co., Ltd.* v. *Clarke* (5), although, as was pointed out quite rightly on behalf of the landlord and the bailiff, the wording in that case is not "left at" but simply "sent to." When I consider the analogy of the words "left at" I do not find myself assisted to come to a conclusion in favour of the landlord and the bailiff by those words. Indeed, if "left at" were the C vital words, then I do not see any real need for the provision with regard to sending "by post or otherwise." If the whole object was that the notice should reach the hirer, then I should have thought "left at" itself would be sufficient. At any rate, I do not see that that provision is a reason for saying that the moment at which the hiring is terminated is to be concluded by one limb of the alternative given and not by the other.

In those circumstances I find that the owners are entitled to recover their furniture. D I ought to add this, that I do not find myself assisted either way by the cases of offer and acceptance, or withdrawal of offer after acceptance has been sent through the post. Those cases seem to me to give rise to different considerations and do not assist me to come to a conclusion in the present case. In my view, on the true construction of the hire-purchase agreement, the hire-purchase agreement came to an end at the moment that the registered letter was delivered to the post office, when it was sent by post to E the hirer. In those circumstances the hire-purchase agreement was determined before the distraint for rent took place, and the owners are entitled to recover the furniture.

Solicitors: *Tredgolds & Idris*; *R. H. King & Co.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

A

INVESTMENT TRUST CORPORATION, LTD. *v.* SINGAPORE TRACTION CO., LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Romer and Maugham, L.JJ.), May 1, 1935]

[Reported [1935] Ch. 615; 105 L.J.Ch. 319; 153 L.T. 83; 51 T.L.R. 476; 79 Sol. Jo. 402] B

Company—Capital—Payment out of—Payment in consideration of surrender of management agreement—Benefit to revenue.

In 1925, on the formation of the S. T. company, a contract was entered into for the management of the undertaking by the S. E. company, it being agreed that the S. E. company should be given a controlling voting power in the S. T. company, C and should be entitled to receive 50 per cent. of the profits of that company. After some years the directors of the S. T. company thought it in the interest of their company that those management powers should be determined, one of the grounds of that decision being that at that time the boards of directors of the two companies were quite distinct and in places far distant from one another. As a result, it was proposed that the S. E. company should cease to manage the D S. T. company and should surrender its voting rights and its right to a half share of the S. T. company's profits and that the S. T. company, in consideration thereof, should pay to the S. E. company £100,000 which it proposed to raise by an issue of debentures. On a motion by a shareholder for an injunction restraining the S. T. company from entering into the proposed agreement.

Held: under that agreement the S. T. company would be getting an advantage, E which the directors of the company had bona fide valued at £100,000 and so would be getting money's worth for their expenditure, and, therefore, the company would be entitled to provide the £100,000 out of its capital resources even though, as a result, the revenue of the company would benefit.

Famatina Development Corpn., Ltd. v. *Bury* (1), [1910] A.C. 439, distinguished.

Notes. As to powers and liabilities of a company, see 6 HALSBURY'S LAWS (3rd F Edn.) 411 et seq., and for cases, see 9 DIGEST (Repl.) 646 et seq.

Cases referred to:

(1) *Famatina Development Corpn., Ltd.* v. *Bury*, [1910] A.C. 439; 79 L.J.Ch. 597; 102 L.T. 866; 26 T.L.R. 540; 54 Sol. Jo. 616, H.L.; 9 Digest (Repl.) 312, *1954*.

(2) *Mitchell* v. *Noble, Ltd.*, [1927] 1 K.B. 719; 96 L.J.K.B. 484; 137 L.T. 33; 43 G T.L.R. 245; 71 Sol. Jo. 175; 11 Tax Cas. 372, C.A.; Digest Supp.

(3) *Anglo Persian Oil Co.* v. *Dale*, [1932] 1 K.B. 124; 100 L.J.K.B. 504; 145 L.T. 529; 47 T.L.R. 487; 75 Sol. Jo. 408; 16 Tax Cas. 253, C.A.; Digest Supp.

(4) *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409; 57 L.J.Ch. 28; 57 L.T. 457; 36 W.R. 145; 3 T.L.R. 745, H.L.; 9 Digest (Repl.) 435, *2844*.

Appeal from an order of EVE, J. H

The plaintiff company, a shareholder in the Singapore Traction Co., Ltd., the first defendant, applied to EVE, J., for an interlocutory injunction restraining the Singapore company until judgment in the action from entering into an agreement by which, in consideration of the second defendant, the Shanghai Electric Construction Co., releasing all rights of management of the Singapore company, the Singapore company should pay the Shanghai company £100,000 to be raised by an issue of debentures. The I Shanghai company, in consideration of managing the Singapore company, had received each year of its management one-half of the profits of the Singapore company. EVE, J., granted the injunction, taking the view that he was bound to do so by the decision in *Famatina Development Corpn., Ltd.* v. *Bury* (1).

The facts appear in the judgment of the Master of the Rolls.

Gavin Simmonds, K.C., and *Gordon Brown* for the Singapore company.

Lionel Cohen, K.C., and *A. Andrewes-Uthwatt* for the Shanghai company.

Harold Christie, K.C., and *J. G. Strangman* for the Investment Trust company.

A The judgment of the Court of Appeal was agreed to be treated as the judgment on the trial of the action.

LORD HANWORTH, M.R.—This appeal raises an important and interesting point. It is an appeal against an order by EVE, J., granting an interlocutory injunction restraining the Singapore company until judgment from entering into an agreement with the B Shanghai company, in the terms of a draft agreement which is exhibited to an affidavit.

In order that the points may be elucidated, and our judgment made plain, it is necessary to state the facts with some little care. It appears that before 1925 there was a company operating tramways or some means of transit at Singapore. That company was known as the Singapore Electric Tramways Co., Ltd. It was not very successful, and ultimately a receiver and manager had to be appointed in the person of the distinguished C accountant who is now Lord Plender. But, at that time, an efficient arrangement was proposed, and there was an ordinance granted, authorising the transfer to a new company of the undertaking of the Singapore Electric Tramways Co.

The way in which the matter was carried out was this. An ordinance, known as the Singapore Traction ordinance, was passed by the governor on May 30, 1925, and that gave a concession for the working of trolley vehicles, omnibuses, and other vehicles D within the settlement of Singapore. The concession contained what might be called the usual powers of borrowing, and so on, which are contained in a private Act of Parliament, granting the powers of operating a tramway; but it also contained certain important clauses one of which was cl. 31 which empowered commissioners to purchase the undertaking and provided:

> ". . . the company shall, until the purchase takes place, have exclusive privilege E of using the trolley-vehicles on the road, and power to control roads."

It also contained clauses which were intended to secure British control which declared that

> "if at any time the company be or become a foreign company or a company under foreign control or if the powers and authorities by this ordinance conferred become F vested in any foreigner or foreign company or company under foreign control, the said powers and authorities shall forthwith cease and determine and shall be no longer exercisable."

That concession ordinance was followed by another which recited:

> "Whereas prior to the passing of the Singapore Traction Ordinance the Singapore G Electric Tramways Company, which was incorporated in England in the year 1905 under the English Companies' Acts of 1862 to 1900, . . . was authorised to construct, equip, and maintain tramways in Singapore along the routes specified in the old ordinance. And whereas before and since the passing of the later ordinance of 1925 the Shanghai Electric Construction Co., Ltd., was to be formed and to acquire these powers,"

H and then authorised that there should be a transfer from the old company to the Shanghai company of its property and assets under the terms of an agreement which was scheduled to the ordinance. That agreement was made between Sir William Plender as the receiver and manager of the Singapore Electric Tramways, Ltd., and by him representing the old company and the Shanghai Electric Construction Co. was a party to that agreement. Then there is provision made for the transfer to a new company, and that I contains the term that the undertaking of the new company shall be managed by the Shanghai company.

The new company was formed, provision being made, in accordance with the agreement, for the management of the undertaking by the Shanghai company. The Shanghai company had a voting power, which would always exceed by one the total number of votes which could on any poll be influenced by all the other shareholders. The purpose of that was to give the control to the Shanghai company. The Shanghai company also were, in the case of a winding-up, to have half the surplus assets, and they were to have what was called one management share.

Those documents that I have read do not provide for the payment to the Shanghai company for their services as managers. That was provided for under a different agreement, a management agreement, which provided by cl. 9 that:

> "As remuneration for their services under this agreement the managers [the Shanghai company] shall be entitled to receive in respect of each financial period of the company 50 per cent. of a sum equal to the amount of the net profits of the company for such financial period calculated before deducting the remuneration payable to the managers hereunder, and before charging any British taxation which shall be imposed upon the company in respect of profits and for the purpose of which taxation the remuneration of the managers hereunder shall be liable to be brought into the managers' assessment of profit, but after making proper and usual provision for depreciation and renewals. . . ."

Pausing there, after this agreement was made on Sept. 23, 1925, the position was that the Shanghai company were the managers of the new company which had been formed to work the new concession. They were to receive very considerable sums in respect of their services, and they had that right secured to them by means of the management share and the voting power which was granted to them of always having one vote beyond any possible combination of opposing voters.

Things went on all right from 1925. One may pause to make the observation that it seems as if the Shanghai company had secured a very large share of the profit of the undertaking, but I do not stop to criticise the terms of that agreement. It was entered into by persons who were completely competent to form a proper measure of their own interests. Exactly how far the Shanghai company had been responsible for the clearing-up of the difficulties which surrounded the Electric company previously—and I dare say, providing capital for the new company, and so on—is not a matter for us to inquire into; but it is noticeable that at first sight it would seem as if the Shanghai company were being paid a very considerable sum for what it called management, the management, of course, being one which would control policy. So far as actual expenses were concerned, those would be met in the ordinary course as running expenses of the company which the Shanghai company were to manage. We are told that over the years from 1926 to 1933 the total sums received by the Shanghai company were £152,000, or an average of nearly £22,000 per annum.

The position of the Shanghai company was modified in 1933. Shortly put, they gave up the overriding voting power which had been originally conferred upon them, and they were placed in a position in which they could prevent the passing of any special resolutions of the company. They also gave up their interest in the surplus assets. But those alterations still left the Shanghai company with an interest in the profits of the company in the measure and to the tune which I have described in the paragraph I have alluded to, or thereabouts.

Certain difficulties have arisen. It is not certain that the Shanghai company will always be controlled in the same way as it has been. There has now occurred, as I understand, a divergence between the Shanghai company and the Singapore company, and it is thought wise to get rid of the management powers of the Shanghai company. There was also some resentment arising in Singapore against the management by the Shanghai company of a concern which was operated entirely within the limits of Singapore, which might cause some powers to be given to a rival corporation or body of persons who might have, by competition, altered the profits which were being made by the Singapore company.

The various considerations which led to the agreement I am coming to in a moment, are set out in the evidence as follows:

> "In addition to the reason mentioned in the preceding paragraph, which makes the termination of the existing management desirable in the interests of the Singapore company, the termination of such management is [in the opinion of the directors] desirable, if not essential, in the best interests of the Singapore company for the following additional reasons: (*a*) Now that the boards of directors of the two companies are quite distinct and are in places far distant from one another,

> A the likelihood of differences and disputes arising between the two companies with regard to the management of the Singapore company by the Shanghai company must be very greatly increased and serious difficulty is likely to arise in adjusting any differences. . . ."

I need not recapitulate all the reasons which are given. At any rate, those reasons led B to the proposed agreement being entered into, and, quite shortly put, it is that the Shanghai company should agree to the termination of their management and receive compensation for giving up their rights in the sum of £100,000. The clause in the agreement which provides that is as follows:

> "In consideration of the Shanghai company agreeing to determination of the management agreement and as compensation to it for its loss of office as manager of the C Singapore company, the Singapore company shall pay to the Shanghai company the sum of £100,000, such payment to be made within one month after this part of this agreement becomes operative."

Incidentally, it is recited in the agreement that:

> "The termination of the management agreement involves as incidental thereto D the alteration of the Singapore company's articles so as to extinguish the special right at present attached thereby to"

what was originally the management share, which had become, when the alteration of the articles was made in 1933, called the reversionary share.

That is the agreement which is the subject-matter of the present proceedings. The writ was issued asking for an injunction to restrain the Singapore company from entering E into this agreement on the ground that it was ultra vires the Singapore company to pay, or enter into an agreement to pay, to the Shanghai company, the capital sum of £100,000, and consequential restriction of the powers under an injunction. EVE, J., considered the matter very carefully, and he came to these two conclusions. He says first of all:

> "I want to say at once that there is no suggestion that that conclusion is anything F but a perfectly honest conclusion, founded upon facts which are stated with exactitude, and I have no doubt in perfect good faith, in the affidavit which has been filed on behalf of the Singapore company. The question is how can this arrangement be made, an arrangement which one approaches from the point of view, so far as one is entitled to do it, of desiring to uphold it, and not destroy it, because here is a business arrangement entered into with propriety, and with perfect G honesty, and which involves nothing which strikes one at first sight as either contrary to law, or as being any excessive remuneration, or payment, for the obtaining of that which the Singapore company desires."

He indicates that, too, when he says:

> "I should have been very glad to have sanctioned the arrangement if I could have H seen my way to do so,"

but he grants an injunction restraining the conclusion of the agreement by reason, or practically by reason, of the decision in *Famatina Development Corpn., Ltd.* v. *Bury* (1).

I pause for a moment to make a short survey of the position at the time when this agreement was proposed. The Singapore company had come to the conclusion that it was no longer to their interest to be managed by the Shanghai company, and there I are valid reasons set out, which nobody controverts, for their coming to that conclusion. There are possibilities, whether approximate or remote does not matter, that it might endanger the success of the company if their present concession was cut into by some rival enterprise, a possibility which must not be ignored; and I think it is sufficient to say that on neither side is it suggested that this proposal is anything other than a business arrangement suggested by perfectly honest considerations of the present and future possibilities and prosperity of the Singapore company. It is, therefore, as EVE, J., says, an agreement to which, if he could, he would wish to give validity. I think it is also important to bear in mind that this form of agreement for getting rid of a director, a management, or an agency, is one which has come before the court in a A different form recently more than once, and it has been found that such a proceeding, such a change of management or agency or the like, is one which may enure to the benefit of the company. I give as a couple of illustrations of that the cases which came before this court on a question whether or not a deduction ought to be made in respect of the expense involved to a company in ascertaining their assessment to income tax. In *Mitchell* v. *Noble, Ltd.* (2), it was held that a considerable sum £19,000 paid to a B director whose services the company no longer wished to retain, was money wholly and exclusively laid out and expended for the purposes of the trade. Another case was *Anglo-Persian Oil Co.* v. *Dale* (3), in which £300,000 was paid to terminate a particular agency. There again it was held that that was a sum which could be deducted as money wholly expended in the carrying out of trade; it was a sum which was expended to bring back into the hands of the company a necessary ingredient of their existing C business.

I have only given those illustrations for the purpose of indicating that as a matter of business there seems to be no objection to the making of this agreement. What may have seemed some years before to be beneficial to the company, either in the matter of an agency then constituted or in the matter of management then constituted, may after the passage of years prove to be indefensible to continue; but whether we are D considering the conclusion of an agreement for management or of an agreement of agency, it appears that it is a matter on which directors may justly and legitimately exercise their discretion.

What then is the objection which is taken to the carrying out of this agreement? It is that it is proposed to find the £100,000 by means of the issue of debentures, in other words, that the company will borrow the money which would be necessary to cover the E £100,000, payable as it is within one month of the conclusion of the agreement, and it is then said that that operation comes within the principle, and indeed within the decision of *Famatina Development Corpn., Ltd.* v. *Bury* (1). One has therefore to consider very carefully whether or not the *Famatina Case* (1) does govern the present case, and does prevent the carrying out of what may be called a legitimate piece of procedure in carrying on a company and its legitimate business most advantageously according to the F opinion of the directors who are charged to so carry it out.

The *Famatina Case* (1) to my mind does not govern the present case. It is, I think, to be remembered in reference to that decision that the operation which was proposed was one of a somewhat extraordinary nature. It was not an ordinary piece of procedure in carrying on the business of the company. The company had been in serious difficulties, and in order to get money they had borrowed it upon what were called G income bonds; the straits in which they were is indicated by the fact that the lender lent a principal sum of £10, and was to receive by way of bonus for his somewhat slender loan a sum of £25 in respect of each £10 that he lent. That was to be paid exclusively out of the net profit from time to time of the company over a period of seven years. Therefore, every lender would be entitled to a total sum of £35 made up of the £10 advance and £25 bonus, and, if he was paid over seven years £5 a year, he would be H getting back his money with the interest, which was capitalised in the sense of the bonus. There was a clause, cl. 13, endorsed on the bond enabling the company to pay off the bonds upon expiration of six months' notice as a whole, and there was a proposal that the holders of the bonds should receive a certain number of shares in return for giving up their income bonds. What was proposed to be done was to pay off those bonds, and it was held by the Court of Appeal, and by the House of Lords that cl. 13 did no more I than give the company the right to advance the date of payment from seven years to six months after the notice had been given. I think it is quite plain, from an examination of the case both before PARKER, J., in the Court of Appeal, and in the House of Lords, that the operation, both in its origin and in its proposed conclusion, was one that was exceptional. It was not a method or a part of the ordinary carrying on of the business of the company. It was a special effort directed to raise money when the fortunes of the company urgently needed it and a method of repaying that money, and was not connected with the ordinary operations of the company's business. Here we are dealing with the ordinary management of the company, which is to be in the hands of either the Shanghai company or the board of the Singapore company, but is a necessary ingredient of the procedure of the company.

Lord Macnaghten comes to the conclusion that the proposal made in the *Famatina Case* (1) cannot be carried out, because it would have involved the issue of shares without payment in money or in money's worth. The company proposed to extinguish a bond by issuing in exchange for it twenty fully paid-up new shares of a nominal value of £1 each. That was a new issue of shares to the income bond holders. Lord Macnaghten examines what was the real charge on the income bond holders, and he says that the charge that they retained when they lent the money was ([1910] A.C. at p. 443)

> "a charge on net profits only; that is, it is a charge on money which the company earns, but which, by the declaration of a general meeting on the recommendation of the directors is, or would be, but for the charge upon it, the property of the shareholders, as individuals, and not the property of the company. The company as a corporation would be receiving nothing whatever in return for the extinction of the charge."

It is important to consider what that involves. The income bond holder, who has not got the right to receive a return from the capital of the company, but has got a charge upon income only, has a right to dip into the pool of money which belongs to the shareholders as individuals and is not the property of the company. The scheme suggested is that the income bond holder who gives up his bond shall receive from the company new shares, and the company itself is to get nothing in return for those new shares. When the facts are examined the *Famatina Case* (1) seems to me merely an illustration of the circumstances in which a company ought not to issue shares unless it gets either money or money's worth for them. Lord Macnaghten obviously holds that the operation did not give to the company anything in the nature of money's worth.

I turn back to consider the facts of the present case. The company will be getting control back into its own hands. It will be enabled to carry on its business without any prospect of immediate danger. It will have less friction than might arise between two separate boards, one sitting in London and the other at Singapore, and it is dealing with what might be called an ordinary piece of the business of the company. Can it be said that the *Famatina Case* (1) lays down some principle which would be trespassed upon by the proposed agreement? To my mind, in the *Famatina Case* (1), the operation was not in the ordinary course of business, but in the present case it is. The present proposal does not prevent the company getting what is money's worth, whether the company carry it out by raising money on debentures, or whether they pay it over a period of time, or whether they dip into some of their resources which it is possible they could do upon the figures which are before the court. That is a matter for the company to consider, but in every circumstance the facts of the present case seem to diverge so largely from those of the *Famatina Case* (1) as to prohibit that case preventing the carrying out of the agreement, and compelling Eve, J., as he thought he was compelled, to grant the injunction. For those reasons it appears to me that the appeal must be allowed, and the injunction discharged.

ROMER, L.J.—I have come to the same conclusion. The evidence and documents have been fully referred to by the Master of the Rolls, and it is unnecessary that I should refer to them further. The one fact that emerges from the documents and from the evidence is that it is essential in the interests of the Singapore company to get rid of this managing agreement and to pay a sum of £100,000 for this purpose, not because the managers are receiving too large a salary, nor because, in the event of a winding-up, the managers have certain rights as holders of the reversionary share in the surplus assets, but purely and solely for the reasons that are set out in the evidence which has been read by the Master of the Rolls. If the company had been an individual—if we were dealing with an individual who was carrying on the business now being carried on by the company—it cannot be doubted that it would be a wise and proper thing for the individual to pay this sum of £100,000 for the purpose of getting rid of this manager, and, that being so, I confess I find it difficult to understand why it should be illegal to make such a payment because the company which is carrying on the business is a limited company and not an individual.

The circumstances in which a company may deal with its capital, and the purposes for which it may deal with its capital, were stated by LORD WATSON in full in his speech in *Trevor* v. *Whitworth* (4) (12 App. Cas. at p. 423), which has been so often referred to. What he said was this:

> "Paid-up capital may be diminished or lost in the course of the company's trading; that is a result which no legislation can prevent; but persons who deal with and give credit to a limited company, naturally rely upon the fact that the company is trading with a certain amount of capital already paid, as well as upon the responsibility of its members for the capital remaining at call; and they are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of its business."

I should have thought myself that in the circumstances that I have mentioned it would be legitimate for a company such as this, in the course of its business, to make this payment. But it is said, and this contention found favour with EVE, J., that we are compelled to hold that this proposed payment of £100,000 is ultra vires the company by reason of the decision of the House of Lords in the case of *Famatina Development Corpn., Ltd.* v. *Bury* (1).

I think it is desirable to see both what the *Famatina Case* (1) did not decide and what it did decide. It did not decide that a company can never spend its capital in any way which would result as a necessary incident of the payment in an increase of the company's revenue available for dividend. Neither any member of the Court of Appeal nor any member of the House of Lords laid down any such proposition, nor could they have intended to lay down such a proposition. It is perfectly plain that if a company—to take an illustration which I ventured to give in the course of the argument—has a leasehold office for which it is paying a rent, and thinks it desirable in the interest of its business as a whole to acquire the freehold of the premises, the expenditure of its capital for the purpose is legitimate, although one result of such payment is that revenue will no longer be debited each year to the annual rent of the offices, rent which might be, and probably would be, larger than the interest earned by the capital expended in acquiring the freehold reversion. Again, it cannot be doubted that if a company has a manager whom it thinks it desirable to get rid of, in the interests of governing principles, it may pay him a lump sum out of its capital in satisfaction of all his claims under his agreement, and, in consideration of his putting an end to that management agreement, although the result, or one of the results, of so doing will be that revenue will benefit in the future to the extent of the manager's salary, and the result must surely be the same, even though the manager's salary is a salary that depends upon and is contingent upon the existence of profits being earned by the company. The *Famatina Case* (1) certainly did not decide that in such a case the payment would be illegal. The truth of the matter is that the advantage to the company in the one case as a whole is just as great as it is in the other. If it be worth, say, £10,000 for a company to get rid of a manager whose salary is not contingent upon the profits, it would be also worth £10,000 for them to get rid of a manager whose salary is contingent upon the profits. In both cases the company would get the advantage of £10,000, and in order to get that advantage is entitled to spend £10,000 of its capital.

What the *Famatina Case* (1) did decide was that the company in that case were getting no advantage whatsoever by the proposed expenditure of money, or, rather, allotment of fully-paid shares, which was proposed to be done there. The facts of the case have already been referred to by the MASTER OF THE ROLLS, and it would appear from that statement that what the company was doing was to anticipate revenue. The bonds that had been issued were payable out of profits, and out of profits only, and the company were proposing to use capital, by the issue of fully-paid shares, for the purpose of getting rid of the right of the bondholders to receive in the future part of the profits earned by the company. To the company it did not matter one penny—or so the House of Lords and the Court of Appeal thought—whether the bondholder was paid out at once or whether he was paid by instalments out of future revenue. So that by paying the bondholder at once, no advantage was coming to the company; the only persons, who would get any advantage out of the proposed payment, were the shareholders for whose benefit revenue would be set free available for dividend. That being so, it seems that the *Famatina Case* (1) is not an authority which would prevent us from upholding the proposed scheme in the present case. The company here as a whole is getting an advantage which the directors have bona fide estimated to be worth £100,000, and they are, therefore, in my opinion, entitled to provide that £100,000 out of their capital resources, even though, as a necessary expense of getting rid of the management agreement, revenue will benefit to the extent of the salary paid to the managers, which was a salary equivalent to 50 per cent. of the revenue in each year, and even although the rights attached to the management share, or the reversionary share, held by the managers will no longer be attached to that share, which is going to be turned into an ordinary share with all the incidents pertaining to such a share. It is true that there is nothing to be found either in the management agreement or in the articles of association providing that in the event of the managers ceasing to be managers the right attached to that share shall be modified or taken away. But, throughout, the parties appear to have realised that the termination of the management agreement would necessarily involve the change of the rights of capital conferred by the management share, and no part, as I have already pointed out, of the consideration being paid to the Shanghai company, is in truth being paid for the purpose of getting rid of those rights in the surplus assets.

For those reasons, with all respect to Eve, J., who felt himself bound by the *Famatina Case* (1) to decide the other way, I think that the appellants are entitled to succeed, and that the injunction must be dissolved.

MAUGHAM, L.J.—I have come to the same conclusion. The facts have been stated by the Master of the Rolls, and I do not think it is necessary for me to add much in relation to them. I should like, however, to point out that the present arrangement involves among other things, a new issue of debenture stock carrying interest at a rate of 5 per cent. instead of 6 per cent. per annum, and the procuring of a further ordinance from the Straits Settlement government, and also the alteration of the company's articles, as well as the transaction of terminating the management agreement which the Master of the Rolls has already mentioned.

The proposed agreement which it is suggested would be ultra vires the company states that:

> "In consideration of the Shanghai company agreeing to the termination of the management agreement and as compensation to it for its loss of office as manager of the Singapore company the Singapore company shall pay to the Shanghai company the sum of £100,000, such payment to be made within one month after this part of this agreement becomes operative."

That is, after certain resolutions of the Singapore company have been duly passed, and the ordinance to which I have referred has become law, and the shareholders have approved of the agreement at a meeting to be held for the purpose. As has been pointed out, the proposed agreement involves the alteration of the articles of association so as to extinguish the special rights at present attached to what is now called the reversionary share of the Shanghai company. That, I think, as pointed out by my brother Romer, is no more than something ancillary or incidental to the main substance of the agreement as between the Singapore company and the Shanghai company which involves the termination of the management agreement so that the Singapore company becomes at liberty to carry on its own concern in such way as it may think proper.

The effect has various advantages, of which I think the two most important may be mentioned. They are not quite visible on the face of the transaction, and they are these. First, that the proposed agreement obviates any risks of the forfeiture of the Singapore company's ordinance in the event of the Shanghai company becoming foreign controlled, and, secondly, it will remove a cause of growing local resentment which might well give rise to friction with the municipal commissioners who, I may mention incidentally, are largely natives, on whose goodwill and co-operation the fortune and future prosperity of the Singapore company are in large measure dependent.

I approach the problems which are raised in this appeal as closely connected with the question of the payment of compensation for the loss of the office of manager, which the Shanghai company is willing to agree to, for consideration. The Singapore company pays nothing, in terms, at any rate, and I think in substance, for the surrender of rights attached to the reversionary share which the Shanghai company owns. I think the terms of the agreement in that respect, and, in particular, cl. 8 of the proposed agreement which I have in effect read, demonstrate that fact. It follows from that that the company is not here proposing to traffic in its own shares, or the single reversionary share, in any true sense.

The questions that remain are not without difficulty, but, like my brethren, I have come to a clear conclusion upon them. The first question which, I think, may be formulated is in these terms, taking a case not exactly like this, but simplified for the purpose of consideration. Suppose A. has a contractual right to be paid the sum of, say, £10,000 a year out of, and only out of, the future profits of a company, if any, is it a transaction ultra vires the company for the company to agree to pay to A. the sum of £50,000 in consideration of the extinguishment of this right? It is said that one or two passages in *Famatina Development Corpn., Ltd.* v. *Bury* (1)—and my brethren have referred to them—may be thought to have lent some support to the proposition that such a release, being a release of a liability to pay a sum only out of future profits, does not create a new asset, and that there is nothing to show in the balance sheet as the result of such a transaction. In a sense, in my opinion, that is true; but it is also undeniable that the result of the bargain would be to increase the value of the undertaking as a whole, and this for the benefit of the company as a corporation.

Many illustrations can be given of that, and the simplest that occurs to me is that if a company has acquired a valuable property by purchase, the consideration payable to the vendor being an annuity for his life, it is obvious that if the life annuity were extinguished by a capital payment, there would not be any fresh asset that you would enter into the balance sheet. The value of the property would be increased by reason of the fact that no longer was there the necessity to pay as a charge upon the property an annuity for the rest of the life of the vendor. It is, however, contended that the *Famatina Case* (1) shows that such a transaction would be improper, and, as I understand it, ultra vires the company, because it is said that that case decides that the extinguishment of a charge on future profits is a transaction by which the company, as a corporation, receives nothing.

I do not think the *Famatina Case* (1) decides anything of the kind. It has to be remembered in considering it that there was a very curious set of facts. The company, as has already been said, borrowed £50,000 by the issue of 5,000 bonds at £10 each, but the terms were that the principal money of £10 had got to be paid, so far as there were net profits available for the purpose, together with the sum of £25 by way of bonus. The registered holder was entitled to convert any ten bonds of the series into a first mortgage debenture of the company for £150, without prejudice to his right to the bonus. Practically the whole of the bondholders exercised that right, and the result was that there were £50,000 first mortgage debentures outstanding, and rights to bonuses amounting to £125,000 charged on income only. The proposal was, not to create £50,000 first mortgage debentures, but to extinguish all the bonus rights, amounting to £125,000, by the issue of 100,000 fully-paid shares; and that, it was suggested, was ultra vires, and it was so held by the Court of Appeal and by the House of Lords in a judgment of LORD MACNAGHTEN, which the other Lords accepted. I think one cannot consider the decision in the *Famatina Case* (1) without observing that their Lordships were faced with a somewhat alarming possibility. They were unwilling to give currency to the view that money could be borrowed by a limited company on terms of a huge bonus payable out of future profits, and that the bonuses could then be released or extinguished in consideration of fully paid-up shares. If that could properly be done, the device afforded a method of issuing shares at a discount by a very simple process. It has also to be remembered that the rights to bonus were not held by persons who had any obligation towards the company at all. The bonus had been given to them when the original bonds were subscribed for, and, accordingly, if the bonuses were extinguished by the issue of so many fully paid-up shares, the company as a corporation would not be getting anything directly from the holders of the bonds, though, no doubt, the future profits of the company would be relieved from an obligation, and the shareholders of the company, including the people who got shares in return for the extinguishment of the bonds, would be getting larger dividends than they otherwise would. The decision of the House of Lords was, I think, that expressed by Lord Macnaghten when he said ([1910] A.C. at p. 443):

> "The company as a corporation would be receiving nothing whatever in return for the extinction of the charge. Nor would the position of the company's creditors be improved in any respect"

and if you add to that his statement that

> "The directors would be issuing shares without payment either in money or money's worth,"

I think you have an explanation of what was the view of the House of Lords in deciding that case in the way they did. The words to be emphasised in that last sentence are:

> "Without payment either in money or money's worth";

because I do not think that Lord Macnaghten pledged himself to the view that there was no consideration whatever for the issue of the shares. He is saying there would be no payment for the shares, and I have no doubt that he held the view that Farwell, L.J., had expressed in the court below ([1909] 1 Ch. at p. 762), after citing the passage of Lord Watson's speech in *Trevor* v. *Whitworth* (4), that it was not a usual and legitimate way of carrying on the business to dispose of contingent profits in futuro in the manner there proposed.

However that may be, let me now somewhat alter the terms of the question which I suggested and present it in these terms. Supposing A. is appointed a manager of a company for life at a salary of, say, £10,000 a year, payable out of, and only out of the future profits of the company, if any. Is it ultra vires the company if the company should pay to A. the sum of £50,000, say, in consideration of the termination of his management and all his rights as manager being extinguished? In my opinion, the *Famatina Case* (1) has nothing directly to do with such a problem. If that question be put, it cannot be affected by answering that the company and the corporation would be receiving nothing whatever in consideration for the extinction of the charge. It would be receiving something. It would be receiving in consideration for the extinguishment of the charge a release of the right of A. to continue to manage the company. In other words, it would receive freedom from the obligations on that agreement.

As I have already said, the £100,000 is paid on the terms, or would be paid on the terms, of cl. 8 of the proposed agreement. It is, in my opinion, beyond dispute that the company as a corporation is getting a true consideration in return for the £100,000. On what ground can we then demand to say that such a transaction is ultra vires? As I have already said, it is not a trafficking in the company's shares. It is obviously not an issue of shares at a discount, because no shares are being issued in connection with the transaction. It is admitted that the transaction is not an unfair one, and upon the evidence it is clear that it is in the interests of the company. In my opinion, then, there is nothing in the *Famatina Case* (1) which prevents the transaction or binds us to hold that it is one which cannot be entered into by an ordinary trading company in its own interests; and in saying that I accept the evidence that the object of the proposed payment is not solely to discharge a charge on the future profits of the company and of the assets distributable among the members in a winding-up, but to procure the termination of the existing management of the Singapore company by the Shanghai company, and to give the Singapore company unfettered control and management of its own undertaking, and that in the interests of the Singapore company itself as distinguished from its shareholders. On those grounds I agree that the judgment of EVE, J., who was endeavouring loyally to follow the decision of the House of Lords in the *Famatina Case* (1) must be reversed.

Appeal allowed.

Solicitors: *Slaughter & May*; *Linklaters & Paines*; *Allen & Overy*.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

MARCELINO GONZALEZ Y COMPANIA *v.* JAMES NOURSE, LTD.

[KING'S BENCH DIVISION (Branson, J.), November 13, 14, 1935]

[Reported [1936] 1 K.B. 565; 105 L.J.K.B. 158; 154 L.T. 497; 80 Sol. Jo. 93; 41 Com. Cas. 94; 18 Asp. M.L.C. 590]

Shipping—Bill of lading—Stipulation to deliver cargo at wharf—Liberty to tranship—Discharge into lighters—Custom of port—Cargo lost through sinking of lighters.

A bill of lading, which provided for the discharge of cargo at a wharf, contained a clause providing as follows: "With liberty to tranship or land and re-ship on board the same or any other vessel or vessels," and an undertaking to deliver the goods from the ship's tackles. It also contained an exception for dangers and accidents of the seas and of navigation. The goods were not discharged at a wharf, but into lighters. A hurricane arose, and the lighters were sunk and the goods lost.

Held: (i) by reason of the liberty to tranship, the ship was entitled to tranship into lighters and not only into another ship alongside; that the goods were lost through an accident of the seas and, therefore, the ship was not responsible.

(ii) the clause was not null and void by reason of the provisions of the Indian Carriage of Goods by Sea Act, 1925, Sched., art. III, rr. 1, 8.

(iii) a custom at the port of discharge to discharge into lighters was not inconsistent with the stipulation that the cargo should be discharged at a wharf.

Notes. The Indian Carriage of Goods by Sea Act, 1925, is in the same terms as the Carriage of Goods by Sea Act, 1924.

As to transhipment of cargo see 30 HALSBURY'S LAWS (2nd Edn.) 491 et seq. and as to stipulations as to mode of delivery see ibid. p. 532 et seq. For cases see 41 DIGEST 499 et seq. and 531 et seq. For Carriage of Goods by Sea Act, 1924, see 23 HALSBURY'S STATUTES (2nd Edn.) 884.

Case referred to:

(1) *Marzetti* v. *Smith & Co.* (1883), Cab. & El. 6; 49 L.T. 580; 5 Asp. M.L.C. 166, C.A.; 41 Digest 552, *3790*.

Action tried by BRANSON, J., in the Commercial Court.

The plaintiffs were the consignees of a shipment of 500 bags of Burma rice shipped at Rangoon for delivery at Havana in the defendants' ship *Tapti*, and were holders of a bill of lading, dated June 4, 1933, signed by the defendants in respect thereof. The bill of lading contained a provision as follows: "With liberty to tranship or land and re-ship on board the same or any other vessel or vessels," and also contained an undertaking by the defendants to deliver the goods "in like good order and condition from the ship's tackles (where the ship's responsibility shall cease)," subject (inter alia) to the following exception, "The act of God . . . and all and every other dangers and accidents of the seas . . . and of navigation of whatever nature or kind." The bill of lading contained a further clause providing that the cargo was to be discharged at a wharf to be designated by the ship's agent, and incorporating the terms of the Indian Carriage of Goods by Sea Act, 1925. By art. III, r. 1, of the rules relating to bills of lading in the schedule to that Act the carrier was bound to exercise due diligence in the performance of his duties, and by r. 8 of that article:

> "Any clause, covenant or agreement in a contract of carriage relieving the . . . ship from liability for loss of . . . goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect."

During the voyage the ship struck a submerged object and was damaged. On arrival at Havana it was found necessary to put her in dry dock to effect repairs, and there was no such accommodation available at that port. She proceeded to a wharf and began to discharge, but before the plaintiffs' goods were discharged, she was obliged to stand off again in order to make room for a vessel belonging to the wharfowners. That was in accordance with a recognised practice of the port, giving precedence to the wharfowner's vessels over others. The plaintiff's goods were then discharged into lighters for conveyance to the wharf. On the next day the lighters were sunk in a hurricane, and the plaintiffs' goods were totally lost.

The plaintiffs brought this action claiming damages for breach of the undertaking to deliver the goods contained in the bill of lading. They contended that the defendants had failed to deliver the goods at the wharf designated by the ship's agent; that, in discharging into lighters, they had committed a breach of contract; and that they had failed to deliver the goods from the ship's tackles. The defendants contended that the loss was due to an excepted peril of the sea, and that they were entitled to discharge into lighters by reason of the proviso giving liberty to tranship.

David Davies, K.C., and *Stevenson* for the plaintiffs.
Willink, K.C., and *Holman* for the defendants.

BRANSON, J.—The plaintiffs allege that the contract contained in the bill of lading involves that the goods should be taken alongside the wharf and delivered from the ship's tackles, and that the placing of the goods in lighters was a breach of the contract. The defendants allege that the contract provided that they should take the goods to the port of Havana and discharge them there in any usual way, and that the practice there of discharging them into lighters was, in those circumstances, a usual way of discharge. It has been repeatedly held that where there is a custom of the port in regard to the discharge of the cargo, unless that custom is excluded by the contract, delivery in accordance with that custom is proper. Similarly, where, as in the present case, a well-known practice as to discharge of cargo has been followed by a line of steamers at a particular port to the knowledge of the receiver of the goods, then, unless there is something in the contract or elsewhere which excludes that practice, it is not open to the receiver to object to it.

It was said on behalf of the plaintiffs that there were matters here which did exclude the practice. In the first place it was said that the provision in the bill of lading that the defendants should have "liberty to tranship" applied only to transhipment to a steamer alongside, and not into lighters. There is nothing in the bill of lading which so restricts the meaning of the words, and it is not possible so to restrict it. Either practice is a usual performance of the contract. The expression "liberty to tranship" covers the putting of the goods into lighters in order to complete the voyage. It is also said that the whole of the clause giving liberty to tranship is rendered null and void by art. III, r. 8, of the rules appended to the Indian Carriage of Goods by Sea Act, 1925. That is an article which provides that the carrier shall be bound to exercise due diligence in the performance of his duties, and I do not see how a clause giving liberty to tranship can come within that rule.

It is further said that the expression in the bill of lading that the goods shall be delivered from the ship's tackles excludes delivery of the goods into lighters. The answer to that contention is to be found in *Marzetti* v. *Smith* (1), where it was held that a custom of the port of London for ships to discharge goods on to the quay and thence into lighters was not inconsistent with an exactly similar provision in the bill of lading there in question. In the present case the contract, when fairly read in the light of the circumstances, was not broken by placing the goods in lighters as a step in the delivery of them, and the defendants are protected from liability for the loss of the goods by the exceptions in the bill of lading.

Judgment for defendants.

Solicitors: *Parker, Garrett, & Co.*; *Holman, Fenwick, & Willan.*

[*Reported by* V. R. Aronson, Esq., *Barrister-at-Law.*]

SIMEON *v.* MINISTER OF HEALTH

[King's Bench Division (Branson, J.), January 24, 1935]

[Reported [1935] 2 K.B. 183; 104 L.J.K.B. 330; 152 L.T. 372; 99 J.P. 167; 51 T.L.R. 235; 79 Sol. Jo. 109; 33 L.G.R. 75]

Compulsory Purchase—Notice stating effect of order—Inclusion of owner of easement among "owners or reputed owners" of land—Sufficiency of notice—Duty of Minister in considering objections—Public Works Facilities Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 50), *Sched. I, Part II, paras.* 3 (*b*), 4.

A local authority made a compulsory purchase order under s. 2 (1) of the Public Works Facilities Act, 1930, and the name of the applicant, who was the owner of an easement to take water from certain land to which the order related, was included under the heading "owners or reputed owners" in a schedule to the notice stating the effect of the order served under Sched. I, Part II, para. 3 (*b*), of the Act. On objection being made by the applicant, a public local inquiry was held under Sched. I, Part II, para. 4, of the Act, and the applicant there desired to put forward objections to the effect that the order purported to authorise the purchase of something which was not land, but merely an easement over land, and that the statutory notice had not sufficiently specified what was to be purchased. The holder of the inquiry declined to entertain these objections on the ground that they were legal matters to be considered by the Minister and not by him. The order was duly confirmed by the Minister. On application by the applicant to the High Court under Sched. I, Part III, para. 2, of the Act,

Held: (i) the order was not invalidated by the inclusion of the applicant's name under the heading "owners or reputed owners" in the schedule to the notice as that document did not necessarily indicate that anything was to be purchased from him, but only referred to the acquisition of any interest in land held by him, and not that of an interest which could not be properly described as "land."

(ii) the notice which the acquiring authority served, under Sched. I, Part II, para. 3 (*b*), need not bring home to the recipient what effect would be produced on him or his property if the order became effective. It was sufficient if the notice indicated what the order contained.

(iii) the Minister had sufficiently discharged his duties under the Act by considering the report of the holder of the inquiry and the written objections submitted by the applicant, and was not bound to give the applicant the further opportunity of submitting legal arguments to him orally.

Notes. The Public Works Facilities Act, 1930, was repealed by the Acquisition of Land (Authorisation Procedure) Act, 1946, but para. 3 (*b*) and para. 4 of Part II of Sched. I to the Act of 1930 are reproduced in para. 3 (1) (*b*) and para. 4 (1) respectively of Part I of Sched. I to the Act of 1946. Paragraphs 3 (*b*) and 5 of Sched. I to the Housing Act, 1936, and paragraphs 3 (*b*) and 5 of Sched. III to that Act are in the same terms.

As to compulsory acquisition of land see 10 Halsbury's Laws (3rd Edn.) 30 et seq., and for cases see 11 Digest (Repl.) 177 et seq. For Acquisition of Land (Authorisation Procedure) Act, 1946, see 3 Halsbury's Statutes (2nd Edn.) 364.

Application under Sched. I, Part III, para. (2), to the Public Works Facilities Act, 1930, to quash an order of the Minister of Health confirming a compulsory purchase order made by the Isle of Wight Rural District Council.

By an agreement dated Aug. 18, 1904, Sir John Simeon's predecessors in title had, in consideration of a payment of £500, granted the above council, for a term of 999 years, the right to go on Pitt's farm, Calbourne, for the purpose of taking water. Certain additional rights to take water were granted to the council by subsequent agreements. By a conveyance dated July 14, 1932, Sir John Simeon conveyed Pitt's Farm to one P. R. Strickland in fee simple, subject to a reservation of the right to percolating water and of all easements necessary to enable the council to exercise their rights under the above agreements. After negotiations for the sale to the council of the sole right to obtain water from the farm had failed, the council, in March, 1934, gave statutory notice of intention to purchase, and on April 17, 1934, made an order authorising them to purchase compulsorily, for the purpose of obtaining water, fifteen-and-a-half acres of meadow land forming part of Pitt's Farm. The order contained a schedule, in one column of which the land was described, and in the other column, under the heading "owners or reputed owners," the names of Sir John Simeon and P. R. Strickland were set out. A similar statement had appeared in the statutory notice of intention to purchase. On May 15, Sir John Simeon gave notice of objection to the confirmation of the order, and on June 14 a public local inquiry was held. The applicant appeared and objected to the order on the grounds that it authorised the purchase of something which was not land and that the statutory notice of intention to purchase did not sufficiently specify what was to be bought, but the holder of the inquiry said that he could not inquire into legal questions, which were for the Minister and not for him to deal with, and refused to consider the objections. On Aug. 11, 1934, the Minister confirmed the order. No request had been made by the applicant for a further opportunity of putting forward his objections.

The applicant applied to the court under Sched. I, Part III, para. (2), to the Act of 1930 to quash the Minister's order. The grounds of the application were: (i) that the order was not within the powers of the Act; (ii) that the requirements of the Act had not been complied with (*a*) because the property proposed to be acquired had not been sufficiently described in the order, (*b*) because the applicant's objection had not been sufficiently considered by the Minister.

By the Public Works Facilities Act, 1930, s. 2 (1): "Any local authority . . . may be authorised to purchase land compulsorily for any of the purposes specified in Part I of Sched. I to this Act by means of an order (in this Act referred to as "a compulsory purchase order") made and submitted to the appropriate Minister and confirmed by him in accordance with the provisions of Part II of that schedule. . . ."

By Sched. I, Part I, para. (1), the purposes for which the purchase of land may be authorised by a compulsory purchase order include "any purpose for which the local authority . . . with respect to whom the order is made could be authorised to acquire compulsorily the land with respect to which it is made by an order having effect (either with or without approval by Parliament) under some enactment in force immediately before the commencement of this Act."

By Sched. I, Part II, para. (1), provision is made for a compulsory purchase order being in a prescribed form. By para. (3) it is provided that, before the order is submitted to the Minister, it shall be published by the local authority in local newspapers, and that notices in a prescribed form shall be served on owners and occupiers of land in the area to which the order relates. These notices are to state the effect of the order and to specify the time and manner of making objections.

By para. (4): "If no objection is duly made by any of the persons upon whom notices are required to be served, or if all objections so made are withdrawn, the Minister may, if he thinks fit, confirm the order with or without modification, but in any other case he shall, before confirming the order, cause a public local inquiry to be held, and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order either with or without modification."

By Part III, para. (2), a right is given to "any person aggrieved by an order" to "question its validity on the ground that it is not within the powers of the Act or that any requirement of the Act has not been complied with" by application to the High Court within twenty-one days after the publication of the notice of confirmation.

By para. (3): "Subject to the provisions of the last preceding paragraph, an order . . . shall become operative at the date on which notice of its confirmation is published."

Sir Gerald Hurst, K.C. (*L. W. Byrne* with him), for the applicant.

The Solicitor-General (*Sir Donald Somervell, K.C.*) (*W. Bowstead* and *R. C. Essenhigh* with him) for the Minister of Health.

BRANSON, J.—This is an application under Part III, para. 2, of Sched. I to the Public Works Facilities Act, 1930. It arises as an appeal against the compulsory purchase order made by the rural district council of the Isle of Wight on April 17, 1934, for the purchase of certain lands at Calbourne in the Isle of Wight and confirmed by the Minister of Health on Aug. 11, 1934, under Part II, para. 4, of Sched. I to the Act. By it Sir John Walter Barrington Simeon, Baronet, moves that the compulsory order should be set aside upon the following grounds. The first ground is that the order is not within the powers of the Act, and the second ground is that the requirements of the Act have not been complied with in two respects, first, because the property proposed to be acquired is not sufficiently described in the compulsory purchase order, and, secondly, that the objection of the applicant to the order has not been sufficiently considered by the Minister.

The first of these objections arises in the following way. It is said that the Public Works Facilities Act, 1930, authorises the acquisition of land, but does not authorise the acquisition of any property or proprietary right in or over land, which is not land, and it is said that this order has authorised the purchase of something from the applicant which is not land, and, therefore, the order is ultra vires. The situation out of which this dispute arises is that the applicant, Sir John Simeon, having been the owner of certain land at Calbourne, disposed of it some years ago to Mr. Percy Strickland, but reserved certain water rights—rights to deal with percolating water and rights to allow the local authority for a royalty or payment of so much a gallon to take the water which percolated through to the subsoil under the land. The notice which was served under Sched. I, Part II, para. 3, to the Act applies, not to the whole of the land sold by Sir John Simeon to Mr. Percy Strickland, but to a portion, to wit, fifteen-and-a-half acres, and the order and the notice under the order contained Sir John's name in a column headed "Owners or reputed owners." It is argued that the order is ultra vires because, by putting in Sir John's name, it purports to acquire something from him which is not an interest in the land described, and, therefore, it must be purporting to acquire from him something which is not land, and, as the Act only authorises the acquisition of land, the order is ultra vires. The whole of that argument depends upon the assumption that the insertion of Sir John's name in the column "Owners or reputed owners" means that the order is authorising the acquisition of something from him. I do not think that that assumption is justified. It seems to me that the effect of the completed document is to say that, if Sir John has any interest in this land which is described, that interest may be bought, but if what he has got is some kind of a right which is not an interest in the land and not "land" within the meaning of that word in this Act, then the fact that his name appears there effects no more as against him than would be effected if the name of somebody who did not happen to be the owner of land was put in this column of owners or reputed owners. The presence of the expression "reputed owners" is enough to show that the insertion of the name in the column does not of necessity indicate that anything is being purchased from the person whose name appears there. For these reasons I think that the first point taken by counsel for Sir John Simeon fails, and the order is not ultra vires the statute.

The second point is that the notice does not sufficiently state the effect of the order. It has been stated a little differently on different occasions. The notice of motion puts it in this way, that the property proposed to be acquired is not sufficiently described. Here again it is only by assuming that the notice is intended to be a notice purporting to acquire such rights as Sir John Simeon reserved for himself under the deeds which have been referred to, that the point can be made at all. The property is described in the second column as approximately fifteen-and-a-half acres of pasture land, bearing a number on the ordnance survey, which is given, and the description of the land is unobjectionable and defines it perfectly. Unless one is to assume that the notice is intended to refer to something other than what it says, no complaint can be made of the description at all. But counsel took a rather different point in the argument before me. He said that the notice was bad because it did not state the effect of the order, and that the expression "effect of the order" means that the notice should bring home to the person receiving it what effect is going to be produced upon him or his property if the order is carried through. I do not so read the expression in para. 3 (*b*) of Part II of Sched. I to the Act. Where it says that "a notice in the prescribed form stating the effect of the order" shall be served, I think it means that the notice is to give an indication of what the order contains. It is to be in the prescribed form, and when one looks at the form in the Public Works Facilities (Procedure, Ministry of Health) Order, 1930 (S.R. & O. 1930, No. 1057) which has been prescribed and the prescribed form which was adopted in the present case, it appears to me that the statute has been fully complied with. The prescribed form reads: "Take notice that," and so forth, "made a compulsory purchase order which is about to be submitted to the Minister of Health for confirmation authorising them to purchase compulsorily for the purpose of" so and so "the lands described in the schedule hereto," and then there is the schedule with the description of the lands. Here the schedule contained a description of the lands by reference to an ordnance number and a coloured patch upon the ordnance survey map, making it clear beyond peradventure what the land referred to was. I think, therefore, that the second objection which has been raised also fails.

That leaves only the third objection, which is that the objection of the applicant to the order has not been sufficiently considered by the Minister of Health. It is said that, the applicant having raised certain objections before the inspector, to wit, first of all the objection that the section only authorises the purchase of land and the order was authorising the purchase of something which was not land, and, secondly, that the notice did not sufficiently specify what was to be bought from Sir John, the inspector said that they were legal matters which he could not very well deal with himself and they must be considered by the Minister. It is argued that, the inspector having said that, it became incumbent on the Minister under the statute to appoint a day and to give an opportunity for representatives of the applicant to come and put before him the legal arguments in support of those two objections. It is said, on the other hand, that there is no such obligation upon the Minister. The obligation, if any, must arise under Part II, para. 4, of Sched. I to the Act, and that paragraph reads:

> "If no objection is duly made by any of the persons upon whom notices are required to be served, or if all objections so made are withdrawn, the Minister may, if he thinks fit, confirm the order with or without modification, but in any other case he shall, before confirming the order, cause a public local inquiry to be held, and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order either with or without modification."

It seems to me that the submission of the Solicitor-General upon that paragraph is the right one. The paragraph provides for a public inquiry before which parties can appear and be heard. It does not provide for any second hearing before the Minister, who has only got to consider the report of the person who held the inquiry and any objection not withdrawn. It seems to me that the language used indicates an intention on the part of the legislature to confer the right upon the Minister, having held the public inquiry, to deal with the report which comes from the holder of the inquiry, and to give his own consideration to objections which are not withdrawn, and nothing more. It is to be observed that there is nothing in the Act or the schedule which prevents reasonable objections being put forward, and there is no evidence here—and, indeed, it is agreed that it was not so—that there was any application made to the Minister to consider any further arguments in support of the objections which were made. According to the affidavit the point that was specifically reserved for the consideration of the Minister was the validity of the reservations in these various conveyances—a matter, it seems to me, which might be very material if the question which was being considered was a question of how much compensation the applicant was to receive, but which does not seem to have any real bearing on the question whether the order authorising the compulsory purchase of this land should or should not be confirmed.

For these reasons I think that this application should be dismissed.

Application dismissed.

Solicitors: *Emmet & Co.*, for *Gunner, Wilson, & Jerome*, Newport, Isle of Wight; *Solicitor to the Ministry of Health.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

Re SANDIFORD (NO. 2). ITALO-CANADIAN CORPN., LTD., *v.* SANDIFORD

[CHANCERY DIVISION (Clauson, J.), July 24, 1935]

[Reported [1935] Ch. 681; 104 L.J.Ch. 335; 154 L.T. 7]

Administration of Estates—Counsel's fees—Solicitor's estate insolvent—Right of counsel to prove for fees—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34 (1), *Sched. I, Part I, r.* 2.

In a creditors' action for the administration of the insolvent estate of a deceased solicitor a barrister applied to be admitted as creditor for a sum of money in respect of fees due to him as counsel, such fees having been received by the deceased solicitor from the lay clients but not paid to the applicant. In the alternative the applicant asked that the personal representative of the solicitor should be ordered to pay to him a dividend on the sum due, rateably with the other creditors.

Held: (i) during the lifetime of the solicitor there could have been no cause of action against him, either at law or in equity, by a counsel for his fees, and, therefore, the applicant was not entitled to be admitted as a creditor of the estate for the sum in question.

(ii) it was impossible to apply the doctrine in *Re Condon, Ex parte James* (1) (1874), 9 Ch. App. 609 (as to payment to a person entitled of money received by a trustee in bankruptcy), to the case of an executor, he not being an officer of the court, and, therefore, the applicant was not entitled to the rateable dividend which he claimed.

Re Hall, Ex parte Hall (2) (1856), 28 L.T.O.S. 72, doubted.

Notes. As to recovery of barrister's fees, see 3 HALSBURY'S LAWS (3rd Edn.) 42 et seq., and for cases see 3 DIGEST 333 et seq.

Cases referred to:

(1) *Re Condon, Ex parte James* (1874), 9 Ch. App. 609; 43 L.J.Bcy. 107; 30 L.T. 773; 22 W.R. 937, L.JJ.; 4 Digest 15, *60*, 205, *1889*; 5 Digest 819, *6961*.

(2) *Re Hall, Ex parte Hall* (1856), 28 L.T.O.S. 72; 2 Jur. N.S. 1076; 3 Digest 333, *227*.

(3) *Wells* v. *Wells*, [1914] P. 157; 83 L.J.P. 81; 111 L.T. 399; 30 T.L.R. 545; 58 Sol. Jo. 555, C.A.; 3 Digest 333, *230*.

(4) *Re Thellusson, Ex parte Abdy*, [1919] 2 K.B. 735; 88 L.J.K.B. 1210; 35 T.L.R. 732; 63 Sol. Jo. 788; 122 L.T. 35; [1918–1919] B. & C.R. 249, C.A.; 4 Digest 206, *1893*.

Summons.

This summons was taken out by a member of the Bar in a creditors' action for the administration of the estate of Henry Gilbert Sandiford, who carried on business as a solicitor under the style of Calder Woods and Sandiford and died on Nov. 19, 1932. The applicant claimed to be admitted as a creditor for the sum of £84 14s. 6d. in respect of fees due to him as counsel, such fees having already been received by the deceased solicitor from the lay clients, but not paid to the applicant. CLAUSON, J., found as a fact that the lay clients paid the fees to the solicitor upon the faith of such solicitor's representation to them that he had actually paid to the applicant such fees, whereas, instead of having paid them, he had kept them for himself. In the alternative the applicant asked that the personal representative of the solicitor should be ordered to pay to the applicant a dividend on the above sum rateably with the other creditors.

G. P. Slade for the applicant.

J. D. Casswell for the defendant, the personal representative of the deceased solicitor.

CLAUSON, J.—This is a summons taken out in an action for the administration of the estate of the deceased by a member of the Bar, who claims to be a creditor of the estate for a sum of £84 14s. 6d. described in the summons as being fees due to him as counsel, and he asks that he may be admitted as a creditor of the estate for the said sum of £84 14s. 6d., or, in the alternative, that the personal representative of the deceased may be ordered to pay to him a sum equal to the dividend on the said amount rateably with the other creditors of the estate and as if he had a legal right of proof in respect of the said sum.

I will deal first of all with his claim to be admitted as a creditor in respect of that sum. The facts are that counsel advised certain clients through the solicitor, but did not take the precaution of requiring payment of his fees before the advice was given, or before, as it was in one case, he appeared for the client in court; that at some subsequent date the solicitor received payments from the client on the representation, as I understand the facts, that he had in fact paid counsel's fees and that the client ought to reimburse him the payments he had made. In the one case, that of *Dent* v. *Baldwin*, t is quite plain that that was the position, because I have before me the bill of costs which was rendered to the client, which contains under the date on which the brief was delivered the entry: "Attending counsel with brief, paid his fee and clerk," and accordingly, the lay client was justified in supposing, on the delivery of that bill, that what he was being asked to do was, not to provide the solicitor with money to pay counsel's fees, but to repay to the solicitor a fee which he had in fact paid to counsel. The facts are not quite so clear in the other case of *Re Mark Martin* (*deceased*), for what happened in that case was that the solicitor wrote to the client's husband admitting that he had received a sum of £2000 on account, which he proposed to apply in paying his own costs and then comes the word—which is possibly ambiguous—"disbursements." Under that heading he mentions, among other items, counsel's fees, with the name of the applicant and of another counsel, and the respective amounts of their fees. At that date the applicant had been paid some fees in the matter, but not nearly as much as the sum which is put down there under "disbursements." However, I think I must treat the facts of that case as the same as the facts in the first case I mentioned, and that I must attribute to the word "disbursements" as it appears in that letter, the meaning that the solicitor is in effect saying to the client: "I am going to apply the moneys by paying myself my own costs and re-imbursing myself my disbursements, i.e., what I have paid to the counsel."

I, therefore, propose—not that I am satisfied that it will make any difference—to treat this as a case in which a solicitor has represented to the client that he has paid the fees, has then received from the client the amount which would reimburse him the payment that he had made, and, instead of using that money to pay the fees, which he had in fact not paid, he appears, without paying the fees, to have put the money

A into his own pocket. Whether or not in any true sense this dishonest conduct on the part of the solicitor has had any practical result which is reflected in the quantum of his estate distributable is by no means clear, for the one transaction took place as much as thirteen or fourteen months before the death of the solicitor, and the other transaction, as I understand it, was only about a couple of months before the solicitor's death.

B However, in those circumstances, the first question I have to determine is: Is counsel entitled to be admitted as a creditor of the estate for the sum in question? In my view, it is quite clear that between the dead man and the counsel there subsisted no obligation enforceable by the counsel at law or in equity, and accordingly it would seem very remarkable that the death of the solicitor should give the counsel a right to prove, whereas before the death he had no right to recover the sums at all. I need C refer to no other case than that of *Wells* v. *Wells* (3), a decision of the Court of Appeal in 1914, which amply justifies the proposition that during the lifetime of the solicitor there was no cause of action by counsel against him at law or in equity. That being the position, it seems to me clear that the applicant cannot be admitted as a creditor.

There is, however, the alternative claim, which is "that the personal representative may be ordered to pay to him a sum equal to the dividend on the said amount rateably D with the other creditors of the estate and as if he had a legal right of proof in respect of the said sum." That claim, which is in rather unusual form, is traceable to the fact that in *Re Hall* (2), bankrupt solicitors admitted that they had actually received from clients a specific sum in respect of fees payable by them on behalf of those clients to counsel previously to the bankruptcy. Mr. Commissioner FANE expressed the opinion that this was sufficient to entitle counsel to prove for this sum, as money had and E received to his use. The proposition put forward on behalf of the applicant in the present case was that, in view of *Re Hall* (2), he is entitled in a bankruptcy either to prove, as the commissioner seems to have thought in that case, or to have a quasi right of proof; and I will explain later, by reference to the judgment of SWINFEN EADY, L.J., in *Wells* v. *Wells* (3)—commenting on Mr. Commissioner FANE's decision in *Re Hall* (2) —upon what principle this quasi right, which the commissioner allowed in that case, F is based.

Section 34 (1) of the Administration of Estates Act of 1925 provides certain rules for the administration of a deceased person's estate where that estate is insolvent, and the rules which are applied (and are to be found in Part I of Sched. I to this Act) are those which would be applied if this estate were being administered in bankruptcy. The relevant rule (r. 2) says:

G

> ". . . the same rules shall prevail . . . as to debts and liabilities provable . . . as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt."

If it were the law, as Mr. Commissioner FANE, if correctly reported, said, that in the circumstances of that case counsel had a right of proof, the argument would be unassailable that in the administration of this insolvent estate the same rule as to debts H provable would be applied. But *Re Hall* (2) has been considered, and, in particular, has been considered in *Wells* v. *Wells* (3), and SWINFEN EADY, L.J., there indicated that the commissioner was wrong in holding that there was a right of proof and that, if the view taken by the commissioner, as reported, is to be supported at all, it must be supported on the footing that the court of bankruptcy may, in certain circumstances, treat a man who has no legal right of proof as though he had such a right. Let me I assume that that view is correct and that in certain circumstances, such as those dealt with in *Re Hall* (2), counsel has what I may call a quasi right of proof in bankruptcy for his fees. I can find nothing in the rules in Part I of Sched. I to the Administration of Estates Act which would justify me in treating such a practice of the court in bankruptcy as being in any way applicable or extendable to the administration of a deceased's insolvent estate.

The passage in the judgment of SWINFEN EADY, L.J., in *Wells* v. *Wells* (3), to which I referred is:

> "There is another case upon which we ought to say a word, that is the case of *Re Hall* (2) which was with reference to the right of counsel to prove in bankruptcy for fees. In that case, the solicitor for the assignees of a bankrupt undertook to hand over in full to the counsel any fees which might come to the hands of the assignees."

That has no application to the present case, because I am not dealing with any moneys handed over by a client to the executor of the solicitor after his death. His Lordship goes on:

> "But in the same case Mr. Commissioner Fane held that as regards counsel's fees received by the bankrupt solicitors before their bankruptcy, and admitted by them to have been so received, counsel could prove for this sum as money had and received to his use. This case is very shortly reported, but in our opinion the decision cannot be supported upon the ground on which it appears to have been rested. No action for money had and received would have lain against the solicitors at the suit of counsel, and no proof upon that ground could be sustained."

In other words, if Mr. Commissioner Fane decided that counsel had a right of proof, he was wrong. Swinfen Eady, L.J., adds:

> "The decision can only be supported, if at all [those words are very significant] on the principle of *Ex parte James* (1) that the estate of the bankrupt having been increased by the fees of counsel paid to and improperly retained by the solicitors, and this amount having been mixed with and become indistinguishable from the rest of the bankrupt's property, all that the court can do by way of acting honestly is to order the trustee to pay to counsel a sum equal to the dividend on the amount so received, rateably with the other creditors, and as if he had a legal right of proof."

It will be observed that Swinfen Eady, L.J., takes great care not to approve the decision of Mr. Commissioner Fane even on that ground. He says it "can only be supported, if at all," on that ground. As it is not necessary for the decision of this case, I propose to speak with some caution, but I think I am justified in saying that, while the application of the principle in *Ex parte James* (1) is familiar in the Bankruptcy Court, it is a principle to be applied with the greatest caution. I do not know of any authority, and counsel has not brought before me any authority, for the proposition that such a doctrine could be applied to an executor who is not an officer of the court. Further, it will be found on investigating the cases that the principle of *Ex parte James* (1), so far as the reported cases go, is that, where the trustee in bankruptcy, during the bankruptcy, has received certain moneys which in the view of the court it is not honest for him to hold, the court will, in certain circumstances, make him refund them.

There is, further, one case, *Re Thellusson* (4), where the money which the trustee was ordered to refund was not actually received by him; it was paid into the bankrupt's banking account at a moment at which, as it ultimately turned out, by reason of the doctrine of relation back, the assets of the debtor were vested in the trustee. When the trustee came into office that sum so paid to the bankrupt was, in fact, there, subject to some diminution occasioned, no doubt, by the per contra account of the bank. It was a specific sum upon which the court could lay its hands and about which a particular order was made as appears in the report of that case. My attention at present has not been drawn to any case in which the principle of *Ex parte James* (1) has been applied so as to order a trustee in bankruptcy to return money which, before the bankruptcy began, came into and became mixed with and indistinguishable from the rest of the bankrupt's property. It is not for me to say what are the limitations in such a case of the application of the doctrine, but if my view as to the reported cases is right, it may throw some light upon the phrase used in *Wells* v. *Wells* (3), by Swinfen Eady, L.J., when he says: "The decision can only be supported, if at all. . . ." It is significant that there does not appear to have been in bankruptcy such a case as Swinfen Eady, L.J., envisages at the top of p. 167 of the report, where the doctrine of *Ex parte James* (1) has been applied so as to order the trustee in bankruptcy to return money which, before the bankruptcy, had become indistinguishably mixed with the rest of the bankrupt's property. In my judgment, it is impossible for me to apply, as I am invited to apply, the doctrine of *Ex parte James* (1) in this case.

I will leave the case with this observation only—it was suggested to me that, in bankruptcy, where it is found that a client has paid a solicitor money to meet counsel's fees and counsel's fees have not been met, there is a practice of treating counsel as though he had a provable right and paying him a dividend pari passu with the other creditors on the sum in question, and it is no doubt with a view to that that the alternative claim in the words which I have read appears in the summons. It must be borne in mind that in those cases it must often happen that the client who has paid the money for the purpose of it being paid to counsel, or on the representation that it was to reimburse the solicitor money paid to counsel which in fact had not been so paid, might have some claim in the bankruptcy in respect of that money which had been so obtained from him; and it may be that the practice, if it exists, may be justified by the fact that the client would be in a position to put in a claim to prove in respect of the moneys so obtained from him, and obviously, as a matter of ordinary business dealing, should he recover a dividend, he would hand it on to the counsel, as it was always his intention that counsel should be paid. There may be that justification for what is said to be the practice in such cases; but that justification, if it exists, does not proceed upon any principle which would enable counsel himself to prove in the administration of the estate of a deceased person. Whether that practice be right or wrong and whether that justification is sound or not, is a matter of argument. None of these considerations is, however, relevant to the present application. I find it impossible to accede to the application and can deal with it only by dismissing it with costs.

Solicitors: *Reed & Reed*; *Edwin Coe & Calder Woods.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

HANNAFORD *v.* MAY

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Humphreys, JJ.), May 15, 1935]

[Reported [1935] 2 K.B. 385; 104 L.J.K.B. 606; 153 L.T. 380; 99 J.P. 267; 51 T.L.R. 483; 33 L.G.R. 297]

Coal Mine—Prosecution of manager—Personal commission of offence—Failure to keep register of times of descent and ascent of workers—Coal Mines Regulation Act, 1908 (8 *Edw.* 7, *c.* 57), *s.* 2 (1)—*Coal Mines Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), p. 102 (5).

By the Coal Mines Act, 1911, s. 102 (5): "No prosecution shall be instituted against the owner, agent, manager, or under-manager of a mine for any offence under this Act, not committed personally by such owner, agent, manager, or under-manager, which can be prosecuted before a court of summary jurisdiction, except by an inspector or with the consent in writing of the Secretary of State . . ."

By s. 126 (*e*): "This Act shall apply to offences under such of the provisions of the Coal Mines Regulation Acts, 1887 to 1908, as are unrepealed by this Act in like manner as if they were offences against this Act, and expressions in those provisions shall have the same meaning as in this Act."

By the Coal Mines Regulation Act, 1908, s. 2 (1): "The . . . manager of every mine . . . shall cause a register to be kept in the form prescribed by the Secretary of State, and containing the particulars prescribed by him with respect to the times at which men are lowered into and raised from the mine, and the cases in which any man is below ground for more than the time fixed by this Act, and the cause thereof. . . ."

The offence of failing to cause a register to be kept in accordance with the provisions of the last-named subsection is one committed personally by a manager, &c., and may, accordingly, be prosecuted by a private individual.

Notes. Distinguished: *Davies* v. *May*, [1937] 2 All E.R. 582.

As to offences relating to coal mines see 22 HALSBURY'S LAWS (2nd Edn.) 820 et seq., and for cases see 34 DIGEST 738 et seq. The Coal Mines Act, 1911, was repealed as from Jan. 1, 1957, by the Mines and Quarries Act, 1954, but not as respects Northern Ireland. As to prosecutions, see now ss. 152 et seq. of the Act of 1954. For the Coal Mines Regulation Act, 1908, see 16 HALSBURY'S STATUTES (2nd Edn.) 90, and for the Mines and Quarries Act, 1954, see ibid., vol. 34, 514.

Case referred to:

(1) *Lochgelly Iron and Coal Co., Ltd.* v. *M'Mullan*, [1934] A.C. 1; 102 L.J.P.C. 123; 149 L.T. 526; 49 T.L.R. 566; 77 Sol. Jo. 539; 26 B.W.C.C. 463; Digest Supp.

Case Stated by the stipendiary magistrate for Pontypridd.

At a court of summary jurisdiction sitting at Pontypridd, an information was preferred by the respondent, May, against the appellant, Hannaford, for that the appellant on March 9, 1934, at Pontypridd, did not cause a register to be kept in the form prescribed and containing particulars prescribed by the Secretary of State, with respect to the cases in which men were below ground for more than the time fixed by the Coal Mines Acts and the cause thereof, contrary to the Coal Mines Acts, 1887–1931.

On the hearing of the information the following facts were proved or admitted:—

(*a*) The appellant was on March 9, 1934, and had been for four years, manager of the Lewis Merthyr Colliery, Forth, Glamorganshire. (*b*) On the above day certain workmen employed at the colliery were below the ground in a mine for more than the number of hours specified by the Coal Mines Acts, 1887–1931. (*c*) The register which the manager of the mine was required to cause to be kept under s. 2 (1) of the Coal Mines Regulation Act, 1908, was produced, and in respect of the above day no entries were made by the appellant or by anyone giving particulars of the cause and (or) causes of the aforesaid workmen being below ground on that date for more than the time fixed by the above Acts. (*d*) The respondent was a miners' agent and in preferring the information he was not acting for or on behalf of an inspector of mines, and the prosecution was instituted without obtaining the consent in writing of the Secretary of State. (*e*) The entries in the register were usually and by the custom of the mine made by an official of the mine, known as "the banksman," whose duty it is to make the necessary entries.

It was contended on behalf of the appellant that the failure to cause the register to be kept in accordance with the requirements of s. 2 (1) of the Coal Mines Regulation Act, 1908, was not an offence committed personally by the manager, but was of the class of offences which were required to be prosecuted, if at all, by an inspector of mines or by some person with the consent in writing of the Secretary of State, in accordance with the provisions of s. 126, proviso (*e*), and s. 102 (5) of the Coal Mines Act, 1911, and that, therefore, the information, having been laid otherwise than in such manner, was improperly and wrongly laid, and the proceedings were outside the jurisdiction of the court. It was contended on behalf of the respondent that, inasmuch as a personal duty of supervision was imposed by s. 3 (1), and s. 24 (2) of the Coal Mines Act, 1911, the failure to cause the register to be properly kept was an offence committed personally by the manager, and that, therefore, the information was rightly laid by the respondent as a private individual and was within the jurisdiction of the court.

The magistrate held that there was an absolute obligation under s. 2 (1) of the Coal Mines Regulation Act, 1908, upon the manager of the mine to cause a register to be kept in the form prescribed and containing the particulars prescribed by the Secretary of State, and that, having regard to s. 3 (1) of the Coal Mines Act, 1911, there was a personal obligation on the manager to cause the register to be properly kept in accordance with the aforesaid statutory provisions. He, therefore, decided that the offence charged was one which might be prosecuted by a person other than an inspector or a person having the consent in writing of the Secretary of State, and that the information against the appellant was rightly laid. He imposed a fine of £2, and the appellant appealed to the Divisional Court.

The material provisions of the Coal Mines Regulation Act, 1908, and the Coal Mines Act, 1911, appear in the judgments.

F. R. Evershed, K.C., and *Godfrey Parsons* for the appellant.

W. H. Upjohn, K.C., and *Trevor Morgan* for the respondent.

LORD HEWART, C.J.—This is a Case stated by the stipendiary magistrate for Pontypridd.

The Case arises out of a prosecution under the Coal Mines Acts, 1887 to 1931, in which the magistrate gave judgment against the present appellant and fined him the sum of £2. The question before this court is whether in finding as he did the magistrate came to a correct determination in point of law.

It was not disputed that on the day named in the information men had been below ground for a time which exceeded the statutory time. It was not disputed that, although a register was kept purporting to be the register satisfying the requirements of s. 2 of the Act of 1908, that register contained no entry whatever either of the fact that three men were below ground for more than the time which the statute prescribes, or of the cause or causes of their so being below ground. As appears from the arguments made to this court, the real question, and ultimately the only question, which had to be decided by the magistrate was whether it was true to say that the failure or non-compliance exhibited by the facts of the case, in contravention of the statute, was such a failure as could truly be described as an offence committed personally by the manager.

The leading contention on behalf of the appellant in the court below, as here, was that the failure to cause the register to be kept in accordance with the requirements of s. 2 (1) of the Coal Mines Regulation Act, 1908, was not an offence committed personally by the manager and was of the class of offences which are required to be prosecuted, if at all, by an inspector of mines, or by some person with the consent in writing of the Secretary of State. The importance of that contention is derived from the fact that the prosecutor here (the respondent) was a miners' agent who was not employed in the mine, and was not authorised, either by an inspector or by the Secretary of State, to begin the prosecution. It became, therefore, an essential ingredient of the case for the prosecution that, if conviction there might be, it should be shown that the offence referred to was an offence of such a kind as to come within the range of offences personally committed by the manager.

That proposition depends on the provisions of s. 102 (5) of the Coal Mines Act, 1911. That subsection states:

> "No prosecution shall be instituted against the owner, agent, manager, or under-manager of a mine for any offence under this Act, not committed personally by such owner, agent, manager, or under-manager, which can be prosecuted before a court of summary jurisdiction, except by an inspector or with the consent in writing of the Secretary of State."

The magistrate had, therefore, to determine the question whether the offence here alleged was committed personally by the manager. He came to the conclusion that it was, and the only question which this court has to decide is whether, in coming to that conclusion, he made an error in law.

It is obvious, when one looks at the scheme of this legislation, which has sometimes been called the Miners' Charter, that many steps are taken to accentuate the personal responsibility of owners, agents, and managers in coal mines. Their responsibility is evidently regarded by the legislature as a matter of supreme importance, regard being had to the welfare of the persons employed in this difficult occupation. Again and again one finds in these statutes provisions that in certain circumstances not one but all of the three persons—the owner, the agent, and the manager—shall be held liable. By s. 2 (1) of the Act of 1911 it is provided that:

> "Every mine shall be under one manager, who shall be responsible for the control, management, and direction of the mine, and the owner or agent of every mine shall appoint himself or some other person to be the manager of such mine."

Section 3 (1) of that Act states that:

> "In every mine required to be under the control of a manager, daily personal supervision shall be exercised by the manager, and, where an under-manager has been appointed by the owner or agent of the mine, also by [not 'by,' but 'also by'] that under-manager."

In like manner one finds again and again in this legislation such a provision, for example, as is contained in s. 3 (3) of the Act:

> "If in any mine there is a contravention of or non-compliance with the provisions of this section, the mine shall be deemed to be not managed in conformity with this Act,"

and where that inference is drawn the responsibility automatically falls on various individuals. Moreover, by s. 126, proviso (*e*), of the Act of 1911, it is provided that that Act

> "shall apply to offences under such of the provisions of the Coal Mines Regulation Acts, 1887 to 1908, as are unrepealed by this Act in like manner as if they were offences against this Act, and expressions in those provisions shall have the same meaning as in this Act."

The particular provision which is said to have been contravened here is the provision contained in s. 2 (1) of the Act of 1908. That subsection is to be construed in close connection with the Act of 1911 and, the prosecutor below being the person he was, we have to decide whether in law it is incorrect to say that the offence alleged was committed personally by the manager.

The scheme of that Act seems obviously to contemplate three different things. At one end of the scale there are offences clearly committed by the manager personally. At the other end of the scale are offences committed by some person other than the manager. Then there is an intermediate class—offences not personally committed by the manager and yet of such a kind that, by an inspector, or with the consent in writing of the Secretary of State, a prosecution may be instituted against the manager. It was argued by counsel for the appellant that, if it should indeed be the case that the offence here charged was committed personally by the manager, it must follow that every offence committed in a coal mine, at any rate against the provisions of this legislation, must be an offence committed personally by the manager. To rebut that argument it was necessary to find some instance or instances of offences where, although at first blush one would say that it was not the manager who personally committed them, nevertheless, within the true interpretation of this statute, the manager might have a properly instituted prosecution launched against him with reference to them. It seems to me that counsel for the respondent has filled that lacuna. He has satisfied me that under various provisions of the Act of 1911, not least ss. 101 and 27, there may be offences which, if the matter were tabula rasa, one would say were not personally committed by the manager, and yet are offences for which the manager may properly find himself a defendant in proceedings. More than that, and apart from any particular instance, I am impressed by the fact that throughout this legislation there is scattered here and there the provision that in certain circumstances, where certain things have been done or omitted, the mine is to be deemed to be a mine not managed in conformity with the provisions of this statute. In those circumstances it follows that the manager may find himself convicted of an offence. Therefore, without entering further on a difficult and interesting case, it seems to me that the magistrate was right.

I would add only one observation. Reference has been made to a recent Scottish case in the House of Lords—*Lochgelly Iron and Coal Co., Ltd.* v. *M'Mullan* (1)—which arose under the Workmen's Compensation Act, 1925, and in which it was alleged that there had been a breach of statutory duty on the part of the employer under s. 49 of the Coal Mines Act, 1911. It was with reference to that subject-matter that LORD ATKIN in the course of his speech, speaking of provisions for safety in the Coal Mines Act, said ([1934] A.C. at p. 8):

> "It is further beyond question that these provisions impose a special duty upon the employer towards those for whose safety they are designed"

and, having referred to certain reported cases, his Lordship went on to say:

> "And in an action founded on a breach of such a duty . . . it is irrelevant whether his servants [that is, the employer's servants] had disregarded his instructions or whether he knew or not of the breach."

That passage is cited, not as concluding the present matter, but as throwing light on it; not as laying down some universal affirmative proposition, but as exhibiting the principle which is to be collected from this legislation. I think that the judgments in that case pro tanto support the view which the magistrate took in this case.

Looking at the whole of the matter, and paying the greatest attention to the able argument which we have heard from counsel for the appellant, I have no doubt that the magistrate was right and that this appeal ought to be dismissed.

AVORY, J.—I am of the same opinion. There is no question here that an offence was in fact committed against the provisions of s. 2 (1) of the Coal Mines Regulation Act, 1908, and the whole question is whether that offence was, within the meaning of s. 102 (5) of the Coal Mines Act, 1911, one committed personally by the manager.

It is to be observed that in s. 2 of the Act of 1908, which creates this offence, there is no proviso exempting the owner or manager in certain circumstances—no such proviso as is to be found in many of the sections of the Act of 1911. Take, for instance, a somewhat analogous section, s. 94 of the Act of 1911, which requires the owner, agent, or manager to keep in the office a register, and to cause to be entered in that register, in such form as may be prescribed, the name, age, &c., and date of first employment of all the boys employed, &c. The section following that section makes it an offence if any person contravenes or fails to comply with, or permits any person to contravene or fail to comply with, any provision with respect to the employment of boys, &c., and it is provided that

> "in the event of any such contravention or non-compliance by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the provisions of this Act, to prevent the contravention or non-compliance."

As I have pointed out, although s. 94 imposes a somewhat similar duty on the manager, and provides him with an excuse in certain circumstances, there is no such proviso in s. 2 of the Act of 1908.

It will be said, of course, that the effect of s. 126 (*e*) of the Act of 1911, which provides that

> "This Act shall apply to offences under such of the provisions of the Coal Mines Regulation Acts, 1887 to 1908, as are unrepealed by this Act in like manner as if they were offences against this Act,"

is that an offence under s. 2 (1) of the Act of 1908 is now to be treated as if it were an offence under the Act of 1911, and I have looked to see whether there is any provision in the Act of 1911 which affords any excuse to the manager for an offence against the Act of 1908 such as is to be found in the section which I have just quoted. The only provision which appears to me to have any relevance to the question of protection of the manager is in s. 102 of the Act of 1911.

That section contains a short code for protection. The marginal note is "Prosecutions of owners, agents, managers, &c.," and I think it might be more appropriately described as "protection of owners in cases of prosecution." The section provides:

> "Where proceedings are taken under this Act against the owner or agent of a mine [not manager, but against the owner or agent] in respect of an offence under this Act for which the owner, agent, or manager or each of them is liable under this Act, the owner or agent shall not be liable to any penalty if he proves"

certain things which are set out under the letters (*a*), (*b*), and (*c*). Under the letter (*c*) he must prove "that the offence was committed without his knowledge, consent or connivance." Then s. 102 (3) contains this provision:

> "Nothing in this Act shall render the owner, agent, or manager of a mine liable to a penalty in respect of any contravention of or non-compliance with the provisions of this Act, if he proves that the contravention or non-compliance was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision."

That seems to me to be the only protection which is afforded to a manager who is accused of an offence under s. 2 of the Act of 1908, and it is to be observed that the protection afforded to him is there limited to a case where he proves that the contravention or non-compliance was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision.

It appears to me impossible that the manager in this case can bring himself within that clause. It is impossible that he can say that the offence was due to a cause over which he had no control and against the happening of which it was impracticable for him to make provision, because, first of all, s. 3 of the Act of 1911 requires that he shall exercise daily personal supervision, and if he chooses to take the risk of delegating his duty to a banksman it clearly remains his duty to supervise the work of the banksman. In my view, the effect of s. 2 of the Act of 1908 is to impose on the manager a personal obligation to see that the required particulars are entered in the register.

In those circumstances, if there was a personal obligation, and if the manager committed a breach of that duty and that obligation, I cannot doubt that the offence was one committed personally by the manager, and I therefore agree that this appeal fails.

HUMPHREYS, J.—I am of the same opinion. The point is really a very short one. It seems to me that the case for the appellant is not based on any conspicuous merits. There is no doubt that he committed an offence. There is no doubt that that was an offence for which he could be prosecuted before a court of summary jurisdiction. He was so prosecuted and was convicted.

The only point which is taken on his behalf is that the person who set the law in motion was not authorised to do so. The appellant was prosecuted for an offence under the Coal Mines Regulation Act, 1908, s. 2 (1) of which provides that the manager of a mine shall cause a register to be kept in the form prescribed by the Secretary of State, and containing the necessary particulars. The appellant did not cause that register containing the proper particulars to be kept, and, accordingly, it is said that he was a person who came within the words of s. 7:

> "If any person contravenes or fails to comply with any provision of this Act . . . he shall be guilty of an offence against this Act."

So far, then, if he had been prosecuted before 1911, he would have been properly convicted of this offence. But the Act of 1911 created a large number of new offences, and with regard to them it was provided in a great many instances that, while certain persons, including the manager, should primâ facie be guilty if there were any failure to comply with the provisions of the Act, yet there should be a defence for any such person if he could establish—and it must be observed that the onus is on him to do so—that he had taken reasonable precautions to prevent any infraction of the provisions of the Act. When the legislature brought the provisions of the Act of 1908, including s. 2 and the section which creates penalties, within the terms of the Act of 1911, it omitted to put the person who was prosecuted under the Act of 1908 in the same position as a person who was prosecuted for some offence under the Act of 1911. It may have been done designedly or undesignedly, but that is the position.

It is, therefore, not contended here that the appellant did not commit the offence which was charged against him, but it is said that the offence was not committed personally by him. It will be observed that the words of the Act are "any offence not committed personally by the manager." The offence was committed. Who committed it? As I understand the facts, the offence was committed by the manager, and by him personally. This was not a matter for which he became responsible because some other person had omitted to do something which he was required to do. It is not one of those cases, like the case in s. 27, where no person is mentioned and the name of the manager is not mentioned, but there is a direction that a thing shall be done, and then, by reason of a general section, s. 101 (2), inasmuch as the mine has not been managed in conformity with the Act in some particular respect, the manager is made responsible and liable to prosecution. That was not the case here at all. The appellant was prosecuted because he had failed to do something which he personally was required by the Act of 1908 to do, and that appears to me a personal commission by him of an offence. If he personally had made a wrong entry in the register, no one could have argued that he was not personally responsible for that and (assuming it to be an offence) that it was not an offence for which he was personally responsible and which he had personally committed. The Act, however, has put on him, and put on him personally, the duty of causing a register to be kept. I listened with great interest to the admirable argument of his counsel, but it seems to me that he has failed to get over one very obvious difficulty. The Act has required the manager to do certain things. He has, in fact, failed to do one of those things, and he has been prosecuted and convicted for having failed to do that thing which the law requires him to do. In those circumstances, it is, in my view, impossible to say that he has not personally committed the offence of which he was convicted.

On that very short ground, as well as for the reasons which have been given in the judgments already delivered, I agreed that the conviction was right, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Savage, Cooper, & Wright,* for *W. H. F. Barklam,* Cardiff; *Smith, Rundell, Dods, & Bockett,* for *Morgan, Bruce, & Nicholas,* Pontypridd.

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

FORSTER *v.* WILLIAMS DEACON'S BANK, LTD.

[Chancery Division (Lord Hanworth, M.R., Maugham, L.J., and Clauson, J.), February 6, 1935]

[Reported [1935] Ch. 359; 104 L.J.Ch. 132; 152 L.T. 433; 51 T.L.R. 254; 79 Sol. Jo. 145]

Trustee—Custodian trustee—Bank—Power to charge fees—Appointment also as managing trustee—Public Trustee Act, 1906 (6 *Edw.* 7, *c.* 55), *s.* 4 (3).

By the will of the testator, dated March 8, 1879, no power was given to any trustee to charge for his services as a trustee. In 1932 a son of the testator was sole trustee, and by a deed dated May 31, 1932, he appointed the defendant bank to be sole managing trustee and also custodian trustee of the will, the bank to be treated, not only as managing trustee, but separately as custodian trustee with such functions, duties and powers as appertained to a custodian trustee under s. 4 of the Public Trustee Act, 1906, and while acting as custodian trustee to have power to charge such fees for its services as would be chargeable by the Public Trustee if he were custodian trustee of the will. In an action by beneficiaries under the will,

Held: a body named in s. 4 (3) of the Public Trustee Act, 1906, as entitled to act as custodian trustee could not properly be appointed also to act as managing trustee; a person performing the duties of both offices was, in effect, an ordinary trustee; and, therefore, the defendant bank was not entitled under s. 4 (3) to charge fees for its services.

Notes. Applied: *Aining* v. *James,* [1936] Ch. 158.

As to custodian trustees and trust corporations see 33 Halsbury's Laws (2nd Edn.) 343 et seq., and for cases see 43 Digest 702, 703, 1033. For Public Trustee Act, 1906, see 26 Halsbury's Statutes (2nd Edn.) 28.

Appeal from an order of Bennett, J.

The following statement of facts is taken from the judgment of Bennett, J.:

"The plaintiffs in this action are Mrs. Lilly Forster and Mrs. Milly Olga Bertha Sinelnikoff, her daughter, and the defendants are Williams Deacon's Bank, Ltd. The plaintiffs are beneficiaries under the will of the late Mr. Philip Ziegler and the defendants are the trustees of his will, and the question between the parties is whether the defendants are entitled to charge the capital and income of the trust estate with the same fees as those to which the Public Trustee would be entitled if he were custodian trustee of the testator's will.

"The testator made his will on March 8, 1879, and died on Sept. 16, 1880. The will contains no power for any trustee to charge remuneration for his services as a trustee. On May 31, 1932, Mr. T. P. Ziegler, a son of the testator, was the sole trustee of the testator's will. He desired to be discharged, and on that day he and the defendants were parties to a deed of appointment whereby the defendants were appointed trustees. The deed, after reciting the will and the various appointments of new trustees which had been made since the testator's death and the state of the residuary trust fund, contains these operative provisions:

"(i) In exercise of the power for this purpose conferred by the Trustee Act, 1925, and by the Public Trustee Act, 1906, and of all other powers him hereunto enabling the present trustee hereby appoints the bank to be (*a*) sole managing trustee of the said will in the place of the present trustee and (*b*) custodian trustee of the said will. (ii) The bank while acting as trustee of the said will shall be treated not only as a managing trustee but separately as custodian trustee with such functions, duties, and powers as appertain to a custodian trustee under s. 4 of the Public Trustee Act, 1906, and may act as such managing trustee and custodian trustee respectively by its proper officer or officers. (iii) The bank while acting as custodian trustee of the said will shall be entitled to receive by way of remuneration for its services as such trustee out of the property subject to the trusts of the said will such fees as would for the time being be chargeable by the Public Trustee if he were custodian trustee of the said will. (iv) The bank hereby consents to act as sole managing trustee and as custodian trustee of the said will.

"Two of the beneficiaries commenced an action against the bank for a declaration that the defendants were not entitled to any remuneration, whether out of the capital or the income of the trust property, for acting as trustees."

Section 4 of the Trustee Act, 1906, provides as follows:

> "(2) Where the Public Trustee is appointed to be custodian trustee of any trust—(*a*) The trust property shall be transferred to the custodian trustee as if he were sole trustee, and for that purpose vesting orders may, where necessary, be made under the Trustee Act, 1893; (*b*) the management of the trust property and the exercise of any power or discretion exercisable by the trustees under the trust shall remain vested in the trustees other than the custodian trustee (which trustees are hereinafter referred to as the managing trustees); (*c*) as between the custodian trustee and the managing trustees, and subject and without prejudice to the rights of any other persons, the custodian trustee shall have the custody of all securities and documents of title relating to the trust property, but the managing trustees shall have free access thereto and be entitled to take copies therefrom or extracts thereof; (*d*) the custodian trustee shall concur in and perform all acts necessary to enable the managing trustees to exercise their powers of management or any other power or discretion vested in them (including the power to pay money or securities into court) unless the matter in which he is requested to concur is a breach of trust, or involves a personal liability upon him in respect of calls or otherwise, but, unless he so concurs, the custodian trustee shall not be liable for any act or default on the part of the managing trustees or any of them; (*e*) all sums payable to or out of the income or capital of the trust property shall be paid to or by the custodian trustee; provided that the custodian trustee may allow the dividends and other income derived from the trust property to be paid to the managing trustees or to such person as they direct, or into such bank to the credit of such person as they may direct, and in such case shall be exonerated from seeing to the application thereof and shall not be answerable for any loss or misapplication thereof; (*f*) the power of appointing new trustees, when exercisable by the trustees, shall be exercisable by the

managing trustees alone, but the custodian trustee shall have the same power of applying to the court for the appointment of a new trustee as any other trustee; (*g*) in determining the number of trustees for the purposes of the Trustee Act, 1893, the custodian trustee shall not be reckoned as a trustee. . . . (3) The provisions of this section shall apply in like manner as to the Public Trustee to any banking or insurance company or other body corporate entitled by rules made under this Act to act as custodian trustee, with power for such company or body corporate to charge and retain or pay out of the trust property fees not exceeding the fees chargeable by the Public Trustee as custodian trustee."

BENNETT, J., in giving judgment, said: In my judgment, it is clear that the Public Trustee, while holding the appointment of custodian trustee, can also be a managing trustee with other persons acting with him as managing trustees, and if he were so appointed when those associated with him as managing trustees had for any reason ceased to be managing trustees, I can find no provision of the Public Trustee Act which prohibits the Public Trustee from continuing to act as a managing trustee while retaining the office of custodian trustee. It would not seem to me to be the necessary consequence of the language of s. 4 of the Public Trustee Act, that there must always be some person or persons associated with the Public Trustee as managing trustee to enable the Public Trustee to act as custodian trustee. As I can find no express prohibition in the section preventing the Public Trustee from holding both offices I see no reason why I should imply into it a prohibition against a banking or insurance company or body corporate, duly qualified to act as custodian trustee, holding both offices, or disentitling them to receive the remuneration which the Public Trustee would be entitled to receive under the provisions of s. 4 (3). On these grounds the basis of the plaintiff's action has, in my judgment, no existence and, therefore, I dismiss it with costs.

The plaintiffs appealed.

W. P. Spens, K.C., and *A. G. Mathews* for the plaintiffs.
Sir Herbert Cunliffe, K.C., and *John Bennett* for the defendant bank.

LORD HANWORTH, M.R.—This case raises an intricate point which depends upon the careful consideration of a number of sections in an Act of Parliament. The facts are not in dispute. It appears that Philip Ziegler made a will on March 8, 1879, and he bequeathed his residuary personal estate to executors and trustees in trust for sale and conversion, and subject to a life interest he gave a portion to Mrs. Lilian Forster, who was his daughter and her daughter again, Mrs. Sinelnikoff, and they are the present plaintiffs. Philip Ziegler died upon Sept. 16, 1880, and probate of his will was obtained on Jan. 6 the following year, 1881. The ordinary sequence of events happened—the life interest of the wife fell in, and on May 31, 1932, for the purpose of carrying out the remaining trusts of the will it became desirable that a new trustee should be appointed. At that time the person who was the surviving trustee was one T. P. Ziegler, a son of the testator, Philip Ziegler. By a deed of May 31, 1932, T. P. Ziegler, being desirous of being discharged from the trusts of the will and of appointing the defendant bank as sole managing trustee in his place, and also as custodian trustee of his father's will, it was recited:

> "And whereas it is intended that the said stocks, funds and securities particularised in the said schedule hereto shall forthwith be transferred by the present trustee into the sole name of the bank as such custodian trustee as aforesaid,"

and then the deed witnesseth:

> "(i) In exercise of the power of appointment for this purpose conferred by the Trustee Act, 1925, and by the Public Trustee Act, 1906, and of all other powers him hereunto enabling the present trustee hereby appoints the Bank to be (*a*) sole managing trustee of the said will in the place of the present trustee and (*b*) custodian trustee of the said will."

It also provided that

> "The bank while acting as trustee of the said will shall be treated not only as

A
> managing trustee, but separately as custodian trustee with such functions, duties and powers as appertain to a custodian trustee under s. 4 of the Public Trustee Act, 1906, and may act as such managing trustee and custodian trustee respectively by its proper officer or officers."

By para. (iii) of the deed:

B
> "The bank while acting as custodian trustee of the said will shall be entitled to receive by way of remuneration for its services as such trustee out of the property subject to the trusts of the said will, such fees as would, for the time being, be chargeable by the Public Trustee if he were custodian trustee of the said will."

The effect of the deed is to discharge T. P. Ziegler from his trust and to give, by the words I have already referred to and in part recited, the positions of managing trustee C and custodian trustee of the remaining estates to the defendant bank. It will be noticed from the words I have read, that there is no effort made to allow the defendant bank to make any charge other than in remuneration for its services as custodian trustee of the will, and that is for reasons which will appear later.

There appear to have been unhappy differences in this family trust; it is unnecessary to go into them, but in consequence of them, on Oct. 4, 1933, the plaintiffs brought D this action against the bank and set out shortly the facts I have already recounted. The plaintiffs claim (i) a declaration that the defendant bank is not entitled to any remuneration whether out of the capital or the income of the trust property for acting as trustee. (ii) If and so far as may be necessary that the trusts of the said will may be carried into execution by the court with all proper accounts and inquiries. What the plaintiffs say is that it was improper to make such an appointment as the last surviving E trustee purported to make, and ineffective to allow the defendant bank to charge a remuneration. In the defence the defendants make it plain that they are asking for the fees as custodian trustee, and no more, because they say that they have a right to charge fees as custodian trustee, and deny that they have wrongfully charged or deducted fees against capital or income of the settled shares of the plaintiffs as alleged. The issue, therefore, is raised whether the defendants were entitled to charge fees as F custodian trustees, but there is involved for the purposes of the determination of that question a consideration of what was the effect of the appointment of the defendant bank as a new trustee in succession to the younger T. P. Ziegler.

There is a power to be found in s. 37 (1) (*c*) of the Trustee Act, 1925, whereby when it becomes necessary to appoint a trustee for the whole or any part of the trust property

G
> "it shall not be obligatory, save as hereinafter provided, to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed, but, except where only one trustee was originally appointed, and a sole trustee when appointed will be able to give valid receipts for all capital money, a trustee shall not be discharged from his trust unless there will be either a trust corporation or at least two individuals to act as trustees to perform the trust."

H
The defendant bank is a trust corporation within the meaning of that sub-clause, and the appointment was made accordingly.

What is meant by "custodian trustee"? What is this distinction that is drawn? A reference to the Public Trustee Act, 1906, will answer that question. By s. 2 of that Act it is declared:

I
> "Subject to and in accordance with the provisions of this Act and rules made thereunder, the Public Trustee may, if he thinks fit (*a*) act in the administration of estates of small value; (*b*) act as custodian trustee; (*c*) act as an ordinary trustee,"

and in the subsequent sections provisions are made at greater length for dealing with the three characters. Section 3 deals with the administration of small estates, estates of which the gross capital value is proved to be less than £1000. Section 4 deals with the position as custodian trustee. Section 5 deals with the powers of a public trustee as an ordinary trustee. When one turns to s. 4 (2), which amplifies the powers and duties of custodian trustees, we find this:

> "Where the Public Trustee is appointed to be custodian trustee of any trust (*a*) the trust property shall be transferred to the custodian trustee, as if he were sole trustee" and "(*b*) the management of the trust property and the exercise of any power or discretion exercisable by the trustees under the trust shall remain vested in the trustees other than the custodian trustee (which trustees are hereinafter referred to as the managing trustees); (*c*) as between the custodian trustee and the managing trustees, and subject and without prejudice to the rights of any other persons, the custodian trustee shall have the custody of all securities and documents of title relating to the trust property, but the managing trustees shall have free access thereto and be entitled to take copies thereof or extracts therefrom."

A

B

Those passages I have read make it plain what it is that differentiates the two characters of custodian trustee and managing trustee, and how the duties of an ordinary trustee can be, and are in certain cases, split up into those two categories.

C

It is right to call attention to the fact that in later clauses of s. 4 (2) powers are given to the custodian trustee which he may want to exercise if it should happen that the managing trustees, with whom he is obviously intended to be associated, should fail for any purpose, and cl. (*f*) says this:

> "The power of appointing new trustees, when exercisable by the trustees shall be exercisable by the managing trustees alone, but the custodian trustee shall have the same power of applying to the court for the appointment of a new trustee as any other trustee."

D

That is how the difficulty here arose. Clause (*g*) provides:

> "In determining the number of trustees for the purposes of the Trustee Act, 1893, the custodian trustee shall not be reckoned as a trustee."

E

It is thus made plain that you can have a person appointed to exercise the functions of a custodian trustee, and no more.

There is a provision inserted in sub-s. (3) of s. 4 which enables payment to be made in respect of the duties performed by a custodian trustee or by a body corporate such as the present bank. The provision is as follows:

F

> "The provisions of this section shall apply in like manner as to the Public Trustee to any banking or insurance company or other body corporate entitled by rules made under this Act to act as custodian trustee, with power for such company or body corporate to charge and retain or pay out of the trust property fees not exceeding the fees chargeable by the Public Trustee as custodian trustee."

G

If, therefore, the defendant bank can establish that they are custodian trustees, they are entitled to exercise the powers under sub-s. (3) and to require to be paid for their services as custodian trustees. If their position was that they are trustees without any limiting terms, a difficulty would arise, because then in order to obtain remuneration the powers of s. 42 of the Trustee Act, 1925, would have to be invoked and that section says:

H

> "Where the court appoints a corporation, other than the Public Trustee, to be a trustee either solely or jointly with another person, the court may authorise the corporation to charge such remuneration for its services as trustee as the court may think fit."

I

It will be seen, having regard to the terms of s. 4 (3) of the Public Trustee Act, 1906, enabling a charge to be made for services rendered as custodian trustee, why the defendants rely on the fact that they are custodian trustees, and as such have made, and do not claim to make any further demand for anything more than they are entitled to retain as fees payable to a custodian trustee. It is said, however, by the plaintiffs, that it is not a possible position for the defendants to take up; that it is all very well for them to call themselves custodian trustees, and it is all very well for them to claim no more than a custodian trustee can claim, but when one turns to the deed under which they were appointed, whatever its exact terms may be and however much it may purport to divide the duties into sections, the effect and operation of it is to make the bank a trustee without any qualification at all. The bank is appointed sole managing trustee and it is appointed custodian trustee. What are its powers? They are the powers which are held by an ordinary trustee. Is it possible by the device —one might almost call it notation—of dividing up these two functions into A and B, to alter the character and duties and powers which are given to the defendant bank and operate to discharge the late trustee from any other responsibility? What is the effect of this appointment? It would seem that it has to be treated as an effective appointment, and, if it is an effective appointment, it operates to make the bank a trustee sans phrase. On the other hand, if it sets out to do what cannot be done, it is inoperative, and the charge cannot be made because the deed is ineffective to give the rights to the bank as a custodian trustee only.

It appears to me that the structure and words of the Act of 1906 indicate that the Public Trustee can have several different characteristic functions. He can, first of all, be appointed to act in the administration of small estates, and that gives him certain powers in relation to those estates which are very important where small funds have to be administrated. Secondly, he can undertake a function which is less than a complete trusteeship; he may be a custodian trustee, and that connotes the fact that there must be somebody who will be the managing trustee; or he may be appointed as an ordinary trustee, which is contemplated by s. 5. On examining the words of s. 4 and bearing in mind that the office of custodian trustee is a lesser function than that of an ordinary trustee, it is plain why it is necessary to put therein a number of clauses which enable the custodian trustee to act in circumstances which may arise either in relation to or under the direction of managing trustees, or where he may be faced with the fact that the managing trustees have ceased to be, by death or otherwise. That seems to indicate a clear distinction between a case where a man is appointed only to hold the lesser office of custodian trustee, and where he is appointed to exercise the full powers of an ordinary trustee, as he can be under s. 5.

In the present case it is unnecessary for us to determine whether or not we are to treat the deed of appointment of May 31, 1932, as wholly ineffective, or whether we are to treat it as effective, but attempting to do what cannot be done. In either event, it appears that the defendants have not got a right to act as custodian trustees only, and to shelter themselves or to protect themselves by saying they have the right under s. 4 (3) of the Act of 1906, or in the other alternative, the deed is ineffective, and under those circumstances they have not got the right to make a charge.

In those circumstances, although in what I have described as an intricate matter, I differ from BENNETT, J., with hesitation and with some diffidence, yet I feel the right course is to allow this appeal and to make the declaration which is required in the prayer. The appeal must be allowed with costs, and the claimants must be entitled to succeed in their action, with costs, but the costs of the inquiries which will be carried out under the second item will be reserved and dealt with after those inquiries have been made.

MAUGHAM, L.J.—I am of the same opinion. The main question that arises is upon the true construction of s. 4 of the Public Trustee Act, 1906, and I need not recapitulate the facts which the MASTER OF THE ROLLS has already dealt with, and which, moreover, are set out in the judgment of BENNETT, J. Section 4 of the Public Trustee Act, 1906, empowers the Public Trustee, with his consent, to hold what was a new position, namely, that of custodian trustee of any trust, and for the present purposes it is material to show that he could be so appointed in any ordinary trust by the person having power to appoint new trustees. Under sub-s. (2) there are a number of provisions to which I shall refer later. In sub-s. (3), the legislature provides that

> "the provisions of this section shall apply in like manner as to the Public Trustee to any banking or insurance company or any other body corporate entitled by rules made under this Act to act as custodian trustee, with power for such company or body corporate to charge and retain or pay out of the trust property fees not exceeding the fees chargeable by the Public Trustee."

It should perhaps be mentioned that under r. 30 of the Public Trustee (Custodian Trustee) Rules, 1926, the defendant bank, in this case having a capital in excess of the requirements mentioned in r. 30 (1) (*b*), is a banking company entitled to act as custodian A trustee. Putting that together with s. 4 (1) of the Act of 1906, we find that the person having the power to appoint new trustees, who was, in this case, T. P. Ziegler, who purported to make the appointment by the deed of May 31, 1932, was empowered to appoint the defendant bank as a custodian trustee. The question emerges whether that power justified an appointment of the bank, not merely as a custodian trustee, but to hold what were described in the deed as two offices, namely, that of sole managing B trustee of the will in place of the appointer and also as custodian trustee of the will. As the MASTER OF THE ROLLS has pointed out, that is precisely the same as an appointment of the bank to be what the Act of 1906 in the heading to s. 5 describes as "an ordinary trustee," and the question may be defined as whether a person having the power under s. 4 to appoint a custodian trustee, is entitled in the case of a bank or insurance company which is entitled by the rules to act as trustee, to make a sort of dual appointment C under which that person is appointed a custodian trustee of the charge, and, on the other hand, appointed as a managing trustee, with the result that the totality of his position is absolutely indistinguishable from that of an ordinary trustee. Section 5 empowers the Public Trustee to be appointed an ordinary trustee, but we do not find any suggestion there that there is a power to appoint him to be a managing trustee in addition to his position as custodian trustee, and the truth and common sense of the matter D seems to me to be that a person who is performing both the duties of custodian trustee, as mentioned in s. 4, and all the other duties of an ordinary trustee, is no more nor less than an ordinary trustee.

When I look at the specific provisions of sub-s. (2) of s. 4, I think I find sub-divisions which indicate the view of the legislature that in every case where the Public Trustee is appointed to be the custodian trustee, there will be other persons who are described E as the managing trustees. The first provision I think necessary to refer to is clause (*b*) of sub-s. (2), which provides that

> "the management of the trust property and the exercise of any power or discretion exercisable by the trustees under the trust shall remain vested in the trustees other than the custodian trustee,"

F

and then it says "which trustees are hereinafter referred to as the managing trustees." So far as this section is concerned, it would seem clear that the intention of the legislature was that the Public Trustee should be appointed as custodian trustee for the purposes of looking after the trust property as mentioned in (*a*), but that the management of the trust property and the exercise of powers and discretion must remain vested in somebody else, namely, any trustee other than the custodian trustee, and I can see some very G good reasons for that. The next clause of s. 4 (2), which I think I must refer to is (*g*) which, though I think it is not very strong on this point, at any rate, tends in the same direction. It is in these terms:

> "In determining the number of trustees for the purpose of the Trustee Act, 1893, the custodian trustee shall not be reckoned as a trustee."

H

One could—I think it would not involve a very great straining of language—hold that that meant that a custodian trustee shall not be reckoned a trustee for that particular purpose; still it has some weight in showing that the draftsman of the section was considering the custodian trustee as outside the category of an ordinary trustee. Clause (*h*), I think, is of considerable importance. It provides:

> "The custodian trustee, if he acts in good faith, shall not be liable for accepting as I correct and acting upon the faith of any written statement by the managing trustee as to any birth, death or marriage, or other matter of fact,"

and then goes on:

> "nor for acting upon any legal advice obtained by the managing trustees independently of the custodian trustee."

Here, again, I do not think the paragraph is conclusive, but it is obvious that if the custodian trustee is also appointed the managing trustee—the two offices being regarded as not coalescing for all purposes—the result will be that it is impossible to obtain legal advice independently of the custodian trustee, because the two corporations or the two bodies will be one, and, therefore, the subsection cannot, strictly speaking, apply.

Section 5 of the Act, to my mind, according to its general phraseology, implies that, if the Public Trustee is appointed to be an ordinary trustee, he is not in any true sense a custodian trustee. He is a trustee and nothing else, and I would observe that one of the points on which I think the learned judge in the court below based the conclusion to which he came, was that the Public Trustee, while holding the appointment of custodian trustee, can also be a managing trustee with other persons acting with him. Assuming that that be the right view, it is a conclusion which depends on s. 2 (2) of the Act, which does not apply to a bank or insurance company or other body corporate which, by virtue of the provisions of s. 4 (3), might be appointed to be a custodian trustee. Accordingly, that argument seems to me to possess no weight in assisting one in coming to the conclusion that the Public Trustee might, in certain cases, be both a custodian trustee and a managing trustee with other persons.

Looking at s. 4 alone and contrasting it with s. 5, under which the Public Trustee may be appointed an ordinary trustee, I come to the conclusion that there is no ground in the Act for holding that the persons named in s. 4 (3) or any trust corporation defined in another section can properly be appointed to hold two separate offices which, in truth, are only one. I think that, if it was desired to appoint the defendant bank to be a trustee, there was no difficulty in making the appointment, and had it been desired to appoint the defendant bank to be a custodian trustee there was no difficulty in doing it, with the result that a custodian trustee would be entitled to charge, but I do not think there is any authority under the Public Trustee Act, 1906, for making a purely artificial and unreal distinction between the two positions of custodian trustee and managing trustee for the purposes of enabling the defendant bank to charge as custodian trustee, and so far as I can see for no other reason whatsoever.

The question whether the defendant bank has been duly appointed to hold one or other of the offices which, as I have mentioned, the bank could have been appointed to hold, that is, either the position of an ordinary trustee or that of custodian trustee, is a question which has not been argued exhaustively at all in this court, and is one with which I think we are not in a position to deal at the present time, and, therefore, that matter must, I think, remain over to be dealt with perhaps on some future occasion, but what the deed does purport to do is something which in my judgment, and I agree in that respect with the Master of the Rolls, the appointor, T. P. Ziegler, was not entitled to do, namely, whilst not appointing the defendant bank to be an ordinary trustee, in terms to attempt to appoint him to two positions which I have mentioned, simply for the purpose of enabling the bank to charge.

For these reasons the appeal must be allowed, with the consequences mentioned by the Master of the Rolls.

CLAUSON, J.—I am of the same opinion, but because we differ from the learned judge in the court below I desire to add a few words. In my judgment and on the construction of the Public Trustee Act, 1906, a custodian trustee discharges a special function, which, by its very nature, is differentiated from the functions of the remaining trustees (in the Act called "managing trustees") of a trust in which a custodian trustee has been appointed. The very existence of a custodian trustee, in my judgment, implies that there are certain functions which he is not to discharge, but which are to be discharged, if discharged at all, by some other person or persons.

I now turn to the document under which it is said the bank occupies the position which justifies them in claiming the remuneration of a custodian trustee. It was suggested, as I understood, that the effect of the deed might be or was to appoint the bank as custodian trustee and nothing more, but that construction of the deed seems to me to be impossible, for, in my view, the whole deed proceeds plainly on the footing that the appointor ceased to be a trustee, and he would not cease to be a trustee if all that happened under the deed was that the bank became a custodian trustee. There are two other possible views of the operation of this deed: one is that it is wholly invalid in view of the fact that it attempts to appoint one person to two separate and incompatible offices. The alternative view is that on its true construction it operated to appoint the bank as what in the heading to s. 5 of the Public Trustee Act, 1906, is spoken of as an "ordinary trustee." In my view, it is not necessary to decide which of those two views of the operation of the deed is correct, as in either view the bank could not properly claim the remuneration which they claim. A

I desire only to add this upon a point which is not strictly material to the matter before us. It must not be taken that I agree with the view that the Public Trustee cannot, according to the true construction of the Act, be appointed either as sole managing trustee, he holding the office of custodian trustee, or even as one of several managing trustees, he holding the office of custodian trustee. The point is one which does not strictly arise, and, accordingly, I say no more about it. B

Subject to these observations, I agree with the judgment of the MASTER OF THE ROLLS. C

Appeal allowed.

Solicitors: *C. S. Tomlinson*; *Routh, Stacey, & Castle*, for *Orford & Sons*, Manchester.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

D

BELTON *v.* CROWLE DISTRICT DRAINAGE BOARD E

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Humphreys, JJ.), April 30, May 1, 2, 1935]

[Reported [1935] 2 K.B. 221; 104 L.J.K.B. 624; 153 L.T. 466; 33 L.G.R. 413]

Land Drainage—Protection conferred by local Act—Exemption from drainage rates—"Local authority"—Commissioner or surveyor—Land Drainage Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 44), *s.* 66. F

By the Land Drainage Act, 1930, s. 66: "Where by any local Act powers are conferred on a drainage board or local authority similar to the powers conferred by this Act, and that local Act contains provisions for the protection of any . . . persons, those provisions shall apply to the exercise by any drainage board within the area to which the local Act applies of the powers conferred on drainage boards by this Act in like manner as they apply in relation to the exercise of the powers under the local Act." G

This section has no reference to provisions dealing with rating, and, therefore, where, under the provisions of a local Act of 1816, the proprietors of certain lands were exempted from a rate levied to meet the expenses of land drainage. H

Held: the occupier and owners were liable for drainage rates made by the drainage board for the area under s. 24 of the Act of 1930, notwithstanding the protective provision in the local Act.

Per LORD HEWART, C.J. (AVORY and HUMPHREYS, JJ. dubitantibus): A "commissioner" or "surveyor" appointed under the local Act is not a "local authority" within the meaning of the above section. I

Notes. As to land drainage see 30 HALSBURY'S LAWS (2nd Edn.) 72 et seq., and for cases see DIGEST SUPPS., title "Sewers". For Land Drainage Act, 1930, see 13 HALSBURY'S STATUTES (2nd Edn.) 551.

Case Stated by Lincolnshire Quarter Sessions.

Pursuant to the provisions of s. 30 of the Land Drainage Act, 1930, the appellants, Belton and others appealed against two rates made by the Crowle District Drainage Board on Aug. 9, 1933, namely, (*a*) an owner's drainage rate wherein Lilly Belton and

A Thomas Fowler Belton were (inter alios) included as being the owners of certain hereditaments situate within the district of the board, and (*b*) an occupier's drainage rate, wherein Thomas Fowler Belton was (inter alios) included as being the occupier of certain of the above hereditaments. Quarter sessions allowed the appeals and quashed the rates, subject to the following Special Case:

By the Doncaster District (Crowle District) Drainage Order, 1932, dated Dec. 3, 1932, B and made by the Minister of Agriculture and Fisheries, a certain area described in the said order and shown by colour on a map sealed by the Minister was constituted as a new drainage district for the purposes of the Land Drainage Act, 1930, under the name of the "Crowle District Drainage District." The Crowle District Drainage District so constituted included (inter alia) certain lands in the parish of Amcotts. The Crowle District Drainage Board were the drainage board for the said district. Lilly Belton C and Thomas Fowler Belton were the owners and Thomas Fowler Belton was the occupier of certain hereditaments within that part of the parish of Amcotts which was within the said district. On Aug. 9, 1933, and pursuant to the provisions of the Land Drainage Act, 1930, the board made two rates: (*a*) an owner's rate and (*b*) an occupier's rate. The expenses of the board for raising which the said rates were made were as to part thereof in respect of drainage works within the lands described as "the said low lands" D in s. 25 of a private Act of 1816 (56 Geo. 3, c. lviii): see infra. Lilly Belton and Thomas Fowler Belton and Thomas Fowler Belton were (inter alios) included in the said rates as being respectively the owners and the occupier of the above hereditaments.

By a private Act of June 22, 1813 (53 Geo. 3, c. clxxvii), intituled "An Act for enclosing lands in the townships of Crowle, Eastoft, and Ealand, in the parish of Crowle, in the county of Lincoln, and extending into the West Riding of the county of York," E s. 1, certain persons named therein were appointed commissioners

> "for dividing, allotting, inclosing, draining, warping, and embanking all the open arable fields, meadows, pastures, ings, carrs, moors, commons and waste lands within the . . . several townships of Crowle, Eastoft and Ealand . . . in the said parish of Crowle; and also all such commons and moors within the said West F Riding of the said county of York . . . as are appurtenant to or belonging to estates within the said parish of Crowle, or the owners thereof"

and for carrying the said Act and the Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109) into execution.

Section 18 empowered the commissioners to scour out and widen all the ancient brooks, drains, watercourses, ditches, tunnels, sluices, and bridges, and to make, cut, erect, G set out, and appoint new drains, watercourses, ditches, tunnels, sluices, gates, banks, and bridges, and required them to order and determine by an award

> "by whom, at whose expense, in what proportions, at what time and in what manner, the said brooks, &c., shall be made, and afterwards cleansed, scoured, repaired and maintained."

Section 54 provided that

H

> "all charges and expenses which shall arise subsequent to the execution of the said commissioners' award, respecting the future reparation and support of the said sewers, banks, sluices, and other works to be made and ordered by the said commissioners in pursuance of the powers hereby vested in them, shall be borne and defrayed from thenceforth for ever thereafter . . . in such shares and proportions as I shall be thought just and equitable by the said commissioners, and as shall be set forth in their said award."

The Act of June 20, 1816 (56 Geo. 3, c. lviii), was intituled:

> "An Act for amending an Act of His present Majesty, intituled an Act for enclosing lands in the townships of Crowle, Eastoft, and Ealand, in the parish of Crowle, in the county of Lincoln, and extending into the West Riding of the county of York; [meaning thereby the Act of 1813] and for draining or warping the said lands, and lands in the parishes of Luddington, Belton, and Adlingfleet, and for making drains in the parish of Althorpe; all in the said counties of Lincoln and York."

The said Act contained the following recitals: (*a*) That the lands included in the Act of 1813 and other lands, as well open as inclosed, in the parishes of Crowle and Luddington in the county of Lincoln and also certain lands in the township of Belton in the parish of Belton particularly described in the recital, and certain lands in the parish of Adlingfleet in the county of York also particularly described in the recital, were frequently overflowed with water, and upwards of two thousand acres thereof were totally unfit for tillage; but that the said last-mentioned lands might be rendered highly productive and all the said lands be greatly improved if properly drained, embanked, and warped; (*b*) that it might be necessary for the purposes of such drainage, embankment, warping, and improvement that certain works particularly described should be carried out; and (*c*) that it was requisite that some of the provisions of the Act of 1813 should be amended and that the powers of the commissioners appointed by virtue thereof should be enlarged.

Section 1 provided:

> "Be it enacted . . . that Joseph Thackray of Gainsborough in the said county of Lincoln, gentleman, shall be and he is hereby appointed commissioner for executing the necessary works for effecting the drainage and warping of the said lands, and for otherwise carrying into execution the several powers of this Act relating thereto."

Section 7 authorised and required the said commissioner to execute certain works, including (inter alia) the building of a new sluice in the bank of the River Trent in the township of Amcotts in the parish of Althorpe and the making of a new cut or drain from the said new sluice through the said township of Amcotts.

By s. 21:

> "And be it further enacted, that it shall be lawful for the commissioners of inclosure appointed by or by virtue of the said recited Act [the Act of 1813], or any two of them, and they are hereby required, within three calendar months, or as soon as conveniently may be after the passing of this Act, to ascertain and determine what part or parts of the lands included in the said recited Act, and of the lands in the said parish of Luddington, are capable of being drained, warped, and improved, and shall then ascertain and determine the respective proportions of the whole general expenses of draining and warping respectively, which such several lands and grounds, and also the lands and grounds in the parish of Belton hereinbefore particularly mentioned to be drained, warped, and improved, and also the lands and grounds in the parish of Adlingfleet hereinbefore particularly mentioned to be drained and improved by virtue of this Act, or the person or persons who is, are, or shall be the proprietor or owner, or proprietors or owners, of such several and respective lands and grounds ought to be charged with or to bear, and shall declare the same at a meeting or meetings to be called for that purpose, by notice to be given in manner directed by the said recited Act respecting the first meeting of the commissioners, as therein mentioned; and when the said commissioners of inclosure shall have ascertained and determined such several and respective proportions, a memorandum or specification of the particulars thereof shall be written or engrossed on parchment, in two parts, and signed and sealed by such commissioners of inclosure, one part whereof shall be enrolled and lodged with the award of the said commissioners of inclosure, as mentioned in the said recited Act, and the other part shall be by them delivered to the commissioner for executing this Act; and the several and respective proportions particularised in such specification shall be at all times observed by the said commissioner for executing this Act, and by all and every the surveyor or surveyors to be appointed under or by virtue of the powers and provisions of this Act, as the scale or rule of proportion by which the assessments to be made or laid by virtue of this Act shall be assessed, paid, and levied; and all the costs, charges, and expenses of obtaining and passing this Act, and attending the making and completing the said several sluices, drains, cuts, and other works, and of otherwise carrying this Act into execution, shall be borne and paid by the person or persons who is, are, or shall be the proprietor or owner, or owners or

proprietors of the lands and grounds so to be declared capable of being drained or warped and improved."

Section 24, so far as is material, was as follows:

> "And be it further enacted, that it shall be lawful for the commissioner for executing this Act, and he is hereby authorised and empowered, from time to time until the said intended works for drainage and warping shall be completed, to assess, tax, and charge such of the lands in the said several parishes as shall be so declared by the said commissioners of inclosure to be capable of being improved as aforesaid, or the owners or proprietors of such lands, and according to the scale or proportion aforesaid, with such sum and sums of money as he the said commissioner for executing this Act shall from time to time find necessary and requisite for defraying the costs, charges, and expenses of obtaining this Act, and of carrying the same into execution (not exceeding in the first year after the passing of this Act the sum of five pounds per acre, and not exceeding in the second year after the passing of this Act the sum of three pounds per acre, and not exceeding in the whole the sum of ten pounds per acre) . . . and the balance, if any, upon the final settlement of accounts shall be immediately repaid to the land owners in proportion to the sums respectively paid by them."

By s. 25:

> "Provided always, and be it further enacted, that none of the homesteads, old inclosed and field lands not benefited by the drainage, nor any of the lands lying on the south side of the Stainforth and Keadby Canal, nor shall any lands and grounds in the said township of Amcotts, or the proprietors or proprietor thereof, be liable or subject to taxation for the expenses of draining the said low lands, under the authority of this Act, nor for any of the expenses of obtaining and executing the same."

By s. 26:

> "Provided always, and be it further enacted, that the surveys and plans made in pursuance of the said recited Act, shall be used by the said commissioner for the purposes of this Act, without fee, reward, or any recompense whatsoever."

By s. 31:

> "And be it further enacted, that the moneys arising from the taxes to be raised by virtue of this Act shall be paid and applied by the said commissioner in the first place in defraying the charges and expenses of obtaining and passing this Act, and of making the necessary surveys, plans, valuations, and reports incident or preparatory thereto, and in making, executing, and completing the several works of drainage by this Act directed and authorised to be made, done, and executed, and all necessary charges and expenses to be incurred in or relating to the due execution of this Act."

Section 34, so far as is material, was as follows:

> "And be it further enacted, that as soon as the said sluices and cuts or drains, and other works hereinbefore authorised to be made or done, shall be made or executed and completed, the commissioner for executing this Act shall and he is hereby empowered and required to form or draw up and make an award, which shall be fairly written or engrossed on parchment, and signed and sealed by the said commissioner, who shall therein specify and declare, according to the scale or rule of proportion hereinbefore mentioned, what lands will be benefited by or under the provisions of this Act, and at whose costs and in what proportion and in what manner the several works by this Act directed or authorised to be made shall from thenceforth be kept in repair, and at what time or times and how, and in what manner the said drainage and warpings shall be done, together with such other regulations and particulars as he shall think requisite for carrying the purposes of this Act into complete execution. . . ."

Section 35, so far as is material, was as follows:

> "And be it further enacted, that as soon as the said banks, drains, sluices, tunnels, and other works hereby directed or authorised to be made, shall be made and perfected, and the said commissioner shall have ascertained the proportion of the expenses to be paid by each proprietor as aforesaid, and shall have executed his award, the said banks and other works, and the said warping, shall from time to time be under the care and inspection of, and as often as necessary, shall be repaired and amended and kept in good repair and condition, and the warping carried on, by a person to be appointed surveyor thereof by a majority in value (to be ascertained by the land tax assessment) of the several proprietors for the time being of the lands and grounds which shall be deemed capable of receiving improvement by warping as hereinbefore mentioned, or hereby directed to be embanked, drained, and warped, or their stewards, who shall be present at a meeting to be held in the said parish of Crowle on the first Monday in March in every year, or oftener if required, as hereinafter is mentioned. . . ."

By s. 37:

> "And be it further enacted, that for the better enabling the said surveyor for the time being to raise money for the purpose of carrying into execution the powers hereby reposed in him, it shall and may be lawful to and for the surveyor for the time being, when and so often as occasion shall require, to make an acre rate or assessment, according to the scale or proportion laid down in the commissioner's award, upon all and every the proprietors of the said lands to be embanked, drained, and warped by virtue of this Act; all which rates or assessments, having been allowed and signed by a majority in value (to be ascertained as aforesaid) of the persons interested in such lands respectively, or their stewards for that purpose specially appointed, who may be present at a meeting to be called in the same manner as hereinbefore is mentioned with respect to the choice of a new surveyor, for the purpose of getting such rates or assessments considered and allowed, shall be collected and received by the said surveyor for the time being; and in case any of the proprietors for the time being shall refuse or neglect to pay such rates or assessments immediately after the same shall be so made, signed, and allowed (being first lawfully demanded of such proprietors respectively), then it shall and may be lawful to and for any justice of the peace acting in and for the parts of Lindsey in the said county of Lincoln, to make inquiry of such default, by summoning to appear before such justice such proprietor of whom such rates or assessments shall have been demanded (and for this purpose notice in writing left at the usual residence of the person intended to be summoned, or of his lessee or tenant, shall be a good summons); and if such defaulter thereof shall be convicted, either by his own confession, or upon the oath of the surveyor for the time being, or any other competent and credible witness (which oath the said justice is hereby empowered to administer), or shall not appear pursuant to such summons, the said justice shall and he is hereby required to levy the said rates or assessments by distress and sale of the goods and chattels of such proprietors, wheresoever the same shall be found, together with the reasonable costs and charges attending such summons, distress, and sale, to be settled and allowed by the said justice, rendering the overplus (if any) on demand to the owner of such goods and chattels."

By s. 38:

> "Provided always, and be it further enacted, that in case any part of the said lands to be embanked, drained, and warped as aforesaid, shall at any time hereafter be untenanted or unoccupied, and no sufficient distress can be made for levying the said rates and taxes, then the lands chargeable therewith shall always remain a security for payment thereof, and all goods and chattels which shall at any time thereafter be found thereon shall and may be distrained, impounded, kept, and sold in manner aforesaid, until all arrears of the said rates and taxes, and the charges incident to such distress, shall be fully paid and satisfied."

A By the Land Drainage Act, 1930, s. 66:

> "Where by any local Act powers are conferred on a drainage board or local authority similar to the powers conferred by this Act, and that local Act contains provisions for the protection of any authorities, companies, or persons, those provisions shall apply to the exercise by any drainage board within the area to which the local Act applies of the powers conferred on drainage boards by this Act in like manner as B they apply in relation to the exercise of the powers under the local Act."

It was contended on behalf of the owners and occupier (*a*) that s. 25 of the Act of 1816 was, within the meaning of the Land Drainage Act, 1930, s. 66, a provision for the protection of (inter alios) proprietors of land in the township of Amcotts; (*b*) that the effect of the Land Drainage Act, 1930, s. 66, was to require the board in making a C rate under s. 24 of the said Act to observe the provisions of s. 25 of the Act of 1816; and (*c*) that, inasmuch as the expenses for raising which the rates, the subject of the appeals, were made were as to part thereof in respect of drainage works within "the low lands" within the meaning of the Act of 1816, s. 25, the said rates, so far as they purported to include the owners and occupier, were bad in law and ought to be quashed. The board contended to the contrary of each of the above propositions.

D Quarter sessions upheld the contentions of the owners and occupier, and allowed the appeals, with costs, and ordered that the said rates be quashed, subject to this case, and the board appealed to the Divisional Court.

W. E. Tyldesley Jones, K.C., and *Hubert Hull* for the appellants.

R. M. Montgomery, K.C., *P. E. Sandlands, K.C.*, and *Geoffrey Howard* for the respondents.

E **LORD HEWART, C.J.**—This is a Case stated by the court of quarter sessions for the county of Lincoln. It arises out of appeals by owners and an occupier of lands, under the Land Drainage Act, 1930, s. 30, against certain rates made by the Crowle District Drainage Board, on Aug. 9, 1933. Those rates were, first, an owner's drainage rate, wherein some of the present respondents were included as owners of certain hereditaments within the district of the appellant board, and, secondly, an occupier's drainage F rate, wherein one of the present respondents was included as being the occupier of certain of the hereditaments. The appeals were heard in October, 1933, and the material facts were not in dispute. A question of law was argued, and the court of quarter sessions, after hearing the arguments, allowed the appeals with costs, and quashed the rates so far as the present respondents were concerned, subject to the opinion of this court upon the case stated. The question is whether the court of quarter G sessions was right in law in holding that the appellants before that court, the present respondents, were entitled to succeed.

The history of the matter may be quite shortly stated. Under the Doncaster Area District Drainage Act, 1929 (19 & 20 Geo. 5, c. xvii), and an order made thereunder, the Crowle District Drainage Board was legally constituted, and is to-day, and was at all material times, what is called an internal drainage board within the meaning of s. 81 H of the Land Drainage Act, 1930. Before the passing of that Act it seems to be true to say that in general the method or principle upon which land drainage proceeded was a method of equality of burden and benefit—acreage as distinguished from annual value. But one of the main objects of the Land Drainage Act, 1930, as has been made clear over and over again, was to obtain uniformity, subject to certain exceptions, by basing the drainage rate upon the annual value of the hereditaments without a very careful I regard to the precise degree of benefit derived in any particular case from the drainage works which were carried out.

With regard to the particular part of the country with which we are here concerned, namely, a part of what was the parish of Althorpe and the part of that parish called Amcotts, in 1816, an Act of Parliament was enacted which is called the Crowle, Ealand, Eastoft, Belton and Luddington Drainage Commission Act. The long title of that Act is in the following terms:

> "An Act for amending an Act of His present Majesty [that is to say, George III]—intituled an Act for enclosing lands in the townships of Crowle, Eastoft, and Ealand,

> in the parish of Crowle, in the county of Lincoln, and extending into the West Riding of the county of York; and for draining or warping the said lands, and lands in the parishes of Luddington, Belton, and Adlingfleet, and for making drains in the parish of Althorpe; all in the said counties of Lincoln and York."

It is apparent, therefore, at the outset, that the title of this local Act suggests a distinction between the parishes of Luddington, Belton, and Adlingfleet on the one hand, and on the other hand, the parish of Althorpe. In the case of the first-named parishes the Act was to apply for the purposes of draining or warping the said lands, while with regard to the parish of Althorpe it was an Act for making the drains in that parish, and, as the provisions of the Act and the undisputed facts of this case show, so far as Amcotts was concerned it was a piece of land through which a pipe-line was driven for the purpose not of draining the superficies of the land itself, but for the purpose of carrying the matter that had to be drained from one piece of land to another, both those pieces of land being other than Amcotts.

The main weapon of the appellants in the court below was s. 25 of that local Act of 1816 read, as they contended it should be read, side by side with s. 66 of the Land Drainage Act, 1930. The local Act, up to and including s. 24, had described certain works which should be done in different places, drawing from time to time, as in particular ss. 6, 7, 12 and 21 make plain, a distinction between the first three-named parishes of Luddington, Belton, and Adlingfleet, on the one side, and the last of the four, the parish of Althorpe, on the other side. Then s. 24 empowers the commissioner (who was afterwards succeeded by a person called a surveyor) to assess tax and charge certain lands, according to the proportions set out, with the sums of money found necessary and requisite for defraying the costs of obtaining the Act, carrying it into execution, and further sums to be charged and assessed at certain times and places. But on the threshold of that important section one finds the words

> "from time to time until the said intended works for drainage and warping shall be completed,"

and it is common ground that that time has long since passed.

The next section (s. 25) is a proviso limited in its scope to s. 24, and it is as follows:

> "Provided always, and be it further enacted, that none of the homesteads, old inclosed and field lands not benefited by the drainage, nor any of the lands lying on the south side of the Stainforth and Keadby Canal, nor shall any lands and grounds in the said township of Amcotts, or the proprietors or proprietor thereof, be liable or subject to taxation for the expenses of draining the said low lands, under the authority of this Act, nor for any of the expenses of obtaining and executing the same."

The main argument in the court below on the part of the present respondents was that they came within the class of persons exempted by s. 25 of the Act of 1816. It was said that the rate against which the appeal was made was in part, at any rate, and for the most part, a rate levied in order to meet the expenses of draining the said low lands under the authority of the Act of 1816. Placing that section side by side with s. 66 of the Land Drainage Act, 1930, the respondents contended, and contended with success, before the court of quarter sessions, that the exemption referred to in the Act of 1816 was not only continued but also extended by the provisions of the later legislation. Section 66 is as follows:

> "Where by any local Act powers are conferred on a drainage board or local authority similar to the powers conferred by this Act, and that local Act contains provisions for the protection of any authorities, companies, or persons, those provisions shall apply to the exercise by any drainage board within the area to which the local Act applies of the powers conferred on drainage boards by this Act in like manner as they apply in relation to the exercise of the powers under the local Act."

It was urged on behalf of the respondents that the moneys to be obtained by means of the rate appealed against fell within the Act of 1816, s. 25, and therefore that, by reason of the provisions of s. 66 of the Act of 1930, the exemption which they said they

A enjoyed continued; or, to put it quite simply, that they did not come within the mischief of rateability by reference to annual value, but were still entitled to say: As we have no benefit, so we must have no burden. That contention was successful before the court of quarter sessions.

The main question here is whether the effect of s. 66 of the Land Drainage Act, 1930, was that which was contended for by the respondents. Section 66 begins:

B

> "Where by any local Act powers are conferred on a drainage board or local authority similar to the powers conferred by this Act, and that local Act contains provisions for the protection of any authorities, companies, or persons."

What is a drainage board within the meaning of that section? What is a local authority? What are powers similar to the powers conferred by the Act of 1930? And what is C meant by "protection of any authorities, companies, or persons"?

I will deal briefly with those questions in the inverse order. It has been contended before us that this word "protection" means—not only in the abstract, which is one thing, but in this context in this statute, which is another thing—exemption from rating. It is said that if "protection" in this sentence does not mean exemption from rating, then the category is void, and there is nothing to which it can apply. This D second criticism seems to be manifestly wrong when one looks at ss. 50 and 51 of the local Act of 1816, which refer respectively to protecting participants against the effects of the works of drainage and protecting a particular canal with its side drains from being affected or injured by the physical work which was to be and was carried out. But is it true to say that, in this Act and in this section of this Act, "protection" does include exemption from rating? If it did, it would be an odd word to employ for the purpose. E It is not denied that there may be contexts in which the term "protection" is wide enough and precise enough to include exemption from rating. But it is said it would be contrary to the whole scheme and to the particular provisions of this Act if in s. 66 "protection" were to have that significance and in particular, when one looks at the Land Drainage Act, 1930, s. 24, one finds certain limited and precisely defined powers which, if the wide meaning given to the term "protection" were right, would be mere F surplusage, and misleading surplusage. Section 24 is dealing with rating powers of the drainage boards other than catchment boards, and by sub-s. (2) it is provided that a rate made by a drainage board may be either an owner's drainage rate or an occupier's drainage rate, and then follows this proviso:

> "Provided that as regards any rates raised in order to defray expenses incurred, or charges in respect of liabilities incurred, before the commencement of this Act, the G provisions as to the incidence of rates contained in s. 38 of the Land Drainage Act, 1861, or, in the case of rates raised under any local Act, the corresponding provisions in that Act, shall have effect in substitution for the provisions of this sub-section."

The limiting words are manifest: "before the commencement of this Act." What need, it is asked, would there be for making a particular provision of that kind with reference to the period before the commencement of this Act, if it were true to say that H the whole of such expenses and liabilities were saved under the provisions of the local Act? It is as if one were to say that to make quite sure that the whole includes the part, there shall be not only an enactment with regard to the whole, but a particular enactment with regard to the part. In like manner, when one looks at s. 24 (4), it is provided that:

> I "Every rate made by a drainage board shall be an annual value rate, that is to say, a rate assessed on a basis of annual value as regards all hereditaments, and, subject to the provisions of this section, every drainage rate shall be assessed at a uniform amount per pound throughout the area—(*a*) in the case of agricultural land, on the annual value of the land; and (*b*) in the case of any other land, on one-third of the annual value thereof."

Then follows another significant proviso:

> "Provided that, where at the commencement of this Act a drainage board was levying drainage rates on the basis of acreage, or partly on the basis of acreage and

> partly on the basis of annual value, any rate made by that board at any time within the period of six months next following the commencement of this Act may be made on any basis on which it might have been made if this section had not be passed."

Again one finds, not indeed the same, but similar limiting words: "At any time within the period of six months next following the commencement of this Act," and if the universal proposition were true that there is a saving always in all such cases, the limitation "within the period of six months" would be not only useless but misleading. Finally, it is provided by s. 24 (7), as follows:

> "A drainage board, after consultation in the case of an internal drainage board with the catchment board, may by order determine that no rates shall be levied by them on the occupiers of hereditaments in any portion of the district which, in their opinion, either by reason of its height above sea-level or for any other reason, ought to be exempted wholly from rating."

There again it is argued by counsel for the appellants that there is a particular and limited provision that in a case which seems proper the drainage board may by a special and individual order determine that no rate shall be levied except in a certain way, if at all, and it is said that such a provision would be otiose if it were indeed true that by s. 66 of the Act of 1930 protection is continued and, indeed, extended, to all persons falling within the ambit of a local Act like the Act of 1816. In my opinion, the arguments of counsel upon these matters are quite conclusive, and I am satisfied that, whatever may be the true scope of s. 66 of the Land Drainage Act, 1930, it has nothing at all to say from first to last to the question of rating.

But even if it were otherwise, and if, in truth and in fact, s. 66 of the Act of 1930 did comprehend the topic of rating, nevertheless, I think the argument for the appellants would be entitled to succeed.

> "Where by any local Act," says s. 66 of the Land Drainage Act, 1930, "powers are conferred on a drainage board or local authority."

Here the powers conferred by the Act of 1816 were conferred, in the first place, upon a commissioner for the purpose of carrying out the works, and later, upon a surveyor for the purpose of maintaining the works. But could it be said, even for controversial purposes, that either of these individuals was a drainage board? In 1930, when this statute was enacted, the term "drainage board" was quite familiar. I cannot entertain the argument that for this purpose either a surveyor or a commissioner could be called a drainage board. But was he a local authority? By a stretch of reasoning it might, perhaps, be said that he was a local authority exercising some sort of jurisdiction in the locality. There again, for my own part, I am disposed to think that that term "local authority," by the year 1930, and especially in juxtaposition with such a term as "drainage board," was not intended to refer to a commissioner or surveyor. Even if the arguments made on behalf of the appellants had not so far succeeded, the Act goes on to say that what is provided shall take place where powers are conferred on a drainage board or local authority similar to the powers conferred by the Land Drainage Act, 1930. Here it seems to me the attempt to apply s. 66 to the present case must fail. There is, in my opinion, not merely some difference, but all the difference, between an enactment which gives the most general power with regard to drainage, as is done in the Land Drainage Act, 1930, and the very limited power, so far as Amcotts is concerned, given by the Act of 1816, namely, that a pipe-line should be driven through it, not in order to drain Amcotts, but in order to carry the material that had to be drained from some land above it to some other land below it. I cannot regard those as similar powers, unless, indeed, it is to be said that every power which has to do with rating is similar to every other power which has to do with rating; and if that were the intention, these words "similar to," contained in s. 66, would seem to me to be mere surplusage again.

There remains the point, on which counsel for the appellants placed no great stress, namely, that this area is not an area to which the local Act applies. The word "applies" is difficult. That the local Act had some application to the area is manifest, and the area is from time to time mentioned eo nomine in the statute. But for what purpose

A is it mentioned? Not as part of the area to be drained, but, finally, the fourth limb of the series, as a parish, part of Althorpe, where a drain is to be made—not to drain Amcotts, but to drain other land. I do not think it is true to say that within the meaning of s. 66 this particular area is an area to which the local Act is applicable in the sense required by s. 66 of the Act of 1930. That point, however, is not necessary to the decision of this case. I am satisfied that upon other grounds, and especially B upon the ground that s. 66 of the Land Drainage Act, 1930, is not concerned with rating, the appellants before us ought to succeed, and the decision of the court of quarter sessions ought to be reversed. This is by no means a simple matter, and it is apparent from the judgment of the learned chairman in the court below that great care was expended upon a difficult case.

C **AVORY, J.**—I agree that this appeal from the decision of the court of quarter sessions should be allowed. Counsel for the respondents, in support of that decision, has relied upon two grounds—first, upon the general principle that a general Act is not to be taken impliedly to repeal any provision of exemption contained in a special or local Act, unless the context clearly shows that to have been the intention of the legislature; and secondly, the provisions of s. 66 of the Land Drainage Act, 1930.

D With regard to the first point, I think the contention fails, for these reasons. In order to determine whether a general Act does impliedly repeal the provisions of a special Act, it is necessary, first of all, to see the nature of the exemption conferred by the special or local Act, and it is then further necessary to consider whether the terms of the general Act are such as to show that there was an intention on the part of the legislature to override or supersede the particular provisions of the special Act. Here E the exemption which is relied upon is, as has been pointed out by my Lord, contained in s. 25 of the local Act of 1816, and it is to be observed that it is not in terms an exemption from all taxation of any kind for the expenses of draining low lands, but it is limited to an exemption from taxation for "the expenses of draining the said low lands, under the authority of this Act" and, the exemption being limited in that way, the question arises whether it can be intended to be an exemption from the expenses of F draining the low lands under the authority of some other Act. In my opinion, those words ought to be strictly construed and applied to that particular exemption, namely, that it is only the expenses of draining the low lands under the authority of the Act of 1816 with regard to which there is any exemption.

Turning now to the general Act, it is important to observe, first of all, that it is entitled "An Act to amend and consolidate the enactments relating to the drainage of land"— G that is all land; and s. 1, (1) provides that:

> "For the purpose of the drainage of land" (again apparently meaning all land) "there shall be such drainage districts as are mentioned in this section and there shall be a drainage board for each such drainage district."

By sub-s. (3):

> H "Subject to the provisions of this Act, a drainage board shall exercise a general supervision over all matters relating to the drainage of land within its district and shall have such other powers and perform such other duties as are conferred or imposed on drainage boards by this Act."

Then we come to the provisions of s. 24, which I need not repeat; my Lord has referred to them, and they appear to me to be a complete code providing for the manner in which I the expenses of the drainage board are to be met, namely, by a rate made by the drainage board; and there are, as has been pointed out, distinct provisions in s. 24 giving a wide discretion to the drainage board either to divide their district into sub-districts and to make and levy differential rates for these sub-districts or to determine the amount per pound to be assessed upon the occupiers of hereditaments in any sub-district, and finally, as has been pointed out, by sub-s. (7) a power is conferred upon the drainage board actually to determine that no rates shall be paid or levied by them on the occupiers of particular hereditaments which, in their view, ought to be exempted wholly from rating. Therefore, I come to the conclusion, looking at the restricted terms of the exemption, and upon the general provisions in the Act of 1930, that it is impossible to say on that general principle of law that the general Act has not overridden or superseded s. 25 of the Act of 1816.

So much for the argument upon the general principle as to the construction of statutes. Turning now to s. 66 of the Act of 1930, I am not prepared to assent to the contention of counsel for the appellants that the word "powers" in s. 66 does not relate to a power to make a rate under s. 24—quite apart from the marginal note, which describes that section as relating to rating powers of drainage boards; nor am I prepared to say that the surveyor under the Act of 1816 is not, within the meaning of s. 66, a local authority. I express no concluded opinion upon that. In view of the fact that he does exercise authority locally, although the expression "local authority" had a recognised meaning in 1930, I am not prepared to decide the case on the ground that the surveyor was not a local authority. But I am clearly of opinion that the local Act does not, within the meaning of s. 66, contain provisions for the protection of persons in the sense of protecting them from the payment of rates. I think this provision refers to the kind of protection which is contemplated in ss. 50 and 51, and, it may be, elsewhere in the Act of 1816; in other words, that it refers to the protection of the interests of property owners or persons whose property may be in any way damaged by the execution of the works, and that, to use the phrase adopted by Mr. Tyldesley Jones, the section generally has no reference at all to the question of rating.

For these reasons, I agree that neither on the general principle as to the construction of statutes, nor by the express provisions of s. 66, were the respondents exempted from the payment of the rate in question; and for that reason, that the judgment of the court of quarter sessions was erroneous and ought to be reversed.

HUMPHREYS, J.—I agree that this appeal should be allowed. The first point of counsel for the respondents has been dealt with by Avory, J., in his judgment, and I agree with every word of that judgment. If counsel is wrong on his first point, he must bring himself within s. 66 of the Land Drainage Act, 1930. The opening words of s. 66 are:

> "Where by any local Act powers are conferred on a drainage board or local authority similar to the powers conferred by this Act."

I agree with the judgment of Avory, J., as to the meaning of the word "powers" in that section. I observe that the "powers" referred to must be conferred on a drainage board or local authority. It is clear that neither the commissioner nor the surveyor referred to in this local Act of 1816 ever was a drainage board, and although I share the doubt expressed by Avory, J., whether he might not possibly be described as a local authority, I cannot think that Parliament in 1930 intended to include in that term any such persons as either the commissioner or surveyor described in the Act of 1816.

Section 66 of the Act of 1930 then goes on to say that where a local Act

> "contains provisions for the protection of any authorities, companies, or persons those provisions shall apply,"

&c. [His Lordship then held that persons living in the parish referred to in the local Act and known as Althorpe, which was the parish concerned in the present case, were never liable, under the Act of 1816, to pay for or to contribute to payment for the construction of the works authorised by that Act, and therefore it could not be said that there was any exemption in the local Act or provision for their protection. He continued:] The other point raised by counsel for the appellants is a difficult one, and with some hesitation I agree with his argument. I think that s. 66 of the Act of 1930 has nothing to do with rating. It is concerned with maintaining, in favour of "any authorities, companies, or persons," provisions contained in any local Act for their protection. Many instances of such provisions can be found and, that being so, the word "protection" is the natural word to be used, which could not be the case if it were used in this statute with regard to exemption from rating. I agree with Mr. Montgomery that "protection" is a word which in an appropriate Act of Parliament might include exemption from rating, but in s. 66 one would have to strain the meaning of the word to a considerable extent to make it include exemption from rating. For these reasons and for those expressed in the judgments already delivered I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Andrew, Purves, Sutton, & Creery,* for *Newman & Bond,* Doncaster; *Williamson, Hill, & Co.,* for *Bentley, Gundill, & Co.,* Goole.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

THE LONDON CORPORATION

[COURT OF APPEAL (Greer and Slesser, L.JJ. and Eve, J.), January 23, 1935]

[Reported [1935] P. 70; 104 L.J.P. 20; 150 L.T. 487; 51 T.L.R. 224; 79 Sol. Jo. 86; 18 Asp. M.L.C. 535]

Shipping—Collision—Damages—Vessel sold for breaking up—Amount of repair damages agreed—No repairs carried out—Right of owners to recover agreed damages.

A vessel was damaged by collision and her owners sold her to be broken up. Later, they agreed with the wrongdoer the amount of the cost of repair.

Held: a fact which was peculiar to the owners, viz., that before the damage had been agreed they had sold the vessel to be broken up, was an accidental circumstance which ought not to be taken into account in the way of diminution of damages, and, therefore, the wrongdoer was liable to the owners in the agreed amount.

Notes. As to measure of damages in collision cases, see 30 HALSBURY'S LAWS (2nd Edn.) 855 et seq., and for cases see 41 DIGEST 800 et seq.

Cases referred to:

(1) *The Glenfinlas,* [1918] P. 363, n.; 122 L.T. 655, n.; 14 Asp. M.L.C. 594, n.; 41 Digest 805, *6656.*

(2) *The Mediana,* [1900] A.C. 113; 82 L.T. 95; 9 Asp. M.L.C. 41; 69 L.J.P. 35; 48 W.R. 398; 16 T.L.R. 194; 44 Sol. Jo. 259; 41 Digest 811, *6733.*

(3) *The Marpessa,* [1891] P. 403; 61 L.J.P. 9; 66 L.T. 356; 40 W.R. 239; 7 Asp. M.L.C. 155; 41 Digest 810, *6723.*

(4) *The York,* [1929] P. 178; 98 L.J.P. 147; 141 L.T. 215; 17 Asp. M.L.C. 600, C.A.; Digest Supp.

(5) *The Kingsway,* [1918] P. 344; 87 L.J.P. 162; 122 L.T. 651; 14 Asp. M.L.C. 590, C.A.; 41 Digest 806, *6671.*

(6) *The Endeavour* (1890), 62 L.T. 840; 6 Asp. M.L.C. 511; 41 Digest 813, *6751.*

Appeal by defendants from an order of BATESON, J., confirming the report of the registrar in a collision action.

During the months of December, 1932, and January, 1933, the plaintiffs' vessel, the *Benguela,* and the defendants' vessel, the *London Corporation,* while laid up in the River Blackwater, came into collision, and both vessels sustained damage. In February, 1933, a surveyor, instructed on behalf of both parties, surveyed both vessels and estimated the cost of repairs at £250 for the *Benguela* and £230 for the *London Corporation.* Neither vessel was repaired. In May, 1933, the plaintiffs entered into a contract with Italian shipbreakers whereby the *Benguela* was sold for breaking up and was broken up with the repairs unexecuted. The parties to the action subsequently compromised on the basis of both vessels to blame and the claims were then referred to the registrar and merchants for assessment. There was no evidence to show that the price paid by the Italian shipbreakers was in any way affected by the existence of the unrepaired collision damage in the *Benguela*. The defendants denied all liability in respect of the damage sustained by the *Benguela*, but admitted that, if they were liable, the cost of repairs as estimated by the surveyor would be the appropriate amount. At the reference the registrar found that the plaintiffs were entitled to recover from the defendants the agreed cost of repairs, and that the case was covered by the decision in *The Glenfinlas* (1). The defendants appealed and the motion was heard by BATESON, J., who gave judgment for the plaintiffs.

The defendants appealed.

Stranger, K.C., and *Cyril Miller* for the defendants.
Willmer for the respondents was not called on to argue.

GREER, L.J.—This is an appeal from the decision of BATESON, J., affirming a decision of the registrar, with reference to one item of damage claimed by the owners of the steamship *Benguela* against the owners of the steamship *London Corporation* in relation to the agreed award that both parties were responsible in equal degrees for the damage which was occasioned to the *Benguela*. The *Benguela* was an old ship, built in 1910. The owners of both ships were suffering from the unprecedented "slump" in shipping business, and their vessels were laid up in the Blackwater River. When laid up they came into touch with one another from time to time, and damage was occasioned to the *Benguela*, which was dealt with by the registrar, and, on appeal from him, on objection to his findings, by the learned judge.

Before any action was started, or any agreement was made as to responsibility for the damage, there had been a survey by Lloyd's surveyor of the damage to each of these two vessels, and he estimated the damage done to the *Benguela* at the sum of £250—the cost of repairs to put her in the same position as she would have been in if she had not been damaged, with an additional sum of £25 for expenses. Thereupon, the question arose how this matter should be dealt with, and letters passed between the representatives of both vessels. In the course of that correspondence, Messrs. Lawrence Jones & Co., for the *Benguela*, wrote this letter:

> ". . . The question in dispute between us is, as to whether or not our clients are precluded from making a claim for estimated damage by reason of the fact that the *Benguela* has been sold for breaking up purposes. . . . We would suggest, in the first instance, that we should meet you with a view to agreeing the amounts of the items other than repairs so that the matter to be dealt with either by the registrar or the arbitrator may be simply the question of estimated repairs."

Then on May 9, Messrs. Middleton, Lewis, and Clarke, for the *London Corporation*, wrote as follows:

> "We have now received our clients' instructions to agree the figures in respect of both claims as recently discussed with you subject to the reservations made with regard to the items to be dealt with by the registrar. After you have issued a writ and the agreement has been filed, we will send you our client's formal claim, and when you send us your clients' claim, will you please also furnish a copy of the agreement of sale of the *Benguela*."

There followed another letter of May 10, from Lawrence Jones & Co., for the *Benguela*:

> "We thank you for your letter of May 9 from which we observe that all the figures of the respective claims are agreed, leaving only to the registrar to decide the question of principle as to whether the estimated repairs and estimated expenses during repairs are recoverable. We will accordingly proceed with the matter on the lines arranged, and will send to you shortly the writ for acceptance of service."

After that the writ was issued, and an agreement was come to, which has the effect of a judgment of the court, that both vessels were to blame, and that the damage should be paid in equal proportions.

That being the state of things, the matter came before the registrar, and the registrar and the learned judge both decided that if in fact any damages were recoverable in respect of the injuries to the hull of the *Benguela*, the amount of those damages had been agreed at the £250 plus the £25. I find myself unable to differ from that view. I think that is what the parties intended. Primâ facie, the damage occasioned to a vessel is the cost of repairs—the cost of putting the vessel in the same condition as she was in before the collision, and to restore her in the hands of the owners to the same value as she would have had if the damage had never been done; and primâ facie, the value of a damaged vessel is less by the cost of repairs than the value it would have if undamaged, though it is true that evidence may establish that the value of the vessel undamaged is exactly the same as her value after she had been damaged. The learned judge decided that, if that proposition were going to be established, it was for the owners of the *London Corporation* to establish it. The defendants argued, however, that that basis has no application to this case, because, at the time she was damaged, the *Benguela* was certain to have no saleable value for use as a ship; all that could happen to her was what we know did happen to her after she was damaged, and which would, just in the same way, have happened to her if she had never been damaged. If that be a fact to be taken into account, it seems to me that the learned judge was right in saying that it was for the defendants to establish it. He came to the same conclusion that the defendants had failed in that burden, because non constat that this vessel would have been sold for breaking up if she had not been a damaged vessel. She might have lived on in the hope that even shipowners sometimes successfully entertain, that an old vessel may have useful service for years to come in a time of boom, which everybody hopes will come some day. Further, it was not established that the owners would have parted with their vessel, if she had not been damaged, at the same price as they had got for the damaged vessel. It must not be lost sight of that the saleable value of a vessel does not depend merely upon what the purchaser says he would like to pay; it depends also on what the owner may feel that he can successfully hold out for, in the hope that another purchaser will come forward and give him a better price than that which has been offered.

I think that the learned judge was right in holding that some damages were necessarily established by the primâ facie evidence, and that if some damages were established, then there was no question for the registrar as to their amount, as that amount had been agreed, and that alone would be sufficient to dispose of this case.

Quite apart from that, however, I agree with the learned judge that in cases of this sort, the primâ facie damage is the cost of repair, and circumstances which are peculiar to the plaintiffs, namely, that they have, before the damage has been agreed, sold the vessel to be broken up, is an accidental circumstance which ought not to be taken into account in the way of diminution of damages, any more than it is in a case of the sale of goods, where the difference in market price and contract price is always allowed, regardless of the fact that, having regard to what the purchaser has done, no such damages are in fact suffered by him. It is desirable that there should be a measure of damage which can be easily and definitely found. In this case, circumstances which are accidental to the plaintiffs of which the defendants have no knowledge, or circumstances applicable to the defendants of which the plaintiffs have no knowledge, need not be taken into account.

A number of cases have been cited, and I think it is clearly established now that where damage is done to a vessel, then some damages are recoverable. I think that is the result of cases like *The Mediana* (2) and *The Marpessa* (3); and the other cases that have been cited, such as *The York* (4), *The Kingsway* (5) and *The Endeavour* (6). I need not go into the details of those cases. It is now clear that the shipowner, who claims damages in respect of injuries to his ship, if it turns out that before he has in fact repaired her he has suffered the loss of the ship by something other than the act of the defendant, can still recover the estimated amount of the cost of repairing the ship, which he would have had to incur if she had not been lost. It seems to me that the principles that apply in those cases apply equally in this: that the owners of the *Benguela* are entitled to recover what has been agreed to be the amount they would have had to expend for repairing their vessel, even though it has turned out, by reason of a subsequent transaction, namely, the sale to shipbreakers, that they never would have to repair her at all. Further, it does not by any means follow that the price paid by the shipbreakers would have been the same if the vessel had been fully repaired, as it was in her unrepaired condition.

For these reasons, I find myself unable to differ from the learned judge and the registrar, and the appeal must be dismissed with costs.

SLESSER, L.J.—I agree.

EVE, J.—I also agree.

Appeal dismissed.

Solicitors: *Middleton, Lewis, & Clarke*; *Lawrence Jones & Co.*

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

GREAT WESTERN RAIL. CO. *v.* WEST MIDLAND TRAFFIC AREA LICENSING AUTHORITY

[HOUSE OF LORDS (Lord Blanesburgh, Lord Atkin, Lord Russell, Lord Macmillan and Lord Maugham), October 28, 29, 1935]

[Reported [1936] A.C. 128; 105 L.J.K.B. 37; 154 L.T. 39; 52 T.L.R. 411; 79 Sol. Jo. 941; 24 Ry. & Can. Tr. Cas. 1]

Road Traffic—Licence—"B" licence—Area of user—Need to state maximum in application—Publication of application—Statement of area of user—Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 53), s. 5 (1) (*c*), s. 11 (1).

By s. 5 (1) of the Road and Rail Traffic Act, 1933: "A person applying for a licence shall submit to the licensing authority a statement in the prescribed form . . . (c) specifying, in the case of an application for an 'A' licence or a 'B' licence, the facilities for the transport of goods intended to be provided by him under the licence for other persons, including particulars of the district within which, or the places between which, it is intended that the authorised vehicles will normally be used for the purpose of carrying goods for hire or reward."

Section 5 (1) (c) assumes that a "B" licence will, as a rule, be unrestricted as to the area over which it extends (although, by s. 8 (3) (a) of the Act, a condition may be attached to it that the authorised vehicle shall be used only in a specified district or between specified places), and in making the required statement of the area of normal user the applicant is giving a general description of the area of his proposed operations and not a legally binding definition of the limits within which he intends to confine them. Where, therefore, an applicant stated in his application that B., W., S., and H. were the "districts in which, or places between which, the vehicles will normally be used" and the licensing authority granted a licence which was unrestricted as to the operation of the vehicles,

Held: the licence was good.

By s. 11 (1): "The licensing authority shall publish in the prescribed manner notice of an application [for a 'B' licence] specifying the time within which, and the manner in which, objections may be made to the grant of the application."

The licensing authority published notice of the application stating the area of normal user as specified in the application.

Held: the statement was not one of the only area within which the applicant proposed to use the vehicles, and, therefore, the order was not bad on that ground.

Notes. The licensing authority is now the Licensing Authority for Goods Vehicles: see Transport Act, 1947, s. 117.

A Applied: *Modern Haulage Services, Ltd.* v. *London Midland and Scottish, and London and North Eastern Rail. Cos.* (1937), 25 Ry. & Can. Tr. Cas. 272. Referred to: *Charman* v. *Southern Rail. Co.* (1934), 22 Ry. & Can. Tr. Cas. 116; *Great Western Rail. Co.* v. *Hillier (Slough), Ltd.* (1939), 27 Ry. & Can. Tr. Cas. 120; *Service Food Co.* v. *London and North Eastern Rail. Co.* (1947), 28 Ry. & Can. Tr. Cas. 19; *Re W.H.S. Transport, Ltd.* (1947), 28 Ry. & Can. Tr. Cas. 223.

B As to goods vehicles licences, see 31 HALSBURY'S LAWS (2nd Edn.) 797 et seq., and for cases see 8 DIGEST (Repl.) 281 et seq. For the Road and Rail Traffic Act, 1933, see 24 HALSBURY'S STATUTES (2nd Edn.) 674.

Appeal from an order of the Court of Appeal (GREER, SLESSER, and ROCHE, L.JJ.).

On May 7, 1934, Hill and Long, Ltd., applied to the licensing authority under the C Road and Rail Traffic Act, 1933, for a limited carrier's licence, known as a "B" licence, for two motor goods vehicles. They gave as particulars of the centre from which the vehicles would normally be used, Nos. 312 and 314, High-street, West Bromwich; as the nature of their business, "furniture removing and delivery of furniture"; as the class or description of goods to be carried, "furniture"; and as the districts in which or places between which the vehicles would normally be used, "Birmingham, Wolverhampton, D Sutton, and Hagley." On June 4, 1934, the licensing authority published the application as follows: "West Bromwich, No. 3062, Hill and Long, Ltd., 312 and 314, High-street: Furnishers and furniture removers. Dis. 2V (3¼T) in use. Furniture. Wolverhampton, Birmingham and District." There was no objection to the application, and the licensing authority on Sept. 17, 1934, granted the application for: "any distance." The Great Western Railway Co. obtained a rule nisi for certiorari to remove E and quash the licence. The Divisional Court made the rule absolute, holding that the applicants had defined completely in their application the districts which they intended to serve, and that the licensing authority had no power to make the order for "any distance."

The licensing authority appealed to the Court of Appeal who held, allowing the appeal, that the effect of an application for a "B" licence was not to define exhaustively F the district within which, or the places between which, the vehicle could be used, and, therefore, where applicants—furniture removers—enumerated in their application for such a licence four Midland towns as the districts within which, or the places between which, it was intended that the vehicles would normally be used, the licensing authority had jurisdiction to grant the application for "any distance." From that decision the Great Western Railway Company appealed to the House of Lords.

G By the Road and Rail Traffic Act, 1933:

> Section 1 (1): "Subject to the provisions of this Part of this Act, no person shall use a goods vehicle on a road for the carriage of goods: (*a*) for hire or reward; or (*b*) for or in connection with any trade or business carried on by him, except under a licence."
>
> H Section 2 (1): "Licences shall be of the following classes: (*a*) public carriers' licences; (*b*) limited carriers' licences; (*c*) private carriers' licences. A limited carrier's licence (in this part of this Act referred to as 'a B licence') shall entitle the holder thereof to use the authorised vehicles as he thinks fit from time to time either for the carriage of goods for or in connection with any trade or business carried on by him, or, subject to any conditions which the licensing authority, in the I exercise of his discretion to attach conditions to a 'B' licence, may attach to the licence, for the carriage of goods for hire or reward."
>
> Section 5 (1): is set out in the headnote.
>
> Section 8 (3): "Subject to the provisions of sub-s. (3) of the last preceding section, the licensing authority may in his discretion attach to a 'B' licence as respects the user of the authorised vehicle . . . for the carriage of goods for hire or reward, all or any of the following conditions . . . (*a*) a condition that they shall be so used only in a specified district or between specified places."
>
> Section 11 (1): is set out in the headnote.

W. T. Monckton, K.C., *W. S. Morrison, K.C.*, and *B. de H. Pereira* for the appellants. A

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *Valentine Holmes* for the respondent were not called on to argue.

LORD BLANESBURGH.—This appeal, in my judgment, fails, and availing myself of the detailed statement of the facts and the careful analysis of the Road and Rail Traffic Act, 1933, to be found in the judgments under review, I can justify that con- B clusion, as I hope, quite simply.

An "A" licence and a "B" licence under this Act have much in common. It is, however, important to note some of the distinctions between them, for these distinctions throw a light, as I think, upon the question of construction raised by this appeal. A public carrier's, or an "A" licence, is a licence granted to an applicant whose business is that of a carrier of goods (s. 2 (2)). A limited carrier's, or a "B" licence, is one C granted to an applicant whose trade or business is other than that of a carrier of goods (s. 2 (3)). Quite consistently with this distinction, an "A" licence when granted is always unrestricted in area; so also, as a licence in pari materia, is a "B" licence so far as it entitles its holder to use the authorised vehicles for the carriage of goods for or in connection with any trade or business carried on by himself. It is only in so far as the "B" licence is an authority to him to use these vehicles to carry goods for hire or reward D that there may, among other conditions, be attached to the licence the condition (s. 8 (3) (*a*)) that the vehicles shall be so used only in a specified district or between specified places. It is not, I think, in the contemplation of the Act, either in the case of an "A" licence or a "B" licence, that there shall ever be any limitation of area except in the case of a "B" licence in the circumstances just stated. The reference to the "district specified in the licence" in s. 11 (3), requires, perhaps, some explanation. The words, E I take it, are in reference to a "B" licence so limited.

These considerations are, I think, of assistance in arriving at the true meaning and effect of s. 5 (1) (*c*), upon which so much turns. A person applying for a licence is by that subsection required to submit to the licensing authority a statement in the prescribed form "specifying, in the case of an application for an 'A' licence or a 'B' licence, the facilities for the transport of goods intended to be provided by him under the licence F for other persons, including particulars of the district within which, or the places between which, it is intended that the authorised vehicles will normally be used for the purpose of carrying goods for hire or reward."

Now, as has been shown, there is in the case of an "A" licence no power under the Act to restrict its operation to that district or those places; nor is there any such power in the case of a "B" licence, except in the way authorised by s. 8 (3) (*a*). This makes G clear what, in itself, is perhaps clear enough, namely, that "normally" is the emphatic word in s. 5 (1) (*c*), and from its use alone I would draw the conclusion that while only exceptional user outside what I may call the area of normal user is expected, it is the assumption of the subsection—in correspondence with the other provisions of the Act to which I have referred—that the "B" licence when granted as a rule, no less than the "A" licence always, will be unrestricted as to the area over which it extends. It H appears to me, therefore, that when, in this case, Messrs. Hill and Long, Ltd., on May 7, 1934, using the prescribed form, applied for a "B" licence specifying "Birmingham, Wolverhampton, Sutton, Hagley," as being, in the words of the application, the "districts in which, or places between which, the vehicles will normally be used," they were implicitly making an application for a "B" licence unrestricted in area—a licence which, in response, it was within the power of the licensing authority to grant if, all I statutory conditions being complied with, he thought fit so to do.

But, further light and in the same direction is, I think, thrown on s. 5 (1) (*c*) of the Act by s. 11, which is complementary to it. That section required the licensing authority to publish in the prescribed manner, as he did, notice of Messrs. Hill and Long's application, specifying the time within which, and the manner in which, objections might be made to the grant of the licence applied for. Thereupon by sub-s. (2) it became his duty "to take into consideration any objections to the application which may be made by persons who are already providing facilities, whether by means of road transport or any other kind of transport for the carriage of goods for hire or reward in the district, or between the places, which the applicant intends to serve on the ground that suitable transport facilities in that district or between those places are or, if the application were granted, would be either generally or in respect of any particular type of vehicles, in excess of requirements, or on the ground that any of the conditions of a licence held by the applicant has not been complied with."

The authorised objectors, it will be noted, must be persons providing facilities "for the carriage of goods for hire or reward in the district, or between the places, which the applicant intends to serve." These words, in my judgment—and I express only my own individual view—are too close to those in s. 5 (1) (*c*) to make it possible to refer them to any other than what I have ventured to call the area of normal user specified by the applicant, as the statute requires, in his application. And further, not only can it fairly be said, as I think, speaking again for myself, that that is the only area which the applicant "intends to serve," but the words, if applied to the whole country, become, in my view, meaningless.

A very important consequence results from this view. It is "the area of normal user" to which alone, whether in the case of an "A" licence or a "B" licence, the attention of the Act is directed. It is only from competitors in that area that objection is heard; it is to the traffic conditions of that area that the attention of the licensing authority is directed. No provision is made for objection from any other quarter, for the reason, I cannot myself doubt, although it is not so expressed, that, to adopt the language of s. 11 (4) (*a*) of this Act, and so far as the outside area is concerned, "having regard to the trivial nature of the application, it is not necessary that any opportunity should be given for objection." The licence only continues for a year, and if on an application for a further licence it appears that the area of normal user has been in use extended, that would be an opportunity either for refusing the licence for a second year or in any case for limiting its operation to a prescribed area. The appellants in this case were authorised objectors. They did not appear to object to the grant of the "B" licence. Had they done so, they would, interested as they are also in the outside area, have been entitled to ask that the licence should be limited to the area of normal user. The licensing authority, in the absence of any such request, decided that the licence for the applicants' two authorised vehicles should be for "Furniture and household effects any distance."

For the reasons I have given I can see no excess of jurisdiction in that decision, and I move your Lordships that this appeal be dismissed with costs.

LORD ATKIN.—This is an appeal on an application for a writ of certiorari that a decision of the licensing authority for the West Midland Traffic Area should be brought up to be quashed on the ground of lack of jurisdiction to make it. The grounds which are set out in the rule nisi and upon which the matter must be decided are, first, that:

> "The said licensing authority had no power to make the said decision upon the said application as published,"

and, secondly, that

> "The said licensing authority had only power to refuse or to grant the said application as published, or to grant a licence for a lesser number of vehicles and (or) a more restricted class of goods and (or) a more limited district of operation."

Personally, I am unable to see any difference in principle between the second ground and the first, but the first is undoubtedly the important matter.

The matter arises under the Road and Rail Traffic Act, 1933, which provides for applications for licences to use vehicles for the purpose of carrying goods. There are three forms of application for licences—"A," "B," and "C." We need not trouble with "C." An "A" licence is a licence which is granted to a public carrier of goods for hire or reward, that is to say, of the goods of other persons, not goods in his own business, and that licence, it is admitted, if granted, is granted free of any restriction as to area. A "B" licence is a licence which carries the right to use vehicles for the carriage of goods in the applicant's own trade or business, and also for the carriage of other people's

goods for hire or reward, and that licence also, unless the licensing authority chooses to A
impose restrictions as to area, is a licence which is unrestricted in area. The application has to be made in a prescribed form, and the contents of the application are prescribed by the statute. By s. 5 (1), of the Act it is provided that

> "A person applying for a licence shall submit to the licensing authority a statement in the prescribed form (*a*) containing . . . such particulars as may be prescribed," B
> and so on; "(*b*) stating the number and type of hired motor vehicles and of trailers proposed to be so used"; and "(*c*) specifying, in the case of an application for an 'A' licence or a 'B' licence, the facilities for the transport of goods intended to be provided by him under the licence for other persons, including particulars of the district within which, or the places between which, it is intended that the authorised vehicles will normally be used for the purpose of carrying goods for hire or reward." C

The prescribed form is the same form of application for both "A" and "B" licences, and in respect of both of them it requires the applicant, under No. 5, to state "Facilities which applicant proposes to provide: (*a*) Class or description of goods to be carried; (*b*) districts in which or places between which the vehicles will normally be used." That appears to me to conform precisely to the terms of the statute; but it is to be noted that it is that form and that form only which the applicant is bound to use. D
Accordingly, the applicants in the present case, Messrs. Hill and Long, Ltd., of West Bromwich, stated the nature of their business as being "Furniture removing and delivery of furniture," and in reply to No. 5 they stated: "(*a*) Class or description of goods to be carried: Furniture. (*b*) Districts in which or places between which the vehicles will normally be used: Birmingham, Wolverhampton, Sutton, Hagley."

That application came before the licensing authority. It was his duty under s. 11 (1) E
of the Act to

> "publish in the prescribed manner notice of an application to which this section applies, specifying the time within which, and the manner in which, objections may be made to the grant of the application";

and there is a form of notice prescribed by the rules. Rule 9 provides: F

> "The licensing authority shall cause to be issued as occasion may require a statement hereinafter called 'Applications and Decisions' which shall contain (unless previously notified therein): (1) As regards notifiable applications" (and this was a notifiable application) . . . "(*a*) notices of such applications; (*b*) the dates . . . on which and the places at which he proposes to hold public inquiries and the applications which he proposes to consider at those inquiries." G

He is not obliged to hold a public inquiry except in special circumstances when he decides to do so.

In accordance with that rule prescribing the form of notice, the licensing authority published, in what appears to me and I think to all your Lordships to be strict accordance with the rule, the notice which is contained in Document No. 4 of the exhibits in this case: "West Bromwich. Hill and Long, Ltd., 312 and 314, High-street, Furnishers H
and Furniture Removers. Dis. 2V (3¼T)"—which means two discretionary vehicles of a total unladen weight of 3¼ tons—"in use." The goods to be carried are described as "furniture," and then there follows: "Wolverhampton, Birmingham and District," being quite plainly a reproduction of the statement in the application of the district in which it is intended normally to use the vehicles. The applications are in like form, and indeed it may be noted that in the notice which is given of the application for an I
"A" licence precisely the same form is used; the applicants for an "A" licence state the district in which they intend normally to use the vehicles—a limited district—and that is published.

The application was considered by the licensing authority, and the licensing authority thought fit not to impose any condition or restriction as to area. It was entirely within his discretion whether he should do so or not. The forms were in accordance with the statutory forms, he was acting within his statutory power, and I confess that I fail to see how any suggestion can arise that there was any lack of jurisdiction, for he was acting in every way in accordance with the procedure prescribed by the statute and was exercising the jurisdiction which was given to him by the statute.

The point which was suggested to the Divisional Court was, I think, twofold: First of all it was suggested, though probably not with much effect, that when a person applied for a licence and stated the district within which he was intending normally to use the vehicle, that in itself was a statement of the district to which he intended to confine the use of his vehicle. That suggestion appears to me to be quite contrary to the actual words of the application and of the statute. Then it was suggested that in any event when the licensing authority published notice of the application and in the notice stated the area as being a particular district—in this case, as I have read to your Lordships, "Wolverhampton, Birmingham and District"—he was stating for some reason or other that that was the only district within which the applicant proposed to use his vehicle. That, again, as I have said, appears to me to be entirely contrary to the terms of the statute and to the form of the application. I see no obligation at all on the part of the licensing authority to publish anything other than that which he is ordered by the statute and by the rules to publish, and with that, as I have said, he has complied by publishing the district as the district of normal user.

That appears to me to dispose of the whole case as to lack of jurisdiction. It is said that the court must be driven to a different conclusion, and must have deemed either the application or the notice (and I have found it very difficult to distinguish between the two), though in terms it refers to the district as the district of normal use, as describing the district of sole use; and it is said that that must be so because of the difficulty which there otherwise would be in objecting. I have myself no doubt at all that the learned judges in the Divisional Court came to the conclusion that the application itself was limited to the particular district. I find that the learned Lord Chief Justice in his judgment says:

> "It appears to me that we should be reducing the Act . . . to a mere nullity if we were to hold, as is suggested, that there might be an application in terms confined to a very limited area . . . and that afterwards . . . that area . . . should be so enlarged,"

and so on; and AVORY, J., in the course of his judgment, in dealing with the powers of objection, says:

> "It is obvious that a person who is already providing facilities in a certain area cannot fill up that form in an effective manner unless the application which is made is limited to a certain district or for the use of the vehicles in one certain place."

I have already stated that the terms of the statute and of the application and of the rules appear to me to afford no ground for putting that limited meaning upon the application.

A question, no doubt, may arise on the terms of s. 11 (2), which provides:

> "It shall be the duty of the licensing authority, on an application to which this section applies, to take into consideration any objections to the application which may be made by persons who are already providing facilities, whether by means of road transport or any other kind of transport, for the carriage of goods for hire or reward in the district, or between the places, which the applicant intends to serve, on the ground that suitable transport facilities in that district, or between those places, are or, if the application were granted, would be . . . in excess of requirements."

I desire to express no opinion on the question, which has been suggested as possibly likely to arise on other occasions, whether those words "in the district, or between the places, which the applicant intends to serve" mean the district or places which he intends normally to serve, or the district or places which he has the power to serve under his application. I can quite see the force of the construction which adapts those words to the words in s. 5 and the form of the application and so forth. On the other hand, I can well understand, as counsel for the appellants has pointed out, that if they do not apply to abnormal user, the accumulation of abnormal user by a number of "B" licensees may amount to a very serious dislocation of, and interference with, existing traffic and may lead to a possible excess of facilities if they are all granted. For my part, I should like not to pass an opinion upon the question as to whether or not an objector is entitled to object to what may be called an abnormal user by a single "B" licensee of his vehicle. I do not think that in this case the matter arises.

The only other point which I wish to mention is this. I was a little startled to find that when the Court of Appeal had in fact discharged the rule and stated their disagreement with the Divisional Court and had reversed the decision of the Divisional Court, it was considered necessary to proceed by a writ of procedendo and also by a writ of supersedeas in order to get the matter put right. I am bound to say that the view which I had formed of the effect of a judgment of the Court of Appeal reversing a decision below was that the decision below became as though it had never been pronounced, which I think is the general effect so far as writs of execution and other things are concerned. The matter has been, in fact, settled, because I think the necessary writs have been granted and the order quashing the decision has now been put an end to, but I wish merely to reserve my own opinion whether or not it was really necessary to proceed by way of those writs.

I am entirely in accord with the motion which has been proposed by the noble and learned Lord on the Woolsack.

LORD RUSSELL.—I also am in agreement with the motion, and I can state my reasons shortly. The appellants' claim to relief here is founded upon an alleged want of jurisdiction in the authority in coming to his decision, and that allegation has been supported in your Lordships' House upon two grounds, the first of which does not appear in the order which granted the rule nisi. It was here said that the application was an irregular application, not in accordance with s. 5 of the Act, the alleged irregularity being an omission by the applicant to state in his application the maximum limits of his area of user. It was then said that, the application being an irregular application, no decision could properly be given in respect of it.

I cannot understand what foundation exists for this allegation of irregularity in the application. Section 5 of the Act, as I read it, imposes no obligation on the applicant to make such a statement at all. Section 5 requires the applicant to submit a statement in the prescribed form specifying the facilities for the transport of goods intended to be provided by him. That is the applicant's duty, and the form which has been prescribed includes all the details which the section specifically requires to be included, including the area of normal user. It appears to me that the application was complete and regular in every respect.

The second ground alleged for the contention of want of jurisdiction was this. It was said that the authority was not entitled to grant the application otherwise than as published. That was elaborated in greater detail in the order granting the rule nisi, in these terms: "The said licensing authority had only power to refuse or to grant the said application as published or to grant a licence for a lesser number of vehicles and (or) a more restricted class of goods and (or) a more limited district of operation." the references there being to the provisions of s. 6 (1) (*a*), and the provisions of s. 8 (3) (*a*) and (*b*), of the Act. That contention depends wholly upon the view that the publication in this particular case stated that this was an application for a licence to use vehicles within a limited area. In my opinion that meaning cannot be attributed to this publication. Read in the light of the Act, as we must read it, it is a statement that Hill and Long, Ltd., have applied for a "B" licence which (I am now using the words of s. 2 (3) of the Act) shall entitle them to use two motor vehicles as they think fit from time to time for the carriage of furniture for hire or reward, and that (in the words of s. 5 (1) (*c*), the authorised vehicles will normally be used in Wolverhampton, Birmingham and district. Upon that application the licensing authority had, in my opinion, full jurisdiction to decide to grant the "B" licence without attaching any condition limiting the area of operation under s. 8 (3) (*a*).

For those reasons I concur in the motion proposed.

LORD MACMILLAN.—An applicant for a licence under the Act, whether an "A" licence or a "B" licence, is required to furnish particulars, inter alia, "of the district within which, or the places between which, it is intended that the authorised vehicles will normally be used for the purpose of carrying goods for hire or reward." This requirement, to my mind, is so phrased as to suggest that the applicant is to give a general description of the area of his proposed operations rather than a legally binding definition of it. Such information is obviously material to enable the licensing authority to judge of the expediency of granting the licence, and also to enable the applicant's competitors to decide whether they shall object. But the statute nowhere prescribes, nor do the statutory forms require, that either an "A" licence or a "B" licence when granted shall contain any definition of area. In the case of the "B" licence, however, the licensing authority may in his discretion attach a condition that the authorised vehicle shall be used "only in a specified district or between specified places." This means that in the licensing authority's discretion he may equally refrain from attaching any such geographical limitation. Accordingly, when notice is given that a "B" licence has been applied for, all potential objectors are thereby made aware that the licence may be granted without any condition limiting it to a specific area.

It is complained in the present case that the licensing authority had no jurisdiction to decide that he would grant the applicant a licence for "any distance," because no previous notification had been given that a licence unlimited as to area had been applied for. In my opinion, a notification that an application has been made for a "B" licence is a notification that if the application is granted a licence of unlimited geographical extent may be accorded. The appellants have, therefore, no right to complain that what has been done has been done without due notice; and as this complaint is the basis of their case, I agree with your Lordships that the appeal should be dismissed.

I may add that no licence has yet been issued; the licensing authority has only announced that he does not propose in this case to exercise his discretion to impose a geographical limitation. It does not follow that the words "any distance" will appear in the licence when issued. I presume they will not, for the form of "B" licence which we have seen does not provide for any mention of area except where the licensing authority has exercised his discretion to impose a geographical limitation.

LORD MAUGHAM.—I am of the same opinion, and do not think it necessary to repeat what has already fallen from your Lordships, statements with which I entirely agree. I will add only two observations.

What has been called the area of normal user must be stated in an application, whether it be for an "A" or for a "B" licence. On the other hand, the actual licence will not in general have any reference to this area. In the case of an "A" licence it cannot properly be so limited; in the case of a "B" licence it will not be so limited unless under s. 8 (3), the licensing authority in his discretion thinks fit to impose a condition to that effect. The licence, however, whether an "A" licence or a "B" licence, is one granted upon a representation of a distinct character made by the applicant, and inasmuch as an "A" licence endures only for two years and a "B" licence for one year, it is plain that there is a very strong sanction (if that popular word may be used) to induce the applicant to be very careful in making his representation as to the area in which he proposes normally to use his vehicles.

I think it unnecessary to add anything to what has been said as to the true construction of s. 5. The view expressed by your Lordships seems to me to accord with the natural construction and the only one which the words can properly bear.

The other observation which I wish to make is with reference to s. 11. I have nothing to say on the first subsection; I agree entirely with what has already fallen from your Lordships on that point. As to sub-s. (2), I incline to take the same view as that which my noble and learned friend Lord Blanesburgh has taken, but I wish plainly to observe that in my opinion it is immaterial for the decision of this appeal to determine whether the word "normally" ought to be implied in the phrase, "in the district, or between the places, which the applicant intends to serve," or whether the words should be left without any implication of that character. If the word "normally" is to be implied, which is the argument strenuously pressed upon your Lordships, the only conclusion which I think can properly be drawn as to the true construction of the Act on this point is that the legislature thought it quite immaterial to enable persons who would be affected only by an abnormal user in the district in which they have ordinarily carried on their business to object to such casual, and probably rare, user of vehicles which might perhaps compete with them. If, on the other hand, the word is not to be implied, then the whole of the argument based upon the construction of s. 11 (2) falls to the ground.

On the grounds already given by your Lordships I concur with the proposed motion.

Appeal dismissed.

Solicitors: *A. G. Hubbard*; *Treasury Solicitor.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

DRUCE AND CO., LTD, *v.* BEAUMONT PROPERTY TRUST, LTD.

[KING'S BENCH DIVISION (Horridge, J.), May 22, 1935]

[Reported [1935] 2 K.B. 257; 104 L.J.K.B. 455; 153 L.T. 183; 51 T.L.R. 444; 79 Sol. Jo. 435]

Distress—Protection of third party's goods on premises—Form of declaration—Omission of certain words—Validity—Law of Distress Amendment Act, 1908 (8 *Edw.* 7, *c.* 53), *s.* 1 (1) (*c*).

The Law of Distress Amendment Act, 1908, provides, by s. 1, that where a landlord has levied a distress for arrears of rent due from his tenant, a third party who is the owner of goods distrained upon may serve upon the landlord a declaration in writing stating that the tenant has no right of property or beneficial interest in the goods, that the goods are the claimant's property or in his lawful possession, and "are not goods or live stock to which this Act is expressed not to apply"; and by s. 2, that a landlord who proceeds with a distress after receipt of such a declaration shall be deemed guilty of an illegal distress.

In a declaration made in purported compliance with s. 1 it was stated that the goods distrained upon were not the tenant's property, that he had no interest therein, and that they were the claimant's property, but the words "and are not goods or live stock to which this Act is expressed not to apply" were omitted.

Held: s. 1 of the Act of 1908 was to be strictly construed, the declaration did not fulfil the requirements of that section, and, accordingly, the landlords who, after receiving the declaration, continued the distress and sold the goods, had not been guilty of an illegal distress.

Notes. As to declarations by owners of goods under s. 1 of the Act of 1908, see 12 HALSBURY'S LAWS (3rd Edn.) 112, para. 180. For the Law of Distress (Amendment) Act, 1908, s. 1, see 6 HALSBURY'S STATUTES (2nd Edn.) 170.

Cases referred to:

(1) *Smart Bros., Ltd.* v. *Holt*, [1929] 2 K.B. 303; 98 L.J.K.B. 532; 141 L.T. 268; 45 T.L.R. 504; 35 Com. Cas. 53; Digest Supp.

(2) *Rugby School* (*Governors*) v. *Tannahill*, [1935] 1 K.B. 87; 104 L.J.K.B. 159; 152 L.T. 198; 51 T.L.R. 84; 78 Sol. Jo. 801, C.A.; 31 Digest (Repl.) 539, *6628.*

(3) *Ex parte Harris* (1885), 16 Q.B.D. 130; 55 L.J.M.C. 24; 53 L.T. 655; 50 J.P. 164; 34 W.R. 132; sub nom. *Harris* v. *Beven*, 2 T.L.R. 167, C.A.; 18 Digest 307, *430.*

(4) *Thwaites* v. *Wilding* (1883), 12 Q.B.D. 4; 53 L.J.Q.B. 1; 49 L.T. 396; 48 J.P. 100; 32 W.R. 80, C.A.; 18 Digest 307, *428.*

(5) *Hackney Furnishing Co.* v. *Watts*, [1912] 3 K.B. 225; 81 L.J.K.B. 993; 106 L.T. 676; 28 T.L.R. 417, D.C.; 18 Digest 306, *423*.

Action

The plaintiffs, the owners of the goods in question, Druce & Co., Ltd., furniture dealers, claimed from the defendant landlords, Beaumont Property Trust, Ltd., damages for an alleged illegal distress. The owners had entered into two hire-purchase agreements, dated May 8, 9, 1934, respectively, under which they agreed to let certain furniture to a Mr. Louis Scott, who then occupied two flats, 102 and 111, at No. 20, Abbey-road, N.W., as tenant of the defendants. Those two agreements were terminated by notices in writing dated Aug. 2, 1934, and thereupon the goods, the subject of the hire-purchase agreements, ceased to be in the lawful possession of the tenant. On Aug. 30, 1934, the landlords levied distress for arrears of rent on the contents of flat 102, and seized part of the owner's furniture of the value of £111 0s. 11d. On Aug. 31 they levied distress on the contents of flat 111, and seized part of the owners' furniture of the value of £59 0s. 4d.

On Sept. 7, 1934, the owners served on the landlords two declarations. That in respect of flat 111 was as follows:

> "Declaration by owner of goods distrained that they are his (8 Edw. 7, c. 53). Sir,—We, Druce & Co., Ltd., of 37, Baker-street, London, W., do hereby declare that Mr. L. Scott, the immediate tenant of the Beaumont Property Trust, Ltd., has no right of property or beneficial interest in the furniture, goods and chattels, distrained at flat 111, 20, Abbey-road, N.W.8, for rent alleged to be due to the Beaumont Property Trust, Ltd., and an inventory whereof is annexed hereto, but that such furniture, goods or chattels are our property.—Dated Sept. 7, 1934. [Signed for Druce & Co., Ltd.]"

The declaration with respect to flat 102 was in similar terms.

The owners contended that the landlords became disentitled to proceed with the distress on receipt of the above declarations and that in selling the goods thereafter they had converted them to their own use.

The landlords admitted that they had seized the goods (subject to a few unimportant exceptions) and admitted service on them of the declarations of Sept. 7, but they said that those declarations were insufficient to satisfy s. 1 of the Law of Distress Amendment Act, 1908, by reason that there were omitted therefrom the words, "and are not goods or live stock to which this Act is expressed not to apply."

By the Law of Distress Amendment Act, 1908, s. 1 (1):

> "If any superior landlord shall levy, or authorise to be levied, a distress on any furniture, goods, or chattels of . . . (*c*) any . . . person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof, for arrears of rent due to such superior landlord by his immediate tenant, such . . . person aforesaid may serve such superior landlord . . . with a declaration in writing made by such . . . person aforesaid, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained, or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such . . . person aforesaid, and are not goods or live stock to which this Act is expressed not to apply. . . ."

By s. 2, a landlord who proceeds with a distress after receipt of such a declaration shall be deemed guilty of an illegal distress.

By s. 4, various classes of goods are excluded from the protection afforded by the Act, including goods in the possession, order, or disposition of the tenant with the consent of the owner, goods on premises where a business is carried on in which both an immediate tenant and under-tenant have an interest, and goods on premises used as offices or warehouses, where the owner neglects for one calendar month after notice to remove the goods.

Tristram Beresford for the owners of the goods.
H. J. A. Burt for the landlords.

HORRIDGE, J.—The facts in this case are not in dispute. The goods, the subject-matter of the action, were hired out by the plaintiffs, the owners, to the tenant, a Mr. Scott. Before the distress in question was levied the hire-purchase agreements had been brought to an end. It was not disputed by counsel for the landlords, that the goods were no longer subject to those agreements, because the agreements had been legally determined in such a way as to bring the case within the decision in *Smart Bros., Ltd.* v. *Holt* (1).

The point on which the case turns is whether or not a proper declaration has been served within the Law of Distress Amendment Act, 1908. That Act considerably impinged on the rights of the landlord as regards distress, but, before those rights were so impinged on, the Act provided that certain formalities should be gone through. In dealing with goods claimed by a third party, s. 1 states that the third party may serve the landlord, or the bailiff or other agent,

> "with a declaration in writing made by such . . . other person aforesaid, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained, or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such . . . other person"

—that is, (i) that the tenant has no interest; (ii) that the person claiming has; and (iii) that such goods "are not goods . . . to which this Act is expressed not to apply." That declaration, if falsely made, entails penalties under the Perjury Act, 1911.

In this case a declaration was served on the proper parties, but it did not contain any statement that the goods were not goods to which the Act was expressed not to apply. Under s. 4 of the Act certain goods are stated to be outside the Act and, therefore, not privileged in any way from distress. Sub-s. (1) of that section deals with goods which are in the possession, order, or disposition of the tenant, although they are the property of somebody else. The goods in this case might conceivably have been in the order, possession, or disposition of the tenant but for the termination of the hire-purchase agreements, and I think that the Act required the person claiming the goods to state by way of declaration, with the penalties to which I have referred, that the goods were not goods which were liable to distress—in other words, that they were not goods which were in the order, possession, or disposition of the tenant. Sub-s. (2) contains other provisions as to goods which are not to be exempted from distress, and as to these, also, I think it necessary that the declaration should show that the goods in question are not within the subsection.

The landlord was entitled to have the protection of a declaration, enforceable in the way to which I have referred, in respect of matters which it was necessary for him to know before deciding whether to continue with the distress or not, and he was entitled to have those matters by way of the declaration prescribed by the statute. That has not been done and, in my view, therefore, the distress did not become illegal, and the plaintiffs' claim fails.

Two cases have been cited to which perhaps I ought to refer. The first, *Rugby School* (*Governors*) v. *Tannahill* (2), was a case not under the Law of Distress Amendment Act, 1908, but under s. 146 of the Law of Property Act, 1925, which re-enacted an old section of the Conveyancing Act, 1882. The question there was whether or not a proper notice had been served so as to entitle the plaintiff to possession of the property, or, in other words, whether the notice required by s. 146 of the Act of 1925 had been served so as to entitle the plaintiff to exercise his right to claim forfeiture. Two questions arose on that notice, which did not state either that the tenant was required to remedy the breach or what compensation was required. The Court of Appeal held that on the true construction of s. 146 the right to require the breach to be remedied only applied to cases where the breach could be remedied, and that in the case in question the breach could not be remedied. On the second point, whether compensation should be demanded, they followed a previous decision of the Court of Appeal, by which it was held that if the landlord required no compensation there was no occasion for him to state anything about compensation in his notice. Those two matters seem to me to turn entirely on the construction of s. 146 of the Law of Property Act, 1925, and have no application to the construction of the section with which I have to deal.

The other case cited was *Ex parte Harris* (3), in which it was held that where no rent was due by the tenant there was no necessity for the lodger to insert any statement about rent. LORD ESHER, M.R., in giving judgment, said (16 Q.B.D. at p. 132):

> "That seems to me to show that the proper reading of the provision is that the declaration is to state what rent, if any, is due, and for what period."

The matter turned on the construction of the section, which is that if any rent is due it has to be stated. As there was no rent due, there was no occasion to state it.

I should just like to mention one or two matters which seem to me to point to the fact that unless the requirements as to the declaration are strictly complied with, the third parties, the plaintiffs in this case, are not entitled to the protection given by the Act. BOWEN, L.J., said in *Thwaites* v. *Wilding* (4) (12 Q.B.D. at p. 7):

> "I think it clear that a lodger is relieved only when the terms of the Lodgers' Goods Protection Act have been rigidly complied with."

And BRAY, J., in *Hackney Furnishing Co.* v. *Watts* (5), said this ([1912] 3 K.B. at p. 232):

> "It must be remembered that the statute is one depriving the landlord of a part of his common law right to distrain. The words must not be strained so as to further restrict his rights."

In my opinion, s. 1 of the Law of Distress Amendment Act, 1908, has to be strictly complied with. It has not been complied with in this case, and there must be judgment for the landlords with costs.

Judgment for the landlords.

Solicitors: *Lindus & Hortin*; *Wedlake, Letts, & Bird.*

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*

ST. PIERRE and OTHERS *v.* SOUTH AMERICAN STORES (GATH & CHAVES), LTD.

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), November 19, 20, 21, December 20, 1935]

[Reported [1936] 1 K.B. 382; 105 L.J.K.B. 436; 154 L.T. 546]

Conflict of Laws—Rent—Claim for rent for premises abroad—Personal action—Jurisdiction of English court to entertain—Lis alibi pendens—Action brought in foreign country by defendants in English proceedings.

The plaintiffs were the personal representatives of one H. B. who had granted a lease of certain premises in Santiago de Chile to the second defendants who covenanted to pay the rent one month in advance. The first defendants guaranteed to hold themselves responsible for all the obligations of the lease. The lease also provided for the payment by the second defendants of £15,000 in respect of alterations to the premises which was to be paid in two parts, the first instalment being due on Aug. 31, 1935. It was agreed that the proper law of the lease was that of Chile. Rent having become due under the lease, the plaintiffs brought an action therefor in the King's Bench Division, and they also claimed £7,500, the first instalment of the indemnity. At the time of the commencement of this action an action was pending in Chile in which the defendants claimed against the plaintiffs a declaration that the rent under the lease was payable in Chilean currency. The defendants having applied that the English action should be stayed,

Held: (i) the action raised no issue relating to real property in Chile, but was a personal action for rent, in its nature transitory, and so the English court had jurisdiction to entertain it although incidentally it was connected with an immovable situated out of England; the only real question so far as regarded the claim for rent was as to the amount of rent payable under the terms of the lease, and that could be justly determined by an English court on evidence of the law of Chile as to the interpretation to be put on the lease; the test applicable was whether the continuance of the proceedings in England would necessarily produce injustice to the defendants, and that the defendants had failed to prove; and, therefore, although both parties would to some extent be inconvenienced by calling evidence in England, the stay asked for would not be granted.

(ii) the action pending in Chile, not being brought by the same parties as brought the English action, was not a lis alibi pendens by reason of which a stay would be granted.

Notes. Considered: *Chaney* v. *Murphy*, [1948] L.J.R. 1301.

As to jurisdiction regarding immovables and movables abroad and lis alibi pendens see 7 HALSBURY'S LAWS (3rd Edn.) 30 et seq. and 170 et seq., and for cases, see 11 DIGEST (Repl.) 369 et seq. and 542 et seq.

Cases referred to:

(1) *Logan* v. *Bank of Scotland*, [1906] 1 K.B. 141; 75 L.J.K.B. 218; 94 L.T. 153; 54 W.R. 270; 22 T.L.R. 187, C.A.; 11 Digest (Repl.) 542, *1508*.

(2) *Re Norton's Settlement, Norton* v. *Norton*, [1908] 1 Ch. 471; 77 L.J.Ch. 312; 99 L.T. 257, C.A.; 11 Digest (Repl.) 542, *1510*.

(3) *McHenry* v. *Lewis* (1882), 22 Ch.D. 397; 52 L.J.Ch. 325; 47 L.T. 549; 31 W.R. 305, C.A.; 11 Digest (Repl.) 543, *1512*.

(4) *The Janera*, [1928] P. 55; 97 L.J.P. 58; 138 L.T. 557; 44 T.L.R. 193; 17 Asp. M.L.C. 416; 11 Digest (Repl.) 551, *1583*.

(5) *The London*, [1931] P. 14; 100 L.J.P. 57; 144 L.T. 375; 47 T.L.R. 170; 18 Asp. M.L.C. 180; 11 Digest (Repl.) 543, *1515*.

(6) *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A.C. 602; 63 L.J.Q.B. 70; 69 L.T. 604; 10 T.L.R. 7; 37 Sol. Jo. 756; 11 Digest (Repl.) 371, *374*.

(7) *Deschamps* v. *Miller*, [1908] 1 Ch. 856; 77 L.J.Ch. 416; 98 L.T. 564; 11 Digest (Repl.) 373, *381*.

(8) *Whitaker* v. *Forbes* (1875), 1 C.P.D. 51; 45 L.J.Q.B. 140; 33 L.T. 582; 40 J.P. 436; 24 W.R. 241, C.A.; 11 Digest (Repl.) 370, *370*.

(9) *Peruvian Guano Co., Ltd.* v. *Bockwoldt* (1883), 23 Ch.D. 225; 52 L.J.Ch. 714; 48 L.T. 7; 31 W.R. 851; 5 Asp. M.L.C. 29, C.A.; 11 Digest (Repl.) 545, *1530*.

(10) *Hyman* v. *Helm* (1883), 24 Ch.D. 531; 49 L.T. 376; 32 W.R. 258, C.A.; 11 Digest (Repl.) 547, *1545*.

(11) *Thornton* v. *Thornton* (1886), 11 P.D. 176; 55 L.J.P. 40; 54 L.T. 774; 34 W.R. 509, C.A.; 11 Digest (Repl.) 543, *1522*.

Appeal from an order of PORTER, J.

The plaintiffs claimed an agreed sum of £7,500 payable on Aug. 31, 1935, and one month's rent of certain premises due under a lease dated June 17, 1931, in the occupation of the second defendants, Chilean Stores (Gath & Chaves), Ltd., situated in Santiago de Chile. By that lease the first defendants, the South American Stores (Gath & Chaves), Ltd., guaranteed the strict fulfilment of all obligations, conditions, and liabilities under the lease. The defendants pleaded that the rights and obligations arising from the lease were to be ascertained by the law of Chile and the plaintiffs' claim, if maintainable at all, was maintainable in Chile; that the rent was payable in the currency of Chile; and that the sum of £7,500 was payable at the second defendant's office in Santiago. Two actions were pending, the one in England to which this report relates, and the other in Chile by the present defendants against the present plaintiffs for a declaration that the rent under the lease was payable in Chilean currency. PORTER, J., having refused to stay the action brought in the King's Bench Division, the defendants appealed.

Evershed, K.C., and *Harold Murphy* for the defendants.

A. T. Miller, K.C., and *Ernest Hancock* for the plaintiffs.

Cur. adv. vult.

Dec. 20. The following judgments were read.

GREER, L.J.—This is an appeal by the two defendants against the refusal of PORTER, J., to stay an action brought in the King's Bench Division to recover an agreed sum of £7,500 and one month's rent of certain premises in the occupation of the defendants, the Chilean Stores, in Santiago de Chile. Both of the claims arose under an agreement made in Paris in the Spanish language between the late Mr. Beeche, whose representatives the plaintiffs are, and the two defendant companies. The defendants are British companies with their head offices in London, but the business of the second defendants is entirely carried on in Santiago de Chile and that of the first defendants in the Argentine. It was stated in the agreement that the representatives of the South American Stores guaranteed to hold themselves responsible for and undertook jointly with the Chilean Stores strict fulfilment of all the obligations in respect of payment and other conditions and liabilities which the contract of lease imposed on the lessee, for which purpose both parties elected domicil at Santiago de Chile as would be proved at the end thereof. By art. 1, Mr. Beeche granted on lease to the Chilean Stores for the period of ten years certain premises at Santiago de Chile, the consideration of the lease being stated as follows:

> "The consideration for the lease is ninety-three thousand five hundred pesos of one hundred and eighty-three thousand and fifty-seven millionths of a gramme of fine gold monthly which shall be paid at the option of the owner either in Santiago de Chile at the residence or office of the latter or of his representatives or remitted to Europe, according to the instructions which the owner may give, one month in advance on the first working day of each month."

The agreement went on to provide that in the event of the said payment not being made punctually penal interest at the rate of 1 per cent. per month should be paid. The said agreement also, by art. 4, referred to an indemnity which had been agreed at £15,000 sterling in respect of alterations already effected in the premises and specified in an earlier contract and payable in lieu of the restoration of the buildings to the state in which they were before the said alterations were made, and provided that this sum of £15,000 should be paid in two parts: £7,500 sterling on Aug. 31, 1935, and the other half on Aug. 31, 1945. It will be observed that, though this article of the agreement is in the same document as the contract of lease, it is not really part of the lease, nor, in my judgment, is it included in the words as to election of domicil at Santiago de Chile. The late Mr. Beeche lived in Paris, and the agreement with these two British companies was made in Paris in the Spanish language, which is the language of Chile, and it was agreed by the plaintiffs for the purposes of this appeal, and I think rightly agreed, that the proper law of the contract was the law of Chile.

It was argued on behalf of the defendants that they were entitled under s. 41 of the Supreme Court of Judicature (Consolidation) Act, 1925, to ask that the action should be stayed on the ground that it was either vexatious or oppressive to them to permit it to proceed in England. Several reasons were suggested why we should regard the action as oppressive—(i) that the action being one which was not of a transitory character the court in England would, according to English law, have no jurisdiction to decide it; (ii) it was said that even if the court has jurisdiction, it still ought not to entertain the action because to do so would involve inconvenience to the defendants amounting to injustice; (iii) it was said that the action ought to be stayed on the ground of lis alibi pendens; and (iv) that by reason of the selection of the domicil of Santiago de Chile the plaintiffs and the defendants must be taken to have agreed to the exclusive jurisdiction of the Chilean courts. Counsel for the defendants called attention to the law as stated in DICEY'S CONFLICT OF LAWS, 5th edit., r. 53, and the exceptions stated on p. 207, where the learned author says:

> "Where the court has jurisdiction to entertain an action against a person under either r. 59, or under any of the exceptions to r. 60, the court has jurisdiction to entertain an action against such person respecting an immovable situate out of England (foreign land) on the ground of either (a) a contract between the parties to the action; or (b) an equity between such parties with reference to such immovable."

Counsel did not dispute the accuracy of this statement of the law. It is quite clear that in the present case there was a personal action on what in England would have been an action on a covenant in a lease for rent. This is not, in my opinion, a real action, but is a personal action, and according to DICEY it is one which a court would have jurisdiction to entertain, though the action in personam incidentally relates to an immovable situate out of England. There is in the present case no issue in the action relating to the land in Chile, inasmuch as there is no dispute that at the date of the writ the rent had become due under the terms of the agreement, and on the authorities it seems to me that unless some injustice would be done to the defendants by allowing the action to proceed in England, it ought not to be stayed.

The law on this subject was considered in a number of cases, especially in *Logan* v. *Bank of Scotland* (1) and *Re Norton's Settlement, Norton* v. *Norton* (2). The decision in *Logan* v. *Bank of Scotland* (1) is accurately summed up in the headnote, which reads as follows:

> "The court will stay an action, brought within the jurisdiction in respect of a cause of action arising out of the jurisdiction, if satisfied that no injustice will be done thereby to the plaintiff, and that the defendant would be subject to such injustice in defending the action as would amount to vexation and oppression to which he would not be subjected if an action were brought, in another and accessible court, where the course of action arose."

SIR GORELL BARNES uses these words ([1906] 1 K.B. at p. 147):

> "The defendants make this motion practically upon the grounds stated in Sir George Anderson's affidavit, where he urges that no legitimate advantage can accrue to the plaintiff from prosecuting this action in England while there is an appropriate tribunal in Scotland, and that he believes that the plaintiff has not brought the action in England bona fide for the purpose of obtaining justice, but vexatiously and solely for the purpose of harassing the defendant."

Referring to the Scottish cases, the President says ([1906] 1 K.B. at p. 149):

> "I should gather that the Scottish courts would scarcely object to allow a case to be tried unless they felt satisfied that injustice would be done by allowing it to proceed in their own court."

And later he states the principle as being:

> "That the court will interfere to prevent vexatious proceedings which would have the effect of preventing the due administration of justice,"

and he cites the judgment of Bowen, L.J., in *McHenry* v. *Lewis* (3) (22 Ch.D. at p. 408), where that learned judge said:

> "The general principle is that the court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end."

Later, the President said ([1906] 1 K.B. at p. 150):

> "The court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent court."

In *Re Norton's Settlement, Norton* v. *Norton* (2), the principle in which a stay should be granted was also considered by the Court of Appeal in an action which had been brought in England by a wife against her husband, a barrister practising in Calcutta, by serving him during his temporary presence in England. The court, having come to the conclusion that the plaintiff had brought the action in England instead of in India, not for any bona fide purpose, but in order to obtain an undue advantage over the defendant, and that the continuance of the proceedings in England would necessarily be productive of injustice to the defendant, stayed the action. It is clear from the decision that the learned lords justices came to the conclusion that it was practically impossible in that case for the litigant who was applying for the stay to get justice in this country. If this test is, as I think it is, rightly applicable to an application to stay a plaintiff's action in this country, I think the defendants, who are English companies, have failed to satisfy the court that they would suffer any injustice by reason of the action being tried in England. It is clear from the affidavits that the only real question in the case so far as it regards the claim for rent relates to the amount of the rent payable under the terms of the lease. It seems to me that this can be justly determined by the English court upon evidence that both sides will be entitled to adduce as to what the law of Chile is as regards the interpretation to be put on the agreement of lease. Both parties will be, to some extent, inconvenienced by calling evidence in England, but this inconvenience will not, I think, amount to an injustice to the two English companies. These considerations dispose of points (i) and (ii) of the appellants' argument.

As regards the question of lis alibi pendens, there are many cases to be found in the reports in which a plaintiff bringing an action here and also in a foreign country, has been put to his election as to which he will proceed with; but even in such cases, there may be advantages to the plaintiff in continuing both actions which will be recognised as entitling him to do so, but there has been no case in which an action of a plaintiff has been stayed on the ground that his defendant has brought the action in a foreign country, and the decisions of Hill, J., in *The Janera* (4) and of Langton, J., in *The London* (5) are authorities for the proposition that in such a case the plaintiff's action ought not to be stayed.

The fourth ground on which it is alleged that the action should be stayed is that it is contended that the effect of the agreement is to give exclusive jurisdiction to the courts in Chile. This is a matter that cannot be determined upon affidavits. It might of course be set down as a preliminary question of law, but it seems to me that it will be more convenient that it be treated as one of the matters which will fall to be determined when the action comes on for trial.

In my judgment, therefore, this is an action in personam in its nature transitory, and though the judgment, if given, may affect the defendants' right to continue in possession of the property if they do not pay the rent, this is a matter which will only arise after judgment, but there is no risk of any injustice to the defendants in allowing the action to proceed in England, and therefore we ought not to reverse the decision of Porter, J. The appeal should, therefore, be dismissed with costs to be paid by the appellants in any event.

SLESSER, L.J.—I have read the judgments of Greer, L.J., and Scott, L.J. I agree with them and I have nothing to add.

SCOTT, L.J.—The facts have been stated fully by Greer, L.J., and it is not necessary for me to do more than to recite those which constitute the foundation of my own judgment. Two actions are pending at the same time, one in England, the other in Chile—which was brought first is in this case immaterial. The defendants in the English action are the plaintiffs in Chile, and in their action in Chile seek a declaration against their lessors (the plaintiffs in the action now before us) that they are entitled by the law of Chile (which it is agreed is the proper law of the contract of lease) to perform their covenant to pay the rent reserved by means of a payment in Chile in Chilean currency. The plaintiffs here seek a different declaration, namely, that the rent is payable in certain weight units of fine gold either in Chile or at the plaintiff's option in Europe in accordance with their instructions, i.e., in such form as the lessors may direct, e.g., by bill on London. It is admitted by the defendants that this option was in fact duly exercised by a demand by the plaintiffs that the defendants should remit to the plaintiffs in Paris.

The plaintiffs here also claim payment of the rent (calculated to amount to £3,858 18s. 9d. when measured in sterling) together with contract interest, and in addition a lump sum of £7,500 due to them on Aug. 31, 1935, according to a particular covenant in the lease. The defendants, by their affidavits, rely on two Chilean laws, Nos. 4973 and 5107. These two laws have already been considered by this court and the House of Lords in litigation which took place in England in the years 1933–1935 between the same parties. By these enactments the defendants say that payment of the rent in accordance with the plaintiffs' requirement under their option, and also of the £7,500, has been rendered illegal by the law of Chile and also impossible in fact. For the reasons given by Greer, L.J., these pleas must be treated as established, at least, so far as this appeal is concerned. The defendants ask for an order under s. 41 of the Judicature Act, 1925, and if it be necessary for their case, submit that under that section it is a matter of right and not merely of discretion that a stay should be granted where the circumstances contemplated by the section exist. They base their argument on two quite separate grounds:—(i) that the English High Court has no jurisdiction because the plaintiffs' action relates to land situate in Chile, and (ii), alternative to the first and assuming that they are wrong on the first, is that the English High Court is not a forum conveniens, with the further submission (if mere convenience, however strong the considerations of convenience may be, does not of itself justify a stay) that the action is in the circumstances of the case vexatious and oppressive and an abuse of the process of the court. Neither their summons nor their notice of appeal to this court indicates any ground for the argument of oppression beyond the fact that litigation is pending before the courts in Chile in which the matters raised in the English action are in process of determination in accordance with the law of Chile, by which alone the issues between the parties have to be determined. But the argument before us covered a wider field and I assume, without deciding for the purpose of this judgment, that it would be wrong to limit the reasons for the decision of the case to the precise grounds stated in the summons.

The defendants' first ground is a plea in bar. The court either has or has not jurisdiction. No question of discretion enters in. In my opinion, the defendants fail on this ground. The action is not one "relating to land" within *British South Africa Co.* v. *Companhia de Moçambique* (6) and Dicey, Conflict of Law, r. 53, at p. 203 of the 5th edition. The inhibition of that rule does not bar the jurisdiction of an English

A court except where the action raises one or other of the two issues to which the rule relates, namely, (i) the title to, or right to possession of land in a foreign country, or (ii) damages for trespass to such land. Before the Judicature Acts where the action was brought on a covenant in a lease, a common law court having jurisdiction over an action founded on such a contract was not deprived of jurisdiction merely because the covenant was to pay rent or otherwise related to land in the sense that the contract as B a whole had to do with land. Courts of equity took a similar view on the question of jurisdiction where the relief asked for could be given by enforcing a personal obligation arising out of express or implied contract; so as to raise an equity, the court did not hesitate to entertain jurisdiction (see *Deschamps* v. *Miller* (7) ([1908] 1 Ch. at p. 863) per PARKER, J., and other cases cited in WHITE AND TUDOR'S LEADING CASES IN EQUITY (9th Edn.), vol. I., pp. 645 and 646). In *Whitaker* v. *Forbes* (8) a question C arose whether the plaintiff could recover against a defendant resident in this country the arrears of a rent charge issuing out of lands in Australia. BLACKBURN, J., said (1 C.P.D. at p. 53):

> "I do not think that this case raises any question as to jurisdiction, though in some respects it has been argued as if it did. The case turns on the technical distinction between local actions where the trial must be local and transitory actions and the question is one of venue only." D

It is true that LORD HERSCHELL in *British South Africa Co.* v. *Companhia de Moçambique* (6) ([1893] A.C. at p. 627) expressly abstained from expressing an opinion on the above observation of BLACKBURN, J., but he had already said ([1893] A.C. at p. 626):

> E "It is quite true that in the exercise of the undoubted jurisdiction of the court it may become necessary incidentally to investigate and determine the title to foreign lands; but it does not seem to me to follow that because such a question may incidentally arise and fall to be adjudicated upon, the courts possess, or that it is expedient that they should exercise, jurisdiction to try an action founded on a disputed claim of title to foreign lands."

F By these words I understand him to have meant that it is the action founded on a disputed claim of title to foreign lands over which an English court has no jurisdiction and that where no question of title arises, or only arises as a collateral incident of the trial of other issues there is nothing to exclude the jurisdiction. In the present case I cannot see that the question of title to or right to possession of the land in Chile is raised even incidentally by any defence to the plaintiffs' claim which is set up in the defendants' G affidavits. This being so, I do not think it necessary to discuss the numerous authorities on this first question which were cited to us in the course of the argument. The rule is, I think, so far as the facts here are concerned, correctly formulated by the late Professor DICEY in his rule 53, and there is nothing there to exclude the jurisdiction of the English High Court in the present case.

Counsel for the defendants, as an alternative justification for an order staying the H English action, contended in the words of his summons that the action is, in the circumstances disclosed in the appellants' affidavits, "vexatious, oppressive and an abuse of the process of the court." I agree with the assumption that these are conditions to the grant of a stay, but his evidence, in my opinion, falls short of his proposition. He gave several strong reasons for contending that the Chilean court is a more convenient forum: (i) the contract is in Spanish; (ii) the law of the contract is Chilean as to both interpreta- I tion and performance; (iii) the action is about land in Chile; (iv) the defendant companies though registered in England carry on all their business in Chile; and (v) Chilean lawyers are so scarce in England that expert evidence for the court here will be difficult to obtain. But those grounds go only to convenience; they do not come near to establishing the allegations of the summons. He sought to rely on the considerations summed up in the phrase lis alibi pendens, which have in some cases led to a party who is plaintiff both here and in another jurisdiction in actions against the same defendant and on the same dispute, being put to his election. But here the present plaintiffs are not plaintiffs in the Chile action: they are defendants and the present defendants are the plaintiffs. In such a case the mere fact that the other action is pending raises no presumption to the effect suggested. A

The true rule about a stay under s. 41, so far as relevant to this case, may, I think, be stated thus: (i) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's court must not be lightly refused; (ii) in order to justify a stay two conditions must be satisfied, one positive and B the other negative; (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive, or vexatious to him, or would be an abuse of the powers of the court in some other way, and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant. These propositions are, I think, consistent with and supported by the following cases: *McHenry* v. *Lewis* (3), *Peruvian Guano Co., Ltd.* v. *Bockwoldt* (9), *Hyman* v. *Helm* (10), C *Thornton* v. *Thornton* (11), *Logan* v. *Bank of Scotland* (1).

I do not think that the cases upon service out of the jurisdiction, some of which were cited to us, are sufficiently germane to the principles upon which this appeal turns, to call for discussion. Discretion looms larger in that exercise of statutory jurisdiction. Under s. 41 there is little, if any, room for discretion. Decisions on questions of degree often look like, but are not instances of discretion. The decision of the learned judge D in the present case is clearly appealable; none the less I am satisfied it was right. I agree that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *McKenna & Co.*; *Smiles & Co.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*] E

F

MATHESON *v.* MATHESON AND HARTLEY

[Probate, Divorce and Admiralty Division (Bucknill, J.), July 23, 31, 1935]

[Reported [1935] P. 171; 104 L.J.P. 59; 153 L.T. 299; 51 T.L.R. 570; 79 Sol. Jo. 658] G

Divorce—Settlement of wife's property—Children's interests—Matters to be taken into consideration—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49) s. 191 (1).

Section 191 (1) of the Supreme Court of Judicature Act, 1925, which gives the court power to order the settlement, for the benefit of the husband or the children, of property of a wife found guilty of adultery is not penal. It is not intended to be H used as a punishment of a guilty wife, or even of the co-respondent through her. Its object is to restore as nearly as may be the pecuniary status of the parties existing before the marriage was broken up, and where the court is prayed to settle the whole or part of a respondent wife's free property on the children of the marriage, the court will consider, inter alia, the fact that by such settlement she would be debarred from benefiting, as she might otherwise do, any of her children during her I lifetime.

Dicta of Lord Penzance in *March* v. *March and Palumbo* (1) (1867), L.R.1, P. & D. 440, at p. 443, and of Sir Gorell Barnes, P., in *Hartopp* v. *Hartopp* (2), [1899] P. 65, at p. 72, applied.

Notes. Section 191 (1) is now s. 24 (1) of the Matrimonial Causes Act, 1950.

As to the object of the section, see 12 Halsbury's Laws (3rd Edn.) 442, para. 993, and for cases on the subject see 27 Digest (Repl.) 651–652, *6132–6139*. For the Matrimonial Causes Act, 1950, s. 24 (1), see 29 Halsbury's Statutes (2nd Edn.) 411.

Cases referred to:

(1) *March* v. *March and Palumbo* (1867), L.R. 1 P. & D. 440; 36 L.J.P. & M. 64; 16 L.T. 366; 15 W.R. 799; 27 Digest (Repl.) 641, *6032*.

(2) *Hartopp* v. *Hartopp and Akhurst*, [1899] P. 65; 68 L.J.P. 33; 80 L.T. 297; 15 T.L.R. 168; 27 Digest (Repl.) 652, *6134*.

(3) *Lorriman* v. *Lorriman and Clair*, [1908] P. 282; 77 L.J.P. 108; 99 L.T. 314; 24 T.L.R. 575; 52 Sol. Jo. 499; 27 Digest (Repl.) 638, *5994*.

(4) *Schofield* v. *Schofield and Cowper* (1891), 64 L.T. 838; 27 Digest (Repl.) 640, *6023*.

(5) *Bacon* v. *Bacon and Bacon* (1860), 2 Sw. & Tr. 86; 29 L.J.P.M. & A. 125; 2 L.T. 438; 8 W.R. 552; 164 E.R. 925; 27 Digest (Repl.) 637, *5989*.

(6) *Midwinter* v. *Midwinter*, [1893] P. 93; 62 L.J.P. 77; 1 R. 512; 68 L.T. 262; 41 W.R. 560; 27 Digest (Repl.) 637, *5991*.

(7) *Milne* v. *Milne and Fowler* (1871), L.R. 2, P. & D. 202; 40 L.J.P. & M. 13; 23 L.T. 877; 19 W.R. 423; 27 Digest (Repl.) 568, *5219*.

Petition

On the petitioner's prayer a post-nuptial settlement, into which the respondent had brought £11,000, was varied by the registrar so as to secure certain reversionary interests to the children and his decision was accepted by the parties. The respondent, who had also transferred £4,000 to a daughter of the marriage, now had £13,400 capital of her own free from settlements. The petitioner's income from earnings was over £7,000 a year, and his capital over £40,000. The petition for the settlement on the children was rejected.

On this motion the husband, on whose petition the marriage had been dissolved by a decree absolute, dated Feb. 4, 1935, prayed the court to vary the report of the registrar in which he refused to order a settlement of the respondent wife's free property. The material facts are set out in the judgment.

Section 191 of the Supreme Court of Judicature (Consolidation) Act, 1925, re-enacting s. 45 of the Matrimonial Causes Act, 1857, provides:

> "(1) If it appears to the court in any case in which the court pronounces a decree for divorce or for judicial separation by reason of the adultery of the wife that the wife is entitled to any property either in possession or reversion, the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage or any or either of them."

Evershed, K.C. (with him *H. B. Durley Grazebrook*), for the petitioner.—The underlying principle with regard to the settlement of a wife's property in pursuance of s. 191 (1), was stated by BUCKNILL, J., in *Lorriman* v. *Lorriman and Clair* (3) ([1908] P. at p. 289). The court must look at the probable pecuniary position which the husband, the wife, and the issue of the marriage would have occupied if the marriage had not been dissolved. The same judge cited with approval the observations of LORD PENZANCE in *March* v. *March and Palumbo* (1) (L.R. 1 P. & D., at p. 443):

> "It would be of evil example if this court were to decide that the entire fortune of a wealthy married woman was to be reckoned as part of the prospects of an adulterer, or the resources of a second home for a guilty woman."

In the present case the wife has married the co-respondent, and the new husband's business might call for assistance from the respondent. The respondent may be ordered to settle her property on the children, except as to, say, one-quarter or one-third, which might be left at her free disposition. There is only one reported case in which a settlement was refused—namely, that of *Schofield* v. *Schofield and Cowper* (4), in which the facts were entirely different. There is no claim here to limit the respondent's life interest in her free property.

In *Lorriman* v. *Lorriman* (3) the wife had very much more than the husband. In *Bacon* v. *Bacon and Bacon* (5) the husband claimed a settlement on behalf of the children as here, and a settlement was ordered. *Midwinter* v. *Midwinter* (6) is a good illustration of the operation of the section.

Bayford, K.C. (with him *F. L. C. Hodson*) for the respondent.—The registrar was right in submitting that there should be no settlement. *Lorriman* v. *Lorriman* (3) does not assist, as there was no marriage settlement in that case. In the present case the original fortune of the respondent was £11,000, which was brought into the marriage settlement. An additional £4,000 has been given by the respondent to the elder daughter. The respondent now has £13,400 free funds. The petitioner's income is about £7,000 a year. In effect the petitioner is now saying that though he wants nothing for himself he wishes to be relieved of the responsibility of settling anything on the children and to put it on his former wife's shoulders. If there had been no divorce the position would have been that the respondent could properly have said that she had made substantial provision for the petitioner and children, and she could not have been expected to settle any more. Nevertheless, she is not likely now to put her children in any different position than before, and she has agreed to the variation of the existing settlements. The court always looks at what a wife has done for her children, and the respondent has expressed her intention as to the children, who have not themselves made any application.

Grazebrook, in reply, referred to *Milne* v. *Milne and Fowler* (7).

Cur. adv. vult.

July 31. **BUCKNILL, J.**—This is a motion to vary the report of the registrar on a petition by the husband petitioner for settlement of the wife respondent's free property. There is also a motion to vary the report of the registrar on a petition by the husband petitioner to vary a post-nuptial settlement on the wife respondent, but the report of the registrar on this petition is accepted by both parties, with one agreed variation as to the appointment of fresh trustees. The variations of the post-nuptial settlement have some bearing on the present motion. The result of these variations is that the children are fairly certain to receive the reversionary interest in the trust funds of the post-nuptial settlement. On the motion before me to vary the report of the registrar on the petition to settle the free property of the respondent there was considerable argument. The registrar reported that no order be made for a settlement of her property. Counsel on behalf of the petitioner asked that this report be varied and that a major portion of the respondent's free property should be vested in trustees on trust, that the respondent should retain the whole of the income therefrom during her life, and that after her death the property should pass to the children of her marriage with the petitioner. The petitioner was willing that the securities should not be touched in order that the respondent should continue to receive the same annual income. The petitioner married the respondent in 1906. There are five children, living issue of the marriage, aged 28, 27, 25, 23, and 19 years respectively. In 1934 the petitioner obtained a decree nisi for the dissolution of his marriage on the ground of the adultery of his wife with the co-respondent, and the decree was made absolute in February, 1935. The respondent is now married to the co-respondent. Her age is fifty-two, so that there is no reasonable prospect of issue of her present marriage. At the present time the respondent possesses stocks and shares of the value of about £13,453, which produce a gross income of £531 a year. In addition to this, she has a freehold property worth about £2,000.

Section 191 (1), of the Supreme Court of Judicature (Consolidation) Act, 1925, invests the court in this case with a discretionary power to make such settlement of the respondent's property as it thinks reasonable for the benefit of the petitioner and of the five children of the marriage or any of them. The section is not penal. It is not intended to be used as a punishment of the guilty wife, or even as a punishment, indirectly through her, of the co-respondent. On this aspect of the matter, however, there are some valuable remarks of LORD PENZANCE in *March* v. *March and Palumbo* (1) (L.R. 1 P. & D. at p. 443). If the settlement was asked for merely to deprive the respondent and her present husband of pecuniary benefit by way of punishment, it might be necessary for the court to investigate the circumstances leading up to the adultery, but these circumstances have not been investigated on the motion before me, or before the registrar on the hearing of this petition. Various cases were cited to me which throw light on the principles which should guide the court in exercising its discretion. Consideration of these cases shows that the main question for the court is the nature and extent of the pecuniary prejudice caused to the husband and the children of a marriage by the dissolution of the marriage and the breaking away of the wife with her property from the common home. In considering this question the court has also to bear in mind the financial position of a respondent wife after the dissolution of the marriage, and to weigh it with the similar position of her former husband and her children after the divorce.

With this consideration in view it is necessary now to state the pecuniary status of the present petitioner and the children at the time when the marriage was dissolved. The registrar reports to the court:

> "The husband is an underwriter at Lloyd's. His total annual income as stated by him amounts to about £7,431 gross, taking an average for the last three years. He has securities to the value of £22,150 deposited at Lloyd's. His brokerage firm has a capital of £5,000. He is possessed of other investments of the capital value of about £10,000 and of a freehold house, the value of which he puts at £6,000. His age is fifty-seven."

These figures have not been questioned on behalf of the petitioner. I was informed at the hearing that his life was also insured for £11,000, as stated in his reply.

As regards the children of the marriage, the registrar reports that:

> "The elder daughter is married, and upon her marriage the respondent settled £2,000 upon her. The second daughter is living at home with the petitioner, and is engaged to be married to an officer in the Navy. The eldest son is in the employment of Imperial Airways at Karachi, and is said to be self-supporting. The second son is in the petitioner's business. The youngest son has recently left Rugby."

At the hearing before me I was informed that about two years ago the respondent had given another £2,000 to the elder daughter to purchase a share in a school, making a total of £4,000 in all transferred by the respondent to the eldest child of the marriage.

The respondent's annual income is £881 gross, of which £350 is the proceeds of the funds of the post-nuptial settlement, and £531 is the proceeds of her free property. In other words, it is about one-tenth of the petitioner's total gross income, including his investments and the annual value of his house. The respondent's income is derived from stocks and shares, some of which are first-class securities, while the petitioner's income is mainly earned income. Taking these facts into consideration, I do not consider that the dissolution of the marriage has seriously prejudiced the pecuniary status of the husband and the children. There is no evidence that while the respondent was living at home with the petitioner she contributed anything substantial to the maintenance of the establishment. Her fair share after deduction of income tax after paying for her dress and own personal expenses would be negligible, if in strict proportion to her own and the petitioner's income.

On the hearing before me it was stated on behalf of the petitioner that he did not ask the court to make any order which would cause any loss of income to the respondent during her life. The petitioner did not ask for any benefit for himself out of the respondent's property; all he asked was that a part of the respondent's free property should be so tied up that her children and not someone else, and in particular the co-respondent, should receive it after her death. It was argued that the respondent would almost certainly have left her property to the children if the marriage had not been dissolved. Counsel for the petitioner relied especially on the judgment of BUCKNILL, J., in *Lorriman* v. *Lorriman* (3) ([1908] P. at p. 289), a somewhat similar case to this, in which the learned judge said:

> "The underlying principle is that the court must try to ascertain the nature and extent of the pecuniary change by the wife's criminality, and in order to see that it must look at the probable pecuniary position which the husband, the wife, and the issue of the marriage would have occupied if the marriage had not been dissolved."

Reference was also made in that case to *Hartopp* v. *Hartopp* (2) ([1899] P. at p. 72), A where SIR GORELL BARNES, in a somewhat similar case, said that the guiding principle was that the court ought to place the petitioner and the children in a position as nearly as circumstances would permit the same as if the family life had not been broken up.

Applying this test, I do not find that before the home was broken up by the respondent's adultery the children received or were likely to receive any substantial pecuniary benefit from their mother. It is true that the elder daughter received £4,000 from her, B but the court is not asked to make any order which would have the effect of giving any present pecuniary benefit to a child of the marriage apart from the value of a reversionary interest in the capital. The children are to receive no benefit while the mother is alive, and the mother may live for many years. As regards the future, there is not sufficient reason for thinking that the respondent will lose her affection for her children. On the other hand, I think it is probable that she will leave the bulk of her free property C to her children if she retains a free hand in the matter. As time goes by, the respondent will probably be in a position to know which of her children is in most need of financial assistance. It may be a serious embarrassment to the respondent if she has to tie up the bulk of her free property now. It is possible that in the future she may wish to give some of her capital to one of her children, if in need of pecuniary assistance, and her power to do this would be taken away in so far as a settlement of her property is now D ordered by the court.

The object of the section is to enable the court, as nearly as may be, to restore to a reasonable degree the pecuniary status of the parties as it was before the dissolution, and therefore it is material to consider that, if the respondent is deprived of all right to dispose of the bulk of her capital now, to that extent she loses the right to benefit during her life any of her children by transferring to him or her part of that capital of which E he or she may be in need. Taking into account the present financial status of the petitioner, the ages and position of the children, and the amount of the free property of the respondent, it does not seem to me, after anxious reflection on the matter, that this is a case in which the court should order a settlement of the respondent's property.

Registrar's report confirmed.

F

Solicitors: *Parker, Garrett & Co.*; *Walter Crimp & Co.* for *Harold Michelmore & Co.*, Newton Abbot.

[*Reported* by WILLIAM LATEY, ESQ., *Barrister-at-Law.*]

IN THE ESTATE OF FINN

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), December 5, 1935]

[Reported 105 L.J.P. 36; 154 L.T. 242; 52 T.L.R. 153; 80 Sol. Jo. 56]

Probate—Will—Signature—Signature made with thumbmark—Wills Act, 1837 (7 *Will.* 4 *and* 1 *Vict., c.* 26), *s.* 9.

An illiterate testator's thumbmark may constitute a valid signature within the Wills Act, 1837.

Notes. As to methods of signing wills, see 34 HALSBURY'S LAWS (2nd Edn.) 56, para. 68, and for cases on the subject, see 44 DIGEST 249–250, *752–769*.

For the Wills Act, 1837, s. 9, see 26 HALSBURY'S STATUTES (2nd Edn.) 1332.

Case referred to:

(1) *In the Goods of Bryce* (1839), 2 Curt. 325; 163 E.R. 427; 44 Digest 250, *761*.

Probate Motion

The applicant moved for a grant of probate of the will, dated May 1, 1935, of James Finn, of Walton, Liverpool, who died on July 5, 1935.

By his will the testator had left his estate, worth about £680, to members of his family. He was illiterate and unable to write, and at the time of his death had been bedridden for over four months. He had asked a local clergyman to prepare his will, and the latter wrote the testator's dictated wishes on a will form and read it over to the testator. The clergyman as a chaplain in North-West India had been accustomed to see illiterate natives execute documents by making a thumb impression. As the testator could not write, the clergyman smeared the testator's thumb with ink, and the testator pressed that thumb on the space usually reserved for the signature. In so doing his thumb slipped, with the result that the mark was smudged. The mark was duly attested.

A brother of the testator, as executor, applied for probate.

H. B. D. Grazebrook, for the applicant.—It is well established that a testator may fulfil the purpose of s. 9 of the Wills Act, 1837, by making his mark. Though there is no reported case of a thumbmark being used for this purpose, it has just as much virtue as a signature as a cross or rubber stamp signature, and both of those have been allowed. The type of mark does not matter so long as the testator's intention is clear. [LANGTON, J.—I see no possibility of identifying this mark as a thumb impression. It is a mere blot.] *In the Goods of Bryce* (1)—a case heard about two years after the Wills Act, 1837, was passed—it was held that it was unnecessary to place the name of the testator against his mark.

J. E. L. Russell, representing minors, offered no opposition to the proposed grant.

LANGTON, J.—Illiterates were much more common a hundred years ago than nowadays, but if a mark was the only way a testator had of making his signature it came within the meaning of the statute. The thumbmark in the present case is no worse than a cross and I shall admit the will to probate, but the method adopted does not commend itself to me at all.

Solicitors: *Fortescue, Adshead, & Guest,* for *J. W. Wall & Co.*, Bootle.

[*Reported by* WILLIAM LATEY, ESQ., *Barrister-at-Law.*]

HEARTS OF OAK ASSURANCE CO., LTD. *v.* JAMES FLOWER & SONS

[CHANCERY DIVISION (Bennett, J.), October 8, 9, 1935.]

[Reported [1936] Ch. 76; 105 L.J.Ch. 25; 154 L.T. 156; 52 T.L.R. 5; 79 Sol. Jo. 839]

Company—Minutes—Proof—Entry in "book"—Loose leaves fastened together in two covers—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 120.

Entries made in a number of loose leaves, fastened together in two covers, purporting to be minutes of directors' meetings of a company, were tendered as evidence in an action.

Held: that the evidence was not admissible as the evidence of minutes entered in books within the meaning of s. 120 of the Companies Act, 1929.

Notes. Companies Act, 1929, is now replaced by s. 145 of the Companies Act, 1948. By s. 436 of that Act a minute book may be a bound book or the minutes may be recorded in any other manner.

As to minutes of meetings, see 6 HALSBURY'S LAWS (3rd Edn.) 318, 350, and for cases, see 9 DIGEST (Repl.) 548, 549. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Witness Action

The sole question for the purpose of this report was whether a number of loose leaves fastened together in two covers was admissible as evidence of minutes of a directors' meeting of a company entered in books within the meaning of s. 120 of the Companies' Act, 1929, which provides:

> "(1) Every company shall cause minutes of all proceedings of general meetings, and where there are directors or managers, of all proceedings, at meetings of its directors, or of its managers, to be entered in books kept for that purpose. (2) Any such minute if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings. (3) Where minutes have been made in accordance with the provisions of this section of the proceedings at any general meeting of the company or meeting of the directors or managers, then until the contrary is proved, the meeting shall be deemed to have been duly held and convened, and all proceedings held thereat to have been duly had, and all appointments of directors, managers, or liquidators, shall be deemed to be valid."

Fergus Morton, K.C., Sir George Jones, and *Wilcock-Holgate* for the plaintiffs.
Gavin Simonds, K.C., B. B. Stenham, and *A. S. Wells* for the defendants.

BENNETT, J.—Counsel for the plaintiffs seeks to put in evidence against the defendants some minutes of directors' meetings, held on Sept. 1 and 2, which are recorded in what he submits is the minute book of the plaintiff company. He proposes to put the book in without calling any witness to depose to its accuracy or to the fact of the minutes of Sept. 1 and 2 being a true record of what passed at the directors' meetings held on those two dates. There will, therefore, be no witness whom the defendants can cross-examine as to the accuracy of the record. Counsel is entitled to take this course if the thing produced is a "book" within the meaning of s. 120 of the Companies Act, 1929, and if the minutes which he desires to use purport to be signed by the chairman of the meeting at which the proceedings were had or by the chairman of the next succeeding meeting. That which he calls the minute book of the plaintiff company consists of a number of loose leaves fastened together in two covers in such a physical condition that, at any moment, any one wishing to do so can take any number of leaves out and substitute any number of other leaves. It is a thing with which anyone disposed to be dishonest can easily tamper, and the question is whether it is a "book" within the meaning of s. 120 of the Companies Act, 1929. There appears to be no authority on that point.

I propose to hold that it is not, because I consider that it is most undesirable that something from which a part may be taken or into which something else may be put should be used in evidence without the sanction of an oath as to its accuracy and without the party against whom the evidence is to be used being able to test its accuracy by cross-examination. I so hold on the ground that what is tendered in evidence is not a "book" within the meaning of s. 120 of the Companies Act, 1929, and, therefore, I reject the evidence.

Solicitors: *Kingsley Wood, Williams, & Murphy*; *Russell & Arnholz.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

PURFLEET URBAN DISTRICT COUNCIL *v.* MINISTER OF HEALTH & ESSEX COUNTY COUNCIL

[HOUSE OF LORDS (Lord Hailsham, L.C., Lord Blanesburgh, Lord Atkin, Lord Russell and Lord Macmillan), October 22, 24, 1935]

[Reported 105 L.J.K.B. 44; 52 T.L.R. 33; 154 L.T. 35; 79 Sol. Jo. 838; 99 J.P. 413; 33 L.G.R. 481]

Local Government—Alteration of area—Proposals by county council—Power of Minister to remit for re-consideration on lines suggested by him—Report by council of review of districts—Implication of extension of time by Minister—Local Government Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 7), *s.* 46 (1).

On June 24, 1932, a county council, having taken the preliminary steps prescribed by s. 46 (1) of the Local Government Act, 1929, as to a review of districts within their area, sent to the Minister of Health a report of the review together with proposals as to the changes which they considered desirable. Objections to the proposals were made by, inter alios, the appellant district council, and in November, 1932, a local inquiry was held by an inspector appointed by the Minister. On May 10, 1933, the Minister put forward proposals which, he felt, were so wide-reaching that they could not be given effect to as mere modifications of the county council's proposals. The county council informed the district council that they proposed to adopt the Minister's proposals. The district council objected, but, in January, 1934, after a further inquiry, the Minister confirmed the proposals of the county council based on his proposals of May 10, and made a draft order to that effect.

Held: (i) although there was no specific provision in the statute giving the Minister power to remit to a county council proposals made by them with a request that they should re-consider them, and, if they thought fit, make new proposals on lines suggested by him, on the true construction of the statute there was nothing to prevent his taking that course.

(ii) although the report of the county council was sent to the Minister after April 1, 1932, the date specified by s. 46 (1), that subsection had not prescribed the manner in which the Minister was to allow an extension, and, while it was desirable that where the Minister allowed an extension of the time that should be stated expressly, by dealing with the whole matter as he had done the Minister must be taken impliedly to have granted an extension.

Notes. The Minister concerned is now the Minister of Housing & Local Government. As to subsequent reviews of areas, see Local Government Act, 1933, s. 146, as amended by Local Government Boundary Commission (Dissolution) Act, 1949, Sched., para. 4.

Followed: *R.* v. *Minister of Health, Ex parte Hampton U.D.C.*, [1936] 3 All E.R. 169.

A As to alterations of areas within a county, see 21 HALSBURY'S LAWS (2nd Edn.) 241 et seq., and for cases, see 33 DIGEST 24 et seq. For Local Government Act, 1929, see 14 HALSBURY'S STATUTES (2nd Edn.) 226.

Appeal from an order of the Court of Appeal (SCRUTTON, GREER and SLESSER, L.JJ.).

In 1929 the urban district of Purfleet was formed and the council thereof constituted. On March 16, 1931, the Essex County Council, in discharge of their duties under s. 46 B of the Local Government Act, 1929, convened a conference with representatives of the councils of the districts within the county, including representatives of the urban district councils of Purfleet, Grays Thurrock, and Tilbury and the rural district council of Orsett, preliminary to a review by the county council of the circumstances of the districts within the county and a consideration whether it was desirable to effect any changes. After the holding of the conference, the county council completed their review, and on C June 24, 1932, they sent to the Minister of Health a report with their proposals with regard to such changes as they considered desirable. Objections were made to the proposals of the county council by local authorities affected thereby, and on Nov. 16 and 17, a local inquiry was held by an inspector appointed by the Minister. On May 10, 1933, a letter was written by the Minister to the county council, with copies to other bodies affected, containing his decisions with regard to the county council's proposals. D These decisions amounted, it was alleged, to the putting forward of a scheme materially different from the proposals submitted by the county council. The letter also invited the county council to submit supplementary proposals, and the county council submitted those on Oct. 4. These proposals produced a third and entirely different scheme. In November, 1933, a further local inquiry was held. On Dec. 29, 1933, the Minister, by letter to the county council, approved the supplementary proposals, subject to E certain minor modifications, and on Jan. 16, 1934, made a draft order accordingly. Under that order the Purfleet Urban District Council was abolished. On Jan. 29, 1934, the Purfleet Urban District Council were granted a rule nisi for a writ of prohibition directed to the Minister of Health and calling on him to show cause why he should not be prohibited from proceeding to make the order. The grounds put forward for the rule were (i) that the county council, having already made proposals dated June 24, F 1932, relating to the several county districts affected by the supplementary proposals, were functi officio and had no power to make the supplementary proposals, and that those proposals were ultra vires and of no effect and were not proposals within the meaning of s. 46 of the Local Government Act, 1929; (ii) that those proposals were ultra vires and of no effect for the further reason that the county council made them without first holding conferences thereon with representatives of the councils of the G districts affected as required by s. 46 (1); (iii) that the Minister had no jurisdiction to make an order giving effect to those proposals under s. 46 (4). At the same time a rule nisi for certiorari was obtained to quash the decisions of the Minister contained in his letters of May 10, 1933, and Dec. 29, 1933. A rule nisi for mandamus directing the Minister to consider and deal with the proposals made by the county council on June 24, 1932, was also obtained. Copies of those rules were served on the Essex H County Council, the Grays Thurrock Urban District Council, and the Orsett Rural District Council.

The Local Government Act, 1929, provides:

> Section 46: "(1) The council of every county shall as soon as may be after the commencement of this Act, after conferences with representatives of the councils of the several districts wholly or partly within the county, review the circumstances of I all such districts and consider whether it is desirable to effect any of the following changes: (*a*) any alteration or definition of the boundaries of any such district or of any parish; (*b*) the union of any such district or parish with another such district or parish; (*c*) the transfer of any part of such district or parish to another district or parish; (*d*) the conversion of any such district or any part thereof, if it is a rural district, into an urban district, or if it is an urban district, into or so as to form part of a rural district; (*e*) the formation of any new district or parish; and shall forthwith after the review is completed as respects the whole or any part of the

> county, and before the 1st day of April, 1932, or such later date as the Minister may in any case allow, send to the Minister a report of the review, together with proposals as to the changes, if any, which they consider desirable . . . (3) As soon as any such proposals are made to the Minister, the council making the proposals shall send copies thereof to the councils of the several districts affected thereby and shall publish in one or more newspapers circulating in those districts a notice stating that proposals have been made and that a copy thereof is open to inspection at a specified place, and that representations with respect thereto may be made to the Minister within six weeks after the publication of the notice. (4) The Minister shall consider the proposals and any representations with respect to the proposals, or any of them, which may have been made by any local authorities (including parish councils and parish meetings) or any local government electors affected thereby, and either may make an order giving effect to the proposals, or any of them, with or without modifications, or may refuse to make such an order: Provided that, if an objection with respect to any proposal is made by a local authority affected thereby, and is not withdrawn, the Minister shall not make an order giving effect to the proposal without first holding a local inquiry into the objection. . . ."
>
> Section 47: "(1) A county council may subsequently whenever they think it desirable, and shall if so required by the Minister, review generally the circumstances of the districts within the county, so, however, that the interval between the original review and the first review under this section, or between any two reviews under this section, shall in no case be less than ten years."

The Court of Appeal held, affirming the decision of the Divisional Court, that under s. 46 (4) of the Act the Minister was entitled to adjourn his decision for a reasonable time in order that he might obtain further information from the interested parties which would enable him to come to a final conclusion as to the right order he ought to make in the matter. The Purfleet Urban District Council appealed.

S. G. Turner, K.C., and *John Hodson* for the appellants.

The Solicitor-General (*Sir Donald Somervell, K.C.*) and *R. C. Essenhigh* for the Minister of Health.

Tyldesley Jones, K.C., and *Geoffrey C. Hutchinson* for the Essex County Council.

LORD HAILSHAM, L.C.—In my opinion these appeals fail. The questions to be determined arise on the provisions of the Local Government Act, 1929, and more particularly on the provisions of s. 46 of that Act. By s. 46 (1), which begins Part IV of the Act, and is headed: "Rearrangement of county districts," the statute enacts:

> "The council of every county shall as soon as may be after the commencement of this Act, after conferences with representatives of the councils of the several districts wholly or partly within the county, review the circumstances of all such districts and consider whether it is desirable to effect any of the following changes."

The subsection then sets out a number of changes in the boundaries of the various districts and in respect of the combination of various districts one with another, and continues:

> ". . . and shall forthwith after the review is completed as respects the whole or any part of the county, and before the first day of April, 1932, or such later date as the Minister may in any case allow, send to the Minister a report of the review, together with proposals as to the changes, if any, which they consider desirable:—Provided that, before making any such proposals the county council shall consult with the councils of the county boroughs adjoining the county, and the Minister shall give those councils an opportunity of laying before him their views on the proposals made by the county council."

It is provided by sub-s. (3) that as soon as any such proposals are made to the Minister, the council making the proposals shall send copies thereof to the councils of the several districts affected thereby and shall publish a notice with regard to the proposals, and the Minister has then to consider any representations made with regard to them and hold a local inquiry before he overrules an objection. There is a further provision in sub-s. (5) that, if a county council fails to act, the Minister may do so.

Section 47 gives a power to review the circumstances of the districts within the county provided that there must be an interval of at least ten years between the original review and any subsequent review.

In pursuance of the provisions of s. 46, the Essex County Council embarked upon the review of the circumstances of all the districts within the county in order to make the necessary proposals. After making that review and after consulting all the districts affected, the county council, on June 24, 1932, sent to the Minister proposals for altering the boundaries and for uniting certain of the parishes and districts. That date, as your Lordships will observe, was after April 1, 1932, but there is nothing in the material before us to show whether any formal application was made to the Minister to extend the date.

After the receipt of those proposals the Minister held the inquiries provided by the statute, and on May 10, 1933, caused a letter to be written to the county council conveying his decisions. With regard to a great number of the areas, he confirmed with or without modifications the proposals which had been put before him. There was, however, one area on the banks of the Thames with regard to which this dispute arises and with regard to which he was not able to take so definite a course. The area in question comprises a number of urban and rural districts, including the urban district of Purfleet and the rural district of Orsett and a number of urban districts adjacent thereto. With regard to that area, the Minister writes: "On the information before him, the Minister is inclined to think that the best solution lies in the constitution of a new riverside urban district," which he describes, and he then goes on to say: "He does not consider, however, that he could make this alteration as a modification of the present proposals of the county council. The alternatives are either that the county council should submit fresh proposals on these lines, or that, in due course, the Minister should, whether as a result of representations made by a district council or otherwise, consider taking action under s. 46 (5) of the Act."

The substantial effect of the Minister's proposal was that, instead of there being three districts, as was suggested in the original proposal, there should be two districts comprising substantially the same area.

That letter was taken into consideration by the Essex County Council, and they again consulted the areas affected, and communicated, among others, with the Purfleet U.D.C. After re-considering the proposal and the situation, on July 11, 1933, the county council wrote to the Purfleet District Council saying that they were proposing to suggest one large district for the whole of the area concerned. That proposal was objected to by the Purfleet District Council. Another inquiry was held in order to consider whether or not the Minister should confirm it, and ultimately on Dec. 29, 1933, the Minister intimated his decision that he would confirm the proposal of the Essex County Council and create only one area, and in January, 1934, a draft order was prepared in order to give effect to that decision.

The Purfleet U.D.C. challenge what has been done, and are asking for writs of certiorari, prohibition and mandamus to prevent effect being given to the so-called decision of the Minister. A number of points were taken on behalf of the Purfleet U.D.C. The case was heard in the Divisional Court, and the rules nisi for the writs were discharged. Appeals were lodged against that decision of the Divisional Court and were dismissed by the Court of Appeal, and from that decision the Purfleet U.D.C. appeal to this House.

The substantial complaint which is made, as I apprehend the argument on behalf of the appellants, is this. It is said that, on the true construction of s. 46, when proposals are received by the Minister he has three things and three things only which he can do —he can accept and confirm them, he can reject them, or he can accept them with modifications, but it is said that he cannot send any of the proposals back to the county council and ask them to submit fresh proposals. It is not disputed that the course which the Minister took was a reasonable and businesslike course to adopt, and one which gave to all the parties concerned every opportunity of being heard and of making their case before the Minister before the final order was made, but it is said, and said truly, that, unless there is power in the Minister to do what he did, it does not matter whether the course he took was convenient or not. It was not in accordance with his statutory jurisdiction.

It seems to me that the mistake which underlies the whole argument advanced on behalf of the appellants is the assumption that, unless you can find in the words of the section an express provision that the Minister can do what he has done here, you are to assume that it is outside his powers. I do not so construe the statute. It seems to me that what the statute in effect does is to provide that proposals are to be put forward by the county council, that after they have been fully examined and considered by the persons affected and after an inquiry has been held the Minister has to make up his mind about them, but there is nothing to prevent the Minister before he reaches a decision from asking the county council to re-consider, in the light of the later information which has been brought forward, their original proposals and to submit such modified or altered proposals as they think more suitable in all the circumstances. That is, in effect, what the Minister did here.

I express no opinion whether or not the Minister could, had he chosen, have made the order which he proposes to make as a modification of the original proposal. I assume, without deciding, that the Minister was right in thinking that the changes in the original proposals were so drastic that they could not fairly be treated as modifications, but I do not think that it in the least follows that because he did not feel that they amounted to a modification of the proposals, therefore, he was bound not only to reject the proposals, but in consequence to confirm a state of affairs which both he and the county council agreed was an undesirable one, and merely to continue the existing boundaries for a period of not less than ten years.

It was said that the proposals of the county council were out of time because they were delivered long after April 1, 1932, and there was no express extension of time by the Minister. In my judgment, the provision in s. 46 (1) that the proposals are to be completed

> "before the first day of April, 1932, or such later date as the Minister may in any case allow,"

cannot be construed, as was contended by the appellants, as meaning that there must be a formal order by the Minister extending the time before any proposals are submitted. I do not think that any such formality is required. I think it is for the Minister, when any proposals are submitted after April 1, 1932, to extend or to refuse to extend the time as in his discretion he may see fit to do. In the present case the original proposals were presented nearly three months beyond the original date, and when the Minister wrote on May 10, 1933, inviting the county council to submit fresh proposals with regard to this district, he was, in my judgment, in effect extending the time for that purpose.

It was said in the argument that since he only invited fresh proposals on the lines contained in his letter he was only extending the time for the purpose of the submission of a proposal on those lines, and that the proposal actually submitted was one of a different kind. I do not so read the correspondence. I think that the effect of the Minister's letter of May 10 was to say that, in the light of the information which he had acquired by virtue of the public inquiry, the original proposals did not seem to him satisfactory, that it seemed to him at the moment that a fresh proposal with regard to that particular district ought to be submitted, and that as then advised he thought the lines of the fresh proposal should be that two districts should be constituted instead of three. But I do not think that he intended by so saying to fetter the county council in their submission or to prevent their submitting what proposals they thought were best with regard to this particular district. It may also be pointed out that in fact when they did submit the revised proposal the Minister accepted it, and after inquiry proposes to act upon it, and that, too, might fairly be treated as an extension of the time necessary for the proposal.

I think the real answer to the point made by the appellants is that they are proceeding on a wrong basis when they say that you have to find in the section power to deal with the matter in this particular way, and I think that the courts below were right in saying that the real effect of the statute was to impose upon the county council in the first instance the duty of preparing proposals, and to impose upon the Minister the duty of considering those proposals and finally of making an order, but there is nothing to prevent him in the course of that consideration from asking a county council to make some alteration in regard to some area within their jurisdiction, or from considering and either rejecting or confirming that proposal when it was made.

A subsidiary point was made that there was no provision in the statute for a second review and that it is a condition precedent for the holding of a review that there must be a preliminary conference. The answer to those arguments is that what the county council did on the second occasion was, not to hold a second review, but to re-consider the proposals which had been put forward, so far as this district is concerned, in the light of the facts which they had already ascertained in the conference which they had already had.

On these grounds, which are substantially the same as those which appear in the judgments below, it seems to me that the orders made were correct and that these appeals should be dismissed with costs; and I move your Lordships accordingly.

LORD BLANESBURGH.—I am of the same opinion.

LORD ATKIN.—I entirely agree with the reasons which have been given by the LORD CHANCELLOR and with the motion which he has proposed. I should merely wish to add these words. I am not myself completely satisfied with the reason which is suggested, at any rate in some of the judgments, that all that the Minister did in this case was to adjourn consideration of the proposals with a view to getting further information. I have no doubt that he has that power, and indeed in respect of another district he exercised it, but it appears to me that he did something much more than that in this case—that he was not merely desirous of getting further information, but that he did desire that the county council should in fact re-consider their proposals and make fresh proposals. I wish to affirm my opinion—which I know was that expressed by the noble and learned viscount on the Woolsack—that the county council are perfectly entitled to do such a thing. It would be most lamentable if they could not, because otherwise the whole object of these provisions would often be defeated.

The scheme of the Act is to give the initiative in the first place to the county council, and the Minister has himself no power of initiating changes at all, save in so far as they are modifications of something proposed by the county council, except in the special case dealt with by sub-s. (5), where the county council have refused to make any proposal at all. It seems to me obvious that there must be cases where the result of the decision of the Minister on some of the proposals may seriously affect the rest of the proposals upon which he has not finally made up his mind, and it is quite right and proper that the Minister should—indeed it would, in my judgment, make the scheme unworkable if he could not—re-submit the remaining proposals to the county council for them to re-consider in the light of the decisions at which the Minister has already arrived.

But quite apart from the question being affected by former decisions, it seems to me that it is within the ordinary scope of the powers of anybody who is asked to assent to and approve of a proposal to say:

> "In the present form I am doubtful whether I could accept it, I think some changes ought to be made. You are the authority for eventually deciding what changes shall be made, and I ask you to consider whether or not you can make a revised proposal."

The county council are not in the least bound to accept the suggestion made by the Minister, and in fact in this case they did not accept his suggestion, but made another, and what eventually turned out to be a better, suggestion, because it was approved by the Minister. That appears to me to be well within their powers.

I entirely agree with what was said by the LORD CHANCELLOR on the question of review. There seems to me to be no question here of a second review of the circumstances. That was not necessary. That had been held with the necessary conferences, and this was merely a question of making further proposals. It appears to me that the county council acted entirely within their powers. And be it remembered that there is no grievance that can be suggested by anybody in respect of it, because all the formalities were gone through in respect of these new proposals which would have been gone through originally if these had been the original proposals made by the county council and they had been in the first place accepted by the Minister.

In these circumstances, it appears to me that the Minister has acted well within his powers and that there is no reason for granting any of the writs asked for.

LORD RUSSELL.—I find myself in complete agreement with the views expressed both by the LORD CHANCELLOR and by my noble and learned friend LORD ATKIN, and I concur in the motion proposed that these appeals be dismissed.

LORD MACMILLAN.—In concurring, as I do, in the judgment which your Lordships propose to adopt, I should like to associate myself with what my noble and learned friend LORD ATKIN has said in pointing out that the decision of this House is not to be taken as depending, as the judgments in the courts below appear to have to some extent depended, upon minimising the nature of the steps which were taken by the Minister. It is consolatory—if any consolation be needed—that the substance of the law has been complied with in the proceedings which are now challenged. The proposals which have been dealt with by the Minister are proposals of the county council, which is the proper body to promote proposals. An opportunity has been given to the local authorities affected to object, and an inquiry has been held into the whole question at which both the promoters (the county council) and the objectors (the various local authorities concerned) have been heard. Therefore, the requirements of the statute, which are designed to ensure that no order shall be made until all parties have been heard and full investigation has been made, have in this case been satisfied. The objections which have been taken, and which have been placed before your Lordships so clearly by counsel for the appellants, are objections to the procedure. It is said that the procedure prescribed by the statute has not been precisely followed. I hope I have appreciated the criticisms which counsel has made, and, while I think they are criticisms of some importance, I am not satisfied that any of them go to the substance of what the statute has prescribed, and, in my opinion, none of them is of such a character as to justify your Lordships in interfering with what has been done.

On one of the matters, namely, the question of date, s. 46 of the Act, in sub-s. (1), requires that proposals should be brought forward "before the first day of April, 1932, or such later date as the Minister may in any case allow." The statute has not prescribed the manner in which the Minister is to allow an extension of time, and I think that in this case the Minister of Health must be assumed to have in effect allowed an extension of time. I am bound to say, for my own part, however, that when a statute prescribes that something is to be done by a specified date or a later date if allowed, the proper course, when it is done by a later date, is to draw attention to the fact that it is a belated proceeding, and that the statute has been considered and the allowance of time has been given. In the present case I am sure that the prescribed date, April 1, 1932, must have been fully in the minds of the Minister and those advising him, and that they must have been well aware that what had taken place had taken place subsequently to that date. I, therefore, think that in effect he must be taken to have granted an extension of time, but I think it would be preferable that in such a case the matter should be dealt with expressly rather than left to implication so as to give rise to arguments such as have been submitted to your Lordships to-day.

With those observations I concur in the motion about to be put from the Woolsack.

Appeal dismissed.

Solicitors: *T. A. Capron & Co.*; *Solicitor to the Ministry of Health*; *Sharpe, Pritchard, & Co.*, for *E. S. Holcroft*, Clerk to Essex County Council.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

B. *v.* B.

[Probate, Divorce and Admiralty Division (Sir Boyd Merriman, P., and Bucknill, J.), February 1, 1935]

[Reported [1935] P. 80; 104 L.J.P. 25; 152 L.T. 419; 99 J.P. 162; 79 Sol. Jo. 216; 33 L.G.R. 182; 30 Cox, C.C. 204]

Justices—Husband and wife—Desertion—Constructive desertion—Charge against husband of perverse practices—Need of corroboration.

The substance of a wife's case in support of her summons for a maintenance order on the ground of her husband's desertion was that he had been guilty of an abnormal sexual practice which had adversely affected her health and compelled her to leave him. The magistrates found that the wife's evidence as to the alleged perverse acts of the husband was not corroborated and they dismissed the summons.

Held: the court demanded that when a matrimonial offence was alleged the evidence of the spouse making the charge should, if possible, be corroborated, and not least with regard to such matters as those raised in the present case in relation to which one spouse would be so easily at the mercy of the other since the acts alleged by their nature must happen in private, but the necessity for corroboration was not an absolute matter of law; magistrates should direct themselves, just as a judge should direct a jury, that it was safer to have corroboration, but when the warning had been given, and in the fullest form, there was no rule of law to prevent the tribunal from finding the matter proved in the absence of corroboration; the magistrates in the present case were right in directing themselves that they ought to be very careful not to find the equivalent of cruelty for the purposes of constructive desertion unless they could see some corroboration of the wife's evidence; and, with full consideration of what the real points were, they had rightly come to the conclusion that the wife had not made out a case of desertion.

Notes. Considered: *Davidson* v. *Davidson*, [1953] 1 All E.R. 611.

As to corroboration of evidence of acts of cruelty, see 12 Halsbury's Laws (3rd Edn.) 276 et seq., and for cases, see 27 Digest (Repl.) 309, 697.

Case referred to:

(1) *Statham* v. *Statham*, [1929] P. 131; 98 L.J.P. 113; 140 L.T. 292; 45 T.L.R. 127; 72 Sol. Jo. 847, C.A.; 27 Digest (Repl.) 294, *2394*.

Appeal from an order made by the Leicester city justices, dismissing a wife's summons for a maintenance order issued on the ground of desertion.

The wife issued her summons on Aug. 1, 1934. At the hearing she said that her real cause of complaint was a perverted sexual practice by her husband. At the beginning of 1934 she went to hospital for nervous debility, and returned home in February. On July 15, 1934, she and her husband had words and he struck her and told her to clear out; she then left him. A doctor who had sent the wife to hospital said that she had made a certain complaint to him, and there was a marked improvement in her condition while she was away from her husband. Another witness gave evidence of the assault in July, 1934. The husband denied the charges of perverted sexual practices, and said that his wife left him because she wanted to go to her mother. The summons was dismissed.

The wife appealed on the grounds that the decision was against the weight of evidence, and that the magistrates were wrong in holding that her evidence had necessarily to be corroborated to enable them to find in her favour.

F. L. C. Hodson for the wife.

Talbot Dyer for the husband.

SIR BOYD MERRIMAN, P.—This appeal raises a very difficult point, but I have come to the conclusion that it ought to be dismissed. The summons was for desertion, and for nothing else. In fact, the wife left the home. It was, therefore, necessary for her to show that it was the husband's conduct which had driven her out and thus to make him guilty of what is sometimes called constructive desertion. In attempting to show that it was the husband's conduct which had driven her out she relied on two things. The first I can dismiss in a sentence. She says that at the moment when she left her home her husband told her to clear out and offered physical violence. Of course, it would plainly have been open to the magistrates, if they thought that that was the real cause of her leaving, to dispose of the matter then and there upon that ground, but it is perfectly obvious from the form which their judgment took that they paid very little attention, as matter of weight of evidence, to that part of the case, and probably for the reason that the wife herself said that the real cause of complaint was that over a considerable time her husband had been guilty of unclean practices with her. It is obvious that on proper evidence it would be fully open to the magistrates to hold that such treatment would justify the wife in leaving the husband, and, indeed, would justify them in finding substantive cruelty, if such were charged, provided in the latter case, at any rate, that it was coupled with evidence that the health of the wife suffered therefrom. But, as the substance of the matter, though not the actual form of the charge, was that it was perverse acts of this sort which are said to be the cruelty of the husband which had driven her away, I think that the magistrates should look for some corroboration on the part of the wife.

The court demands that when a matrimonial offence, whatever it is, is charged, the evidence of the spouse making the charge should, if possible, be corroborated and not least with regard to matters of this sort about which, if there was not a reasonably strict rule in this respect, one spouse would be so easily at the mercy of the other in relation to things which in their nature must happen in private. But when that has been said it is admitted that the necessity for corroboration is not an absolute matter of law. Magistrates should direct themselves, just as a judge should direct a jury, that it is safer to have corroboration, but when the warning has been given, and given in the fullest form, then there is no rule of law which prevents the tribunal from finding the matter proved in the absence of corroboration.

In this case at first sight, the reasons for the magistrates' decision do look as if they had said that corroboration was required as a matter of law, but on a very full consideration of the note and the arguments on both sides I have come to the conclusion that that is not what they meant. The magistrates found that the evidence of the wife as to the alleged perverse acts of the husband was not corroborated and, therefore, that they were not satisfied that the conduct of the husband compelled the wife to leave him so as to constitute desertion. The proposition up to which they were leading is: Are we satisfied, or are we not satisfied, that it was the conduct of the husband that compelled the wife to leave him so as to constitute desertion by him? They must be assumed —because she herself paid very little attention to it—to have considered and discounted the evidence of physical violence and to have realised correctly that the case depended entirely on the question of these alleged perverse acts. It is true that, strictly speaking, *Statham* v. *Statham* (1) is no direct authority for this case, but, once it is conceded that some corroboration should be looked for, whatever is the form of cruelty alleged, the reasoning underlying the judgment in *Statham* v. *Statham* (1) applies very strongly to this class of case, though the decision itself does not directly apply. The line of reasoning which is implied throughout the whole of the judgments of Greer and Russell, L.JJ., is this: To show that the conduct complained of can only have happened, primâ facie, with the assent of the wife, one ought really to look for some corroboration, or, alternatively, she ought not to be able to make it a matter of complaint, or to come to the court to complain of something to which she herself has consented. Whichever way the thing is put, it is plain that the closest scrutiny ought to be given by magistrates to an allegation of cruelty which is based upon acts of this sort, which in turn cannot have occurred without at least the assent of the wife. In that state of things I think that the magistrates were perfectly right in directing themselves, before they were prepared on such material as they had before them to find cruelty constituting constructive desertion, that they ought to be very careful not to find it unless they could see some corroboration, not merely that certain things occurred, but that those things gave rise to a legitimate matrimonial complaint.

I do not think there was such corroboration. The only thing apart from the physical violence, with which I have already dealt, which can be said, in my opinion, to be corroboration of the wife's evidence is the doctor's evidence. The doctor, undoubtedly, does prove that when she was away from her husband she was better than when she was with him, and he also proved that some complaint, which is entirely undefined, was made, and that her nervous condition at the time when that was made was consistent with the nature of the complaint. That certainly is evidence which provides a necessary step in proving the allegation of cruelty in so far as this case depends on cruelty generally, but as corroboration of the wife's evidence that the husband was guilty of the grosser sort of conduct, in my opinion, it comes nowhere near corroboration. I am not going to discuss now the interesting question whether or not a statement made to the doctor that the husband had done this, that, or the other would have been admissible as corroboration. It is sufficient to say in this case that no such evidence was tendered or given. We are told nothing whatever about what the nature of the complaint was, and, therefore, though the doctor's evidence is relevant on the question of health and injury to health, it is no evidence whatever implicating the husband in relation to the alleged gross acts. Therefore, if corroboration was necessary, I think the magistrates were right in saying that there was none. They do not in fact found their judgment on what I think is the even stronger alternative ground, that there is no real evidence that it was this sort of conduct which so affected the wife as to drive her from home. Although I admit, as I have already said, that at first sight their judgment may appear to contain a misdirection of themselves, I am satisfied that in substance they have not misdirected themselves at all. I think they approached this case with full consideration of what the real points were, and, having heard both the husband and the wife, they came to the conclusion, as I think rightly, that the wife had not made out a case that the husband had deserted her.

BUCKNILL, J.—I agree. If I construed this decision of the magistrates as meaning that they thought they were bound to dismiss the summons because there was no corroboration, I should certainly think that the case should be remitted to them, but I do not read it in such a way, for two reasons. First of all they refer to *Statham* v. *Statham* (1). I presume that they or the clerk were well acquainted with the reasoning in that case, and, so far as I read it, I cannot find anywhere in the judgments of the lords justices that there is a legal or statutory necessity for corroboration, even in the case of sodomy, and so far as the other sexual acts which are referred to there, I do not think the matter of corroboration is even referred to. Secondly, the magistrates say that they are not satisfied that the conduct of the husband compelled the wife to leave him. If they dismissed this summons because they felt that they were bound to dismiss it as a matter of law for want of corroboration, I do not think they would have used the word "satisfied." In my view, they weighed all the evidence, they saw the two witnesses—the husband and the wife—and they came to the conclusion that it would be unsafe in the absence of corroboration to find that these acts had been committed. For these reasons I agree with the President that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Woolley & Whitfield*, for *Maurice E. Pick*, Leicester; *Peacock & Goddard*, for *Edwards & Frisby*, Leicester.

[*Reported by* WILLIAM LATEY, ESQ., *Barrister-at-Law.*]

STEVENSON *v.* FULTON

[KING'S BENCH DIVISION (Lord Hewart, C.J., Humphreys and Singleton, JJ.), October 29, 1935]

[Reported [1936] 1 K.B. 320; 105 L.J.K.B. 167; 154 L.T. 162; 99 J.P. 423; 52 T.L.R. 89; 80 Sol. Jo. 75; 34 L.G.R. 26; 30 Cox, C.C. 293]

Official Secrets—False information—Furnished by user of accommodation address—Liability to conviction—Official Secrets Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 75), *s.* 5 (4).

The offence of furnishing false information, contrary to s. 5 (4) of the Official Secrets Act, 1920, may be committed by a person using an accommodation address, and the subsection is not confined in its ambit to offences committed by persons carrying on the business of receiving for reward letters at such addresses.

Notes. As to offences under the Official Secrets Acts, see 10 HALSBURY'S LAWS (3rd Edn.) 604 et seq., and for cases, see 15 DIGEST (Repl.) 805; 37 Digest 376. For Official Secrets Act, 1920, see 5 HALSBURY'S STATUTES (2nd Edn.) 1046.

Case Stated by a metropolitan police magistrate.

An information was preferred at Bow-street magistrate's court by Leonard Stevenson, a police officer (hereinafter called the appellant), against Albert Raymond Clarence Fulton (hereinafter called the respondent), charging that the respondent, on July 5, 1934, gave false information to the keeper of an accommodation address registered for the receipt of letters, contrary to s. 5 (4) of the Official Secrets Act, 1920.

At the hearing it was proved or admitted that on July 5, 1934, the respondent called at 57, St. Martin's-court, W.C.2, an accommodation address registered for the receipt of letters under s. 5 (1) of the Act, and asked that letters might be received there on his behalf. On being asked by the proprietor of the business to write his name and address in the register kept for that purpose, he wrote the words "Norman Blake, 46, Windermere-road, Southall." There was no such number as 46, Windermere-road, Southall. On Sept. 28, 1934, and Nov. 8, 1934, the respondent called at Rays Agency, in Cecil-court, Charing Cross-road, and filled in a form for an advertisement in the *Daily Telegraph*, giving, in each case, a false name and address. The advertisement appeared in the *Daily Telegraph* on Nov. 9, 1934, and forty or fifty replies were received. On Nov. 22, 1934, the appellant, who was keeping observation near 37, St. Martin's-court, saw the respondent leave number 37 and asked him: "At what address are you living?" The respondent's answer was: "At 71, Delaware-mansions, Maida Vale." In fact, the respondent had lived at that address for the past two years.

The question at issue was whether s. 5 (4) of the Official Secrets Act, 1920, applied only to keepers of accommodation addresses for the receipt of postal packets or also to a person giving false information to such a keeper. On the part of the appellant it was contended that the words of the subsection were wide enough to include any person giving false information to the keeper of such a business. On the part of the respondent it was contended, in view of the fact that the marginal note to s. 5 is: "Registration and regulation of persons carrying on the business of receiving postal packets," and that sub-ss. (1), (2), and (3) dealt exclusively with the duties of persons carrying on the business of receiving postal packets and chief officers of police and in no way regulated the conduct of persons who used any such business by having their correspondence addressed thereto, that the marginal note referred to the whole of the section and that sub-s. (4) could only apply to persons carrying on any such business.

The magistrate held that the opening words of s. 5 (4), "fails to comply with any of the provisions of this section," were inappropriate to the imposition of a penalty except on one of the class specified in sub-ss. (1) and (2), i.e., accommodation address keepers, and that the succeeding words in sub-s. (4), "furnishes any false information or makes any false entry," being unaccompanied by any words as to whom the information should be given, and about what, were not sufficiently precise to justify the imposition of a penalty on any member of the public under an Act, which appeared to contemplate offences committed by a particular class only. He, accordingly, dismissed the information.

The appellant appealed to the Divisional Court. A

By s. 5 (1) of the Official Secrets Act, 1920:

> "Every person who carries on . . . the business of receiving for reward letters, telegrams, or other postal packets for delivery or forwarding to the persons for whom they are intended, shall as soon as may be send to the chief officer of police for the district, for registration by him, notice of the fact together with the address or addresses where the business is carried on, and the chief officer of police shall keep a register of the names and addresses of such persons. . . ." B

Sub-s. (2): "Every person who carries on such a business as aforesaid shall cause to be entered in a book kept for the purpose the following particulars: (*a*) the name and address of every person for whom any postal packet is received, or who has requested that postal packets received may be delivered or forwarded to him . . . and shall not deliver a letter to any person until that person has signed a receipt for the same in such book as aforesaid. . . ." C

Sub-s. (3): "The books so kept and all postal packets received by a person carrying on any such business, and any instruction as to the delivery or forwarding of postal packets received by any such person, shall be kept at all reasonable times open to inspection by any police constable." D

Sub-s. (4): "If any person contravenes or fails to comply with any of the provisions of this section, or furnishes any false information or makes any false entry, he shall be guilty of an offence under this Act. . . ."

By s. 7: "Any person who attempts to commit any offence under . . . this Act, or solicits or incites or endeavours to persuade another person to commit an offence, or aids or abets and does any act preparatory to the commission of an offence under . . . this Act, shall . . . be liable to the same punishment, and to be proceeded against in the same manner, as if he had committed the offence." E

Mervyn Griffith-Jones (*Christmas Humphreys* with him) for the appellant.

L. A. Byrne for the respondent.

LORD HEWART, C.J.—This is a Case stated by one of the magistrates of the police courts of the metropolis, and it raises a somewhat interesting point. The question is whether the words in s. 5 (4) of the Official Secrets Act, 1920: "or furnishes any false information" are wide enough to cover the act of a person who, in order to make use of what is called an accommodation address, gives to the person carrying on that business false information as to his actual name and address. F

On various occasions the respondent gave false names and addresses to be registered in order that he might afterwards collect letters or postal packets, concealing his own identity. It is said by the magistrate that, in his opinion, to bring such a person within the net of furnishing any false information within the meaning of s. 5 (4), would be to give an unduly wide interpretation to that subsection. He was of the opinion that the Act of Parliament contemplated offences committed only by a particular class—that is to say, by the keepers, as distinguished from the mere users, of accommodation addresses. With all due respect to the magistrate, I cannot help thinking that he has taken too narrow a view. He seems to have been misled to some extent by the words of the marginal note: "Registration and regulation of persons carrying on the business of receiving postal packets." G H

That marginal note, however, is no more than a label, which shows the subject-matter that is being dealt with in the section, and, if one looks at the scheme of the section, I think that it is tolerably plain that the magistrate came to a wrong conclusion. Sub-s. (1) of the section begins with the expression: I

> "Every person who carries on . . . the business, &c., &c."

Sub-s. (2) begins with the expression:

> "Every person who carries on such a business as aforesaid, &c."

In the course of those two subsections and in the words which follow other persons are mentioned, and in particular

> "every person for whom any postal packet is received, or who has requested that postal packets received may be delivered or forwarded to him."

It is after the section has used those expressions that sub-s. (4) provides, inter alia, that if any person furnishes false information he shall be guilty of an offence. That must mean not every person who carries on such a business, but any person who furnishes false information with reference to the matters therein treated.

I think that the view which the magistrate has so well expressed fails to give sufficient effect to what seems to me to be the clear antithesis between the expression "every person who carries on such a business" and the expression "any person," especially as those words "any person" follow an enumeration of persons including others than the person carrying on the business.

It was argued by counsel for the respondent that, if the magistrate's view is correct, it does not follow that a person who by falsehood is able to conceal his identity when he is seeking the accommodation here being described would go scot free. It was said that by a proper interpretation of at least one other section in this Act he might be rendered liable. I am not sure of that, and I decide nothing about it. Least of all is it necessary to decide whether a person who makes a false entry in his book must, if he is to be guilty of an offence, make it with knowledge of falsity. It may be that some day that question will have to be considered, but I do not think it arises to-day. It seems to me that, upon the plain words of this subsection, accentuated by contrast with other words appearing in the other subsections of the section, the respondent does come within the mischief which is covered by the Act. He furnished false information of the most vital and fundamental character, because all the inquiries which this section is intended to facilitate would be rendered nugatory if, although a register proper in form were kept, the register consisted in fact not of true names and addresses, but of names and addresses deliberately falsified.

With all due respect to the magistrate, who has evidently considered this matter with great care, I think that his conclusion on the point of law was wrong, and that the words "furnishes any false information" are wide enough, and at the same time precise enough, in this context, to cover the offence which was charged. I think, therefore, that this appeal ought to be allowed and the case will go back to the magistrate with a direction that the offence which was charged was proved. I have deliberately refrained from entering into some other matters which are of interest, but which do not appear to me to be necessary to the decision of this case.

HUMPHREYS, J.—I also think that the magistrate was wrong in the view which he took of the words "furnishes any false information," in s. 5 (4) of the Official Secrets Act, 1920, on the ground advanced by Mr. Griffith-Jones, that there is no good reason why those plain words should not be given their plain meaning in the construction of this subsection.

Counsel for the respondent says:

> "I admit that, if the result of my argument is that the legislature has not provided any penalty for the person who is the fons et origo of the trouble created by the giving and recording of false particulars with regard to the keepers of accommodation addresses and the persons who use them, my argument must fail, but the legislature must be taken not to have intended, in using the words 'any person who furnishes any false information,' to deal with anyone except the keeper of an accommodation address, because it has dealt elsewhere with the person who gives false information to the keeper of an accommodation address and thereby causes something to be done which will eventually result in false information being given to a police officer, who has the right to inspect the books under s. 5 (3)."

His argument amounts to this, that the person who gives false information about himself—that is to say, a false name and address—makes a false entry in the book. He says that person makes a false entry because he intentionally causes a false entry to be made, and those are the appropriate words, he says, which deal with the person who gives false information.

It seems to me to be a very elaborate method of dealing with such a person, who clearly and ex concessis must have been intended to be dealt with by Parliament. I respectfully agree with my Lord that it is not necessary to decide in this case whether it is or is not possible to deal in some other way with a person who gives false information, but, however that may be, I myself cannot think that that is a good reason for attributing any other than their ordinary meaning to these perfectly simple words.

In my view, the plain meaning of s. 5 is this. Sub-s. (1) requires of the person who keeps an accommodation address particulars of himself and his business. Sub-ss. (2) and (3) require that such a person shall enter particulars as to the persons who use his business premises, and in sub-s. (4), which is the only part of this section dealing with penalty, I think that each of those classes of persons is dealt with in quite appropriate language. While it is quite true the first words,

> "If any person contravenes or fails to comply with any of the provisions of this section,"

deal only with a person who carries on the business, in my view, the next words

> "or furnishes any false information"

are intended to be and certainly are wide enough to bring into the ambit of the subsection the person who does that which the respondent has admittedly done—that is to say, gives false information with regard to the matters dealt with by this section.

For those reasons I agree with the judgment of my Lord and I think that this case ought to go back to the magistrate with the intimation that he has taken a wrong view of the law, and that on the facts stated by him the respondent should have been found to have committed the offence charged against him.

SINGLETON, J.—I agree that on the facts as stated the offence charged under s. 5 (4) of the Official Secrets Act, 1920, was committed.

Appeal allowed.

Solicitors: *Wontner & Sons*; *Freke Palmer, Romain, & Romain.*

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

FISHENDEN *v.* HIGGS AND HILL, LTD.

[Court of Appeal (Lord Hanworth, M.R., Romer and Maugham, L.JJ.), May 14, 15, 20, 21, 22, 1935]

[Reported 153 L.T. 128; 79 Sol. Jo. 434]

Easement—Light—Obstruction—Question of fact—Sufficiency of light—Test—Relevance of locality—Desirability of calling in court expert—R.S.C., Ord. 37A, *r.* 1.

Whether the privation of light is sufficient to render the occupation of premises uncomfortable and less beneficial than it has formerly been is a question of fact to which persons who have to determine it must apply the sort of reasoning which would be applied by a jury.

In all cases relating to nuisance the question of locality must be taken into consideration, but in cases of nuisance by obstruction of light the question of locality is much less important than in cases relating to other nuisances. In deciding whether a supply of light is sufficient for the ordinary occupations of life, domestic or concerning business, the test to be applied is, not the precise amount which neighbouring premises have got, but what a reasonable person would expect. Such a person would not expect, e.g., as much light in a town as he would get in the country.

Observation of Maugham, L.J., on the desirability of calling in a court expert to inquire and report to the court on any question of fact under R.S.C., Ord. 37A in cases relating to obstruction of light.

Injunction—Easement—Interference—Where damages awarded in lieu of injunction.

In *Shelfer* v. *City of London Electric Lighting Co.* (1), [1895] 1 Ch. 287, at p. 322, A. L. Smith, L.J., said that it might be stated as a good working rule that if, in a case of nuisance, the injury to the plaintiff's rights was small and was one which was capable of being estimated in money, and could be adequately compensated by a small money payment, and the case was one in which it would be oppressive to the defendant to grant an injunction, damages might be given in substitution for an injunction.

While the court will grant damages in lieu of an injunction where those four conditions are satisfied, it will not necessarily grant an injunction in a case in which those conditions do not prevail. In every case, even though the conditions laid down by A. L. Smith, L.J., are not to be found, the court has a discretion, having regard to all the circumstances of the case, which it can exercise in the matter.

In the present case, there being really a question whether the obstruction of light by the defendants was legal or not, and the defendants not having acted unfairly or in an unneighbourly spirit, and the plaintiff's conduct in limiting his earlier complaints to one part of the building in erection by the defendants as distinct from the whole building of which he complained later being such as to render it unjust that he should receive more than pecuniary relief,

Held: the case was one for an award of damages and not an injunction.

Notes. As to right to light, see 12 Halsbury's Laws (3rd Edn.) 582 et seq., and as to injunction, see 18 Halsbury's Laws (2nd Edn.) 20–24, and for cases, see 19 Digest 123 et seq., and ibid., vol. 28, 415–417.

Cases referred to:

(1) *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287; 64 L.J.Ch. 216; 72 L.T. 34; 43 W.R. 238; 11 T.L.R. 137; 39 Sol. Jo. 132; 12 R. 112, C.A.; 19 Digest 186, *1356*.

(2) *Sheffield Masonic Hall Co., Ltd.* v. *Sheffield Corpn.*, [1932] 2 Ch. 17; 101 L.J.Ch. 328; 147 L.T. 474; 48 T.L.R. 336; Digest Supp.

(3) *Davis* v. *Marrable*, [1913] 2 Ch. 421; 82 L.J.Ch. 510; 109 L.T. 33; 29 T.L.R. 617; 57 Sol. Jo. 702; 19 Digest 125, *833*.

(4) *Colls* v. *Home and Colonial Stores, Ltd.*, [1904] A.C. 179; 73 L.J.Ch. 484; 90 L.T. 687; 53 W.R. 30; 20 T.L.R. 475, H.L.; 19 Digest 124, *830*.

(5) *Back* v. *Stacey* (1826), 2 C. & P. 465, N.P.; 19 Digest 134, *911*. A
(6) *Parker* v. *Smith* (1832), 5 C. & P. 438, N.P.; 19 Digest 135, *912*.
(7) *Fishmongers' Co.* v. *East India Co.* (1752), 1 Dick. 163; 21 E.R. 232, L.C.; 19 Digest 134, *905*.
(8) *Horton's Estate, Ltd.* v. *Beattie, Ltd.*, [1927] 1 Ch. 75; 96 L.J.Ch. 15; 136 L.T. 218; 42 T.L.R. 701; 70 Sol. Jo. 917; Digest Supp.
(9) *Jolly* v. *Kine*, [1907] A.C. 1; 76 L.J.Ch. 1; 95 L.T. 656; 23 T.L.R. 1; 51 Sol. Jo. 11, H.L.; 19 Digest 138, *932*. B
(10) *Hammerton* v. *Dysart*, [1916] 1 A.C. 57; 85 L.J.Ch. 33; 113 L.T. 1032; 80 J.P. 97; 31 T.L.R. 592; 59 Sol. Jo. 665; 13 L.G.R. 1255, H.L.; 19 Digest 54, *299*.
(11) *Slack* v. *Leeds Industrial Co-operative Society, Ltd.*, [1924] 2 Ch. 475; 94 L.J.Ch. 46, C.A.; Digest Supp.
(12) *Aynsley* v. *Glover* (1874), L.R. 18 Eq. 544; 43 L.J.Ch. 777; 31 L.T. 219; 39 J.P. 36; 23 W.R. 147; 19 Digest 189, *1408*. C
(13) *Wells* v. *Ody* (1836), 1 M. & W. 452; 7 C. & P. 410; 5 Dowl. 95; 2 Gale, 12; Tyr. & Gr. 715; 5 L.J.Ex. 199; 150 E.R. 512; 19 Digest 135, *914*.
(14) *Clarke* v. *Clark* (1865), 1 Ch. App. 16; 35 L.J.Ch. 151; 13 L.T. 482; 30 J.P. 20; 11 Jur. N.S. 914; 14 W.R. 115, L.C.; 19 Digest 136, *918*.

D

Appeal from an order of CROSSMAN, J.

The following statement of the facts is taken from the judgment of CROSSMAN, J.:

The claim the plaintiff makes in this action is for an injunction restraining the defendants their officers agents servants and workmen from erecting or continuing to erect any buildings in or near Chesterfield Gardens in the city of Westminster, so as to cause a nuisance or illegal obstruction to the plaintiff's ancient lights in No. 8, Chesterfield-gardens, as the same existed before the pulling down by the defendants of the buildings known as Chesterfield House in the city of Westminster. That, I think, is the ordinary form in which an injunction is framed for interference with ancient lights by reason of putting up one building in substitution for another. The plaintiff further asks for a mandatory order on the defendants "to pull down and remove so much of the new building erected by them in or near Chesterfield-gardens as causes such a nuisance obstruction or interference as aforesaid." E F

The plaintiff is the leaseholder of No. 8, Chesterfield-gardens, and he holds the property under a lease of Dec. 24, 1930, by which the property was demised to him for a period of thirty-five years from Christmas, 1930, at a rent of £1,500 a year. There was no premium paid for the lease, but he enters into a strict repairing covenant and he also covenants that he will submit to the lessor's surveyor provisional plans and specifications of the works proposed to be done in adapting the premises as flats or servants' quarters, and there is a provision that upon the completion of the works to the satisfaction of the lessor or his surveyor at a cost of approximately £5,000, the lessor will pay to the lessee the sum of £750 towards the cost thereof. The lease is determinable by the lessee at the end of the twenty-first or the twenty-eighth years of the term, so that at the present moment he has got this property on his hands for a period of at least twenty-one years from Christmas, 1930, and has to pay a rent of £1,500 a year for it. Chesterfield-gardens is a cul-de-sac running north from Curzon-street, Mayfair, in London, and the plaintiff's house is the northernmost house on the east side of Chesterfield-gardens. The whole of the west side of the street was formerly occupied by Chesterfield House. The defendants have recently demolished Chesterfield House, and they are in course of erecting, and it is not disputed that they propose to erect, subject to their being restrained by the court, on the site of Chesterfield House, a large building considerably higher than Chesterfield House which formerly stood there. I think it is admitted, that the northernmost part of Chesterfield House opposite to the plaintiff's house was 55 ft. from the plantiff's house and that it was 34 ft. to 47 ft. high—in fact, I understand, it was the stables of Chesterfield House, and was a great deal lower than the rest of the premises. The rest of Chesterfield House was 104 ft. from the plaintiff's house, and was 47 ft. to 69 ft. high. What the defendants are proposing to do is to erect a building, in fact it is a projecting wing, which is 26 ft. 6 in. G H I

A wide, and which projects 32 ft. 6 in. forward on the northernmost part of the site, 59 ft. from the plaintiff's house, and to a height of 80 ft. On the rest of the site of Chesterfield House they are erecting a building which will be 97 ft. high approximately, at a distance of roughly 92 ft. from the plaintiff's house. The defendants have already put up eight storeys of ironwork, and three storeys have got their floors put in, and one storey, I think, has the front already filled in.

B In the plaintiff's house, the plaintiff lives himself in a flat on the ground floor, and he tells me in evidence that in the last few weeks, he has had to use artificial light to eat his lunch, though formerly he could do so by daylight. He also tells me that he now has to turn on the light in his room on the ground floor on the south side of the house an hour earlier in the afternoon than he did when Chesterfield House was standing. He also tells me that in the room on the other side on the ground floor, which is in fact C occupied by the Chesterfield Salon Club, Ltd., as his tenant, and is known as the Chesterfield Salon, the darkness has become very noticeable during the last few weeks. He also tells me that the entrance hall, which lies between these two rooms, has been darkened during the same period, and that in the first floor south room, that is to say, the room immediately over the room in which he lives himself, there is a "sort of darkening," which is the phrase that he used. The other person who has lived in the house and who D has given evidence before me, is the plaintiff's manager, Mr. Harold Grainger, who lives in the north room in the basement of the house, that is to say. He and his wife use that as a bed-sitting room, and it is also where he does his office work in connection with the management of the house, the rest of the house being let in flats. Mr. Grainger tells me that in the last few weeks, that is to say, with the defendants' building only gone up to its present extent, which is three storeys only with floors put in and one E storey only with the front put in—in his basement room he cannot write at his desk without artificial light, though he could do so before, and that the room was formerly very well lit. In fact he describes it, in his view, I think, as one of the best basements in London, as it was in its former state. He also tells me that he requires artificial light at the west end of the room, that is to say, the part of the room furthest away from the window, and that when he is sitting by the fireplace, he cannot use that part F of the room without artificial light. With regard to the room on the south side of the basement, which is occupied as a dormitory by the plaintiff's staff of servants, Mr. Grainger says that during the last few weeks that the building has gone up, there has been a perceptible difference in the light of that room. He also says that the hall lights in the hall on the ground floor have to be put on an hour earlier, and in the first floor room, called the study, he confirms what the plaintiff says, that there is a G marked difference.

All the windows in these two rooms in the basement and the windows in the two rooms on the ground floor, that is to say, the plaintiff's sitting room and the Chesterfield Salon, and I think the windows on the upper floor as well, are admitted to be ancient lights. The only windows in the house which are not admitted to be ancient lights and facing Chesterfield-gardens, are the fanlight and panels over and in the front H door, and I am not prepared to find these excepted lights are ancient lights.

Further evidence before me is the evidence of Mr. Douglas Yates Pitts, who is an architectural expert on the question of lighting to buildings. He says that for a room to be adequately lighted, at least half of the room should be within what is known technically as the grumble point, that is to say, a point having 1/250th of the light available on the unobstructed windowsill. Plans have been put before me which I contain contour lines which show, first, the parts of the rooms within the grumble line, that is to say, the parts of the rooms adequately lighted when the old building was up. Secondly, they show the parts which will be left within the grumble line when the proposed building is completed, and, thirdly, the parts which would be left within the grumble line when not only the proposed building is completed, but if and when the buildings on the north side of the plaintiff's house are built up to a height to which they could legally be built up in accordance with the decision of MAUGHAM, J., in *Sheffield Masonic Hall Co.* v. *Sheffield Corpn.* (2). Those figures which are agreed—and the principles upon which I understand they are agreed are accepted—are these, that taking the basement rooms, the part of room No. 1 (which is the room occupied by the staff) which was adequately lighted when Chesterfield House was originally standing there, was 34·5 per cent., and when the defendants' buildings are completed, the amount of the adequately lighted part of that room will be 16·1 per cent.; and in the third event, if and when the buildings to the north are erected, it would be reduced to 10·9 per cent. In room No. 3, which is the Graingers' room, they began with 39·9 per cent. when Chesterfield House was standing there, and it drops to 21 per cent. when the defendants' building is completed, and 14·9 per cent. if and when the buildings to the north are completed. As regards the ground floor rooms, room No. 4, the plaintiff's room which he occupies himself, the originally adequately lighted part is 38·8 per cent., and that will be reduced to 23·6 per cent., and further reduced, when the buildings to the north are put up, to 19 per cent. As regards room No. 6, which is the Chesterfield Salon, the originally adequately lighted part was 63 per cent.; that will be reduced to 38 per cent., and it may ultimately be reduced to 25 per cent. The only other room which I need mention at present is the first floor room to the south, No. 7, of which the originally adequately lighted part was 71·6 per cent. of the room, and that will be reduced to 40·15 per cent. when the defendants' building is completed. As I understand the evidence, the defendants admit that their building will cause a substantial diminution of the light in the plaintiff's rooms.

The plaintiff's witness, Mr. Pitts, says that when the defendants' building is completed, the rooms in the basement will be insufficiently lighted for ordinary business and domestic purposes. Mr. Waldram, who was the expert who gave evidence on behalf of the defendants, said that the proposed building would affect the plaintiff's lights, and would create a serious nuisance—meaning nuisance in the popular sense, and not a legal sense—to the plaintiff's rooms.

CROSSMAN, J., held that the admitted diminution of light which would be caused by the obstruction was such as to cause an actionable nuisance, and he granted the injunction claimed. The defendants appealed.

Wilfrid Greene, K.C., and *Andrew Clark* for the defendants.

Gavin T. Simonds, K.C., and *T. Cunliffe* for the plaintiff.

The arguments appear in the judgments.

LORD HANWORTH, M.R.—This appeal is brought from a decision of CROSSMAN, J., who heard the action during a number of days, when matters were presented to him in respect of a claim by the plaintiff to restrain the building by Messrs. Higgs and Hill, Ltd., of a large block of flats on a site where there used to stand Chesterfield House, which is at the bottom of South Audley-street, and in the neighbourhood of Park-lane.

The action was brought by Mr. Reginald Charles Fishenden, who is the lessee under a lease of No. 8, Chesterfield-gardens, which was granted on Dec. 24, 1930, for a term of thirty-five years from Dec. 25, 1930, at a rent of £1,500 a year clear of all deductions, and in addition the lessee undertook to spend a sum of not less than £5,000 on certain alterations which were to be made upon the site. As a matter of fact he spent as much as £8,000, and at the time when the action was brought, in January of this year, there still remained, broadly, thirty years of his lease unexpired. The interest, therefore, of the plaintiff is as lessee of No. 8, Chesterfield-gardens. Chesterfield-gardens is a cul-de-sac which stands on the east side of the site of Chesterfield House, and there are some considerable and important houses built in Chesterfield-gardens. The plaintiff himself has made use of the premises by occupying the southerly room on the ground floor. The northerly room on that floor is let to a club. In his basement there are rooms which are used, in particular by what I may call the manager of the flats and his wife.

The plaintiff claimed an injunction to restrain the defendants from erecting or continuing to erect a new building which would in any way cause a nuisance by the interruption of the plaintiff's light to which he was entitled, it being without question that the plaintiff has a right to ancient lights in his premises. CROSSMAN, J., granted an injunction, mandatory in form, which did not condescend into actual particulars, requiring the defendants to remove so much of their building as should interfere with or constitute a nuisance or obstruction or interference with the plaintiff's rights of light.

I think it is very important that I should state some of the facts relating to these premises, for it is upon an appreciation of the facts and to those facts that one has to apply the rules laid down in numbers of cases which deal with ancient lights. Chesterfield House stood in what may be called its own grounds, and was set back some distance from the margin of the grounds. There were a series of steps down from it to what I may call a garden or courtyard, and that courtyard was, I think, something like 10 ft. or 15 ft. back from the eastern margin of the site. The house was, in the main, a square house, but it had adjuncts to it which were not raised to the same height as the main building. Chesterfield-gardens was a cul-de-sac, and at the north end of it it was closed by some buildings which are approached from another street, and part of those buildings which are on the other side of the cul-de-sac was a certain "Red Lion" public-house which, at the present moment, does not seriously obstruct the light to Chesterfield-gardens, but it stands upon a site upon which there could be a larger building built if it was required to do so. As I have said, the plaintiff's right to ancient lights is not disputed, nor is it disputed that there will be some interference by the proposed building to the light which will reach the plaintiff's premises. The learned judge held there had been proof given that the ground floor and the basement did suffer, and would suffer, a nuisance by reason of the diminution of the light, but with regard to the rooms on the first and second floors he held that there was no nuisance proved or intended. The learned judge came to the conclusion that it was a case in which he ought to grant an injunction. Upon that part of the case it is important to see what the conduct of the defendants has been. The learned judge found in his judgment that the defendants acted honestly on what they thought to be their rights. It is important from the point of view of the defendants that that should be quite clearly stated and definitely appreciated.

Before the action was brought certain correspondence took place between the plaintiff's advisers and those who represented the defendants, and there are one or two letters in the bundle of correspondence to which I must call attention. The advisers to the plaintiff wrote as early as April 6, 1934, to Messrs. Higgs and Hill on the subject of the complaints, and I need not dwell upon so early a date as that. But when we come to July, 1934, the parties get into touch and the plaintiff asks for particulars of the proposed building. On July 12, Messrs. Burnett and Eprile, who were acting on behalf of the defendants, wrote this to the owner of 8, Chesterfield-gardens:

> "Clients of ours have under consideration the rebuilding of Chesterfield House. Although it is not anticipated that the scheme now being considered will affect the lighting of your premises to any extent that would be material, our clients have desired us to communicate with you, in common with all their neighbours, in order that you may be acquainted with their proposals in case you may be apprehensive with regard to the effect of the rebuilding upon your property. Therefore, if you would care to put your architect in touch with us we should be glad to show him the plans of the proposed building, and as our clients are responsible for raising the question of the effect of their proposals, they desire to be allowed to consider themselves also responsible for the reasonable charges of your architect in the matter, even though, as they contemplate, his opinion will be that your light will not be materially affected in any way. If you are not the freeholder of the premises we would be very obliged if you would kindly inform us as to the length of the term of your interest in them, and also the name and address of your lessors."

That is a very fair and a very honest letter. After a time it was replied to, and the parties got into touch, and on July 19 the same firm, Messrs. Burnett and Eprile, wrote to Mr. Cole, who was then acting for the plaintiff:

> "We are informed by Mr. Fishenden that you are acting for him and that he has forwarded our previous letter to you. We have now completed our diagrams showing the relationship of your client's house with the new building on the site of Chesterfield House, and I am enclosing copies of these diagrams for your information. You will note that, except for two small towers, the new building will be set back some considerable distance from the boundary line in Chesterfield-gardens,

> and that the angles of light from your client's ground floor windows will be very low having regard to the locality."

Upon that the answer of Mr. Cole, on July 26, is:

> "In my opinion my client would suffer material damage. I must ask you to consider some adjustment with regard to the projecting wing."

As matters stood then, therefore, it appeared that the defendants had been desirous of consulting the rights of the plaintiff; they had brought to his attention the fact, as it is the fact, that the main building as proposed would be set back slightly from the position occupied by Chesterfield House, and to that extent there would possibly be an improved light reaching the plaintiff's windows, and with regard to that, that is a matter which has to be taken into account, because under *Davis* v. *Marrable* (3), it has been laid down that a person who offends in the way of creating a nuisance against light is entitled to take into account in his favour any increased light that his new building provides. In the letter I have just read it is pointed out that the projecting wing is what is objected to. Broadly speaking, the plan of the new design was that there should be a main building set back slightly from the old position of Chesterfield House, but that there should be two wings on the north and south which should be advanced closer to the street which divides Chesterfield House from the houses in Chesterfield-gardens. Those projections have been called turrets and wings, and so on, but they are substantial projections from the face of the proposed new building. The breadth of the wings was 26 ft. 6 in., and the depth was 32 ft. 6 in., and one of those projections was in front of the plaintiff's windows. There was, therefore, at that point, a matter which gave concern to the plaintiff whether or not he would suffer injury. The correspondence continues, and the plans and elevations of old Chesterfield House were sent to Mr. Cole on Oct. 31. There is no doubt that for the most part the focus of the complaint which was made by Mr. Cole was in reference to the wing or turret which was in front of the plaintiff's windows, but the parties were considering what the actual position was, and I cannot, for my own part, attach any fault to the plaintiff if ultimately he asserted his whole rights, although during the previous months he had directed attention more particularly to the actual position of the projection which was contemplated. Suffice it to say, that, after this correspondence had taken place, in a proper spirit on both sides, the parties failed to come to any adjustment, and the result was that, in order to test his rights and to assert them, the plaintiff issued his writ on Jan. 19 of this year. The trial took place on March 30 and in the early days of April, when the result was reached to which I have already referred, and the defendants were ordered by a mandatory injunction to take down a part of their building and to modify their plans so as to avoid causing any nuisance to the plaintiff's lights. There was a contest before CROSSMAN, J., whether or not an injunction was the right remedy to which the plaintiff was entitled. But he determined that the injunction ought to go. From that decision the appeal is brought to this court, and it is, in form, directed alternatively to saying that the plaintiff had not proved that the proposed building when completed would cause a nuisance to the plaintiff's right to light, or that such remedy as the plaintiff may be entitled to ought to be confined to damages and not to an injunction. We have heard the matter at some length, not by any means at too great length, for it is obvious that the matters concerned are of importance to the parties, and it has been necessary to look with some care into the cases that have been decided. We have come to the conclusion and the learned judge was right in holding that there had been or was intended to be an invasion of the plaintiff's right—that the building when set up by the defendants would cause a nuisance to the plaintiff.

There have been a great number of cases decided, but we are all of us aware that when the decision was given in *Colls* v. *Home and Colonial Stores* (4) the House of Lords brought back the problem, which must always be raised in these cases, to the broad proposition, namely, whether there is a substantial deprivation of light sufficient to cause a nuisance, or, in other words, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind. It is not enough that the light is less than before; there must be an invasion of what might be called the ordinary

A rights which attach to the plaintiff as the holder of ancient lights. The House of Lords rejected what had grown up to be accepted as a rule, namely, that there ought to be a pencil of light reaching the windows at an angle of 45 deg., and they went back to the broad propositions which had been laid down by LORD HARDWICKE, and subsequently adopted in a number of cases, of which perhaps the best illustration was that in *Back* v. *Stacey* in 1826 (5), when there was a summing up by BEST, C.J., which was held to be
B right, and also *Parker* v. *Smith* (6) which was determined in the sittings after Michaelmas Term in 1832, and the proposition to which the House of Lords reverted was, as I have said, the proposition which had been laid down by LORD HARDWICKE and illustrated in the two cases to which I have referred. LORD HARDWICKE's words were these (*Fishmongers' Co.* v. *East India Co.* (7)):

C
> "It is not sufficient to say that it [the change of the building] will alter the plaintiff's lights, for then no vacant piece of ground could be built on in the city, and here there will be 17 ft. distance, and the law says it must be so near as to be a nuisance."

BEST, C.J.'s words are taken from a summing-up of his in *Back* v. *Stacey* (5) and he told the jury, who viewed the premises, that they were to judge rather from their own ocular observation than the testimony of any witnesses, however respectable, of the degree
D of diminution that the plaintiff's ancient lights had undergone.

> "In order to give a right of action, and sustain the issue there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff carrying on his accustomed business (that of a grocer) on the premises, as beneficially as he had formerly done."

His lordship added that

E
> "it might be difficult to draw the line, but the jury must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises."

TINDAL, C.J., put the proposition in this way (5 Carr. & P. at p. 439), that that diminution of light and air which the law recognises

F
> "is such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business."

A good deal of evidence was given in this case by witnesses who claimed to be experts in determining what is the normal amount of light to which persons are entitled in what may be called a normal room—Mr. Waldram and others. They have laid down what is called a grumble point, namely, a point at which you are unable, except under the
G fortunate possession of brilliant sunshine, to read without difficulty, and they have endeavoured to show that this is a standard which ought to be conformed to, and there was evidence, which was in the main accepted, on the lines that there would be considerable interference with the amount of light which would reach the plaintiff's windows. But it was said that, although that may be so, there are other considerations which have to be borne in mind and that you must take into account, as other cases have
H taken into account, the locality, and you cannot expect in a town crowded with buildings the same amount of access of light as you would expect in more fortunate districts, and so it is said that you must always consider what is the locality. That view was rejected by RUSSELL, J., in *Horton's Estate, Ltd.* v. *Beattie, Ltd.* (8). The rule laid down in the *Colls Case* (4) is referred to, and then he says that the argument which had been presented to him was that ([1927] 1 Ch. at p. 76):

I
> "in considering whether the decrease in light constitutes a nuisance the standard of comfort prevailing in the locality must be taken into account. Much turns on the nature and locality of the window, the supply of light to which has been interfered with. Persons who live in towns cannot expect the same volume of light as those who live in the country,"

and a number of cases are referred to for that proposition, and then it goes on:

> "Even if this room be inadequately lighted according to ordinary standards, the evidence shows that it is adequately lighted according to the standard prevailing

> in Wolverhampton, a manufacturing town, and therefore no actionable wrong has been committed. The amount of light to be left is not to be tested by any hard and fast standard, but by reference to the general standard of light in the district." A

RUSSELL, J., rejected that view, and he said this ([1927] 1 Ch. at p. 78):

> "The standard of lighting required to survive in order to eliminate the existence of a nuisance seems to me of necessity an absolute standard. The human eye requires as much light for comfortable reading or sewing in Darlington-street, Wolverhampton, as in Mayfair. True, no doubt it may be that as a rule buildings are more crowded together in manufacturing districts than in residential neighbourhoods. Lights have been obstructed, and no doubt where they have been ancient compensation has been accepted," B

and so on, C

> "I can see, however, no reason in this for saying that a man whose room in such a locality has been turned into a room no longer adequately lighted for ordinary purposes has not suffered an actionable wrong."

It was claimed that that view is incorrect, and it was said, in particular, that the locality here must be considered, that it had not been adequately considered by CROSSMAN, J., and that on that he had misdirected himself. D It was said that if you take this locality or area, which was described as Mayfair, you will find that in a great number of streets there is much less light than will be left to the plaintiff after the building, as proposed, has been erected. I confess I find a great difficulty in applying any doctrine of locality with such particularity as that suggests. I can understand that you may have a locality which may be described as residential or manufacturing E or industrial, and different considerations may apply in those areas to which you can apply these adjectives broadly. But I do not find it possible to accept that by "locality" you mean an area which is determined in its limits arbitrarily, or, perhaps, usefully, for postal purposes and determining what is the right address to which a letter could be sent, or, perhaps, also usefully to a surveyor or agent for the purpose of enhancing the values of properties which lay within the margin of that so-called locality. F But it seems to me quite unreasonable to say that, because you find that in some places in Mayfair there is less access of light than would be left here in Chesterfield-gardens, it can be said that the plaintiff has suffered no wrong. Whether you are to consider that all persons living in that locality are possessed of ancient lights or not I am not sure—whether you are to take into account the squares that lie there or not I do not know. But if you are only to select particular streets, it seems to me that the test of so-called G locality must break down. I prefer the evidence which was given by the plaintiff and Mr. Grainger, his manager, and really not contested, that when this building has been set up there will be a diminution of light reaching the windows which will put the premises beyond the margin of which the House of Lords speaks, namely, that the occupation of the house would be rendered uncomfortable according to the ordinary notions of mankind. H It will be observed from the passages I have quoted and the principles which are laid down that they are very loose; it is almost impossible to reach precise definitions when you are talking of the occupation of a house being uncomfortable according to the ordinary notions of mankind, when you are talking of different localities, and the like. I believe, for my own part, that one will have to go back to the words which were laid before the jury in *Back* v. *Stacey* (5) by BEST, C.J., and say that it is a matter of degree, and, therefore, a question of fact to which persons who I have got to determine it will have to apply the sort of reasoning which would be applied by a jury, and will have to determine on those lines whether the privation of light is sufficient to render the occupation of the house uncomfortable and less beneficial than it had formerly been. If one attempts to do more than give a broad rule which may be given to the jury for the purposes of their coming to their verdict, I think one gets into a range of difficulties which are by no means easy to solve.

Having regard to the facts which were proved in this case I think it would be unreasonable to treat Chesterfield-gardens on the same basis as other streets in Mayfair. It may be that for the purposes of local administration Chesterfield-gardens is on the same basis as other streets in Mayfair. It may be that for the purposes of local administration Chesterfield-gardens is a street, but it is a street in which there is a considerable access of light, and to the whole of that quantum the plaintiff is clearly not entitled; but he is entitled, I think, to have consideration given to the type of house in which he is living, and that in a locality which is residential rather than manufacturing or industrial and one in which, perhaps, the value of the house is enhanced by its situation, and you may test what would be uncomfortable and would be a privation of light as somewhat different in this particular house than if it was being used for wholly different purposes, and not residential purposes. But, having regard to the learned judge's judgment in this case in the court below, I am satisfied that he did not in any part of his judgment leave out of sight the question of locality, or misdirect himself upon the evidence on the main question of whether the plaintiff had suffered a nuisance or not. It is true that he did not refer in actual terms in the later portions of his judgment to locality, or use the word "locality," but in the first seven or eight pages he clearly indicated that he had got that in mind, and I think it would be an unfair criticism of his judgment to treat it otherwise than directly in accordance with the rules which have been laid down.

On the question of locality I will only add one or two more words, namely, that LORD LOREBURN, in *Jolly* v. *Kine* (9) says this ([1907] A.C. at p. 2):

> "He does not obtain by his easement a right to all the light he has enjoyed. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind, having regard to the locality and surroundings."

There is a passage by LORD PARKER in *Hammerton* v. *Dysart* (10) ([1916] 1 A.C. at p. 86), where he says:

> "Further, the character or circumstances of the neighbourhood are always material in considering the degree to which the owner of the right said to have been infringed is entitled to immunity from interference by others. What may be a nuisance by smoke or noise or interference with light under one set of circumstances is not necessarily a nuisance under a totally distinct set of circumstances. That which the law protects is the reasonable enjoyment of the right in question, and in deciding whether the right is infringed the law has due regard to the needs and interests of others. The convenience or inconvenience entailed by the assertion of the right is not without its materiality."

I have read those passages for the purpose of making it clear, as I think it ought to be made clear, that the learned judge rightly directed himself upon the main point, and he, after hearing the evidence and seeing the witnesses, came to the conclusion that a nuisance had been established by the plaintiff and that it was a nuisance for which he was entitled to invoke the assistance of the court. Upon that I am not prepared in any way to differ from him, and I accept that conclusion.

Then comes another very difficult question: What is the remedy which is to be employed? No doubt, in the old days before the passing of Lord Cairns' Act, 1858, there would have been in equity an injunction granted. If the action had been brought at law, damages would have been granted. The courts of law could not have granted an injunction, and the courts of Chancery could not have granted damages. But by Lord Cairns' Act, it was declared by s. 2 that in all cases in which the Court of Chancery had jurisdiction to entertain an application for an injunction against any wrongful act, "it shall be lawful for the same court, if it shall think fit, to award damages to the party injured . . . in substitution for an injunction in all cases." Some efforts have been made to lay down some guiding rules as to which the court ought to choose or adhere to an injunction or when it is sufficient that it should grant damages. Perhaps the best known place in which some rules are stated is the judgment of A. L. SMITH, L.J., which is to be found in *Shelfer* v. *City of London Electric Lighting Co.* (1) ([1895] 1 Ch. at p. 322). I will not read those four rules again, but the learned judge continues:

> "There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction. It is impossible to lay down any rule as to what, in the differing circumstances of each case, constitutes either a small injury, or one that can be estimated in money, or what is a small money payment, or an adequate compensation, or what would be oppressive to the defendant. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication."

Those words at the commencement and at the conclusion of the four rules clearly indicate that A. L. Smith, L.J., was only attempting to lay down some sort of canons which ought to be followed appropriately as a guide in determining whether an injunction or damages should be granted, but in the very terms he eliminates any stringency from them and indicates that the tribunal itself must consider what is the right course in any particular case. Lindley, L.J. ([1895] 1 Ch. at p. 316), says this:

> "Without denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances, such jurisdiction ought not to be exercised in such cases except under very exceptional circumstances."

Then he says he will not attempt to lay down rules for the exercise of judicial discretion and then comes the passage which has been read:

> "In all such cases as these, and in all others where an action for damages is really an adequate remedy—as where the acts complained of are already finished—an injunction can be properly refused,"

and so on, and he there, in the *Shelfer Case* (1) grants the injunction. Be it remembered that the *Shelfer Case* (1) was a case in which, by reason of vibration, the lives of the persons in the house were rendered not merely uncomfortable, but that in some measure their health was endangered. The *Shelfer Case* (1) seems to me the high-water mark of what might be called definite rules, and at the same time, when you examine those rules, both A. L. Smith, L.J., and Lindley, L.J., held that those tests are, if I may use the expression, "of imperfect application."

When we come to *Colls* v. *Home and Colonial Stores* (4) once more, we find that the matter is left more at large than it was in the *Shelfer Case* (1) not, perhaps, more at large than it was in the *Shelfer Case* (1) when you read the passages which are concomitant to the rules, but more at large than it was left if you focus your attention upon the rules and the rules only. Lord Macnaghten in the *Colls Case* (4) ([1904] A.C. at p. 193) says this:

> "But the recovery of damages, whatever the amount may be, indicates a violation of right, and in former times, unless there were something special in the case, would have entitled the plaintiff as of course to an injunction in equity. I rather doubt whether the amount of the damages which may be supposed to be recoverable at law affords a satisfactory test. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the court ought to incline to damages rather than to an injunction."

Lord Lindley ([1904] A.C. at p. 212), again, says this:

> "The present case is eminently one in which damages would be an adequate remedy, even assuming the plaintiffs could prove a small nuisance for which some damages could be properly given; and where that is the case an injunction, and especially a mandatory injunction, ought not to issue."

I pointed out in *Slack* v. *Leeds Industrial Co-operative Society* (11) that the so-called tests in the *Shelfer Case* (1) were no more than what had been anticipated by Sir George Jessel in *Aynsley* v. *Glover* (12), and that they did no more—that the *Colls Case* (4) had not altered those rules; but it must not be taken I held that the rules in the *Shelfer*

A *Case* (1) by themselves were now prescribed as the guiding tests for the court. I think my judgment indicates that one must bear in mind, not merely the *Shelfer Case* (1) but also the *Colls Case* (4), and also what had been said by SIR GEORGE JESSEL in *Aynsley* v. *Glover* (12) and it is important just to look at what he did say. SIR GEORGE JESSEL said this (L.R. 18 Eq. at p. 552):

> B "As I understand it, the rule now is—and I shall so decide in future, unless in the meantime the appeal court shall decide differently—that wherever an action can be maintained at law and really substantial damages, or perhaps I should say considerable damages (for some people may say that £20 is substantial damages), can be recovered at law, there the injunction ought to follow in equity; generally, not universally, because I have nothing to add upon that subject. In this case I do not C think that anybody would doubt the damages would be substantial. The obstruction would in fact destroy the use of the room altogether; it would so darken it that perhaps it might be used for a cellar,"

and so on. Then he goes on (L.R. 18 Eq. at p. 555):

> "The discretion, being a reasonable discretion, should, I think, be reasonably exercised, and it must depend upon the special circumstances of each case whether D it ought to be exercised."

After one turns to the passages in the previous judgments to which I was referring in the *Slack Case* (11), I do not think it could be said that that judgment was intended in any way to cut down, as indeed it could not cut down, the previous authorities to which I was referring. In *Kine* v. *Jolly* (9) in the decision below, which stood affirmed after E the case had been argued in the House of Lords, damages were considered. VAUGHAN WILLIAMS, L.J. ([1905] 1 Ch. at p. 496), says this:

> "The only other matter which, according to LORD MACNAGHTEN'S speech, remains to be considered is whether this injury cannot be fairly compensated by money damages. I think it can be, and therefore I think there ought to be no mandatory injunction."

F In other words, following out the principle which LORD MACNAGHTEN appeared to indicate, that the court ought to incline towards damages more than to an injunction, VAUGHAN WILLIAMS, L.J., applies that course. Again ([1905] 1 Ch. at p. 504), COZENS-HARDY, L.J., says this:

> G "I think it is impossible to doubt that the tendency of the speeches in the House of Lords in *Colls* v. *Home and Colonial Stores* (4) is to go a little further than was done in *Shelfer* v. *City of London Electric Lighting Co.* (1), and to indicate that as a general rule the court ought to be less free in granting mandatory injunctions than it was in years gone by."

It seems to me, therefore, that these rules in the *Shelfer Case* (1) must now be taken with the concomitant passages to which I have referred in the later cases, in *Colls* (4) H and in *Kine* v. *Jolly* (9), and that we ought to incline against an injunction if possible. It is not possible to say what the injury to the plaintiff will be when estimated in money. I think the damages that he may be given will be a substantial sum—not a trivial sum like £50 or £100, but a substantial sum. On the other hand, the defendants have certainly acted with circumspection, and I think with a desire to avoid any unreasonable invasion of the plaintiff's rights, and certainly not to take him or catch him at a I disadvantage. Their conduct inures to their benefit, and therefore we have to consider what would be the result to them if they had to modify their plans and to cut off a portion of their building. They may be unable to use the site in a manner in which they have a right to use it when they are making use of this now vacant piece of land and building upon it in a manner which is not uncommon at the present time, a liberty which cannot be restrained because of what LORD HALSBURY said in the *Colls Case* (4), namely, that there is a right to build upon a piece of land like this within the city of Westminster.

I have come to the conclusion on the whole that this is a case in which damages will be a sufficient remedy. Even though those damages may sound a not inconsiderable sum, we are dealing with sites of large value. The plaintiff himself has to pay a high rental, and he is subject to a covenant under which he had to make a large outlay when he took possession of these premises. One cannot be surprised, therefore, if, appropriately to the site and to his own position as lessee, the figures involved are considerable. But I also think that one ought to consider whether the defendants will be oppressed in the sense that they will lose so very large a quantum of the enjoyment of their site as to amount to oppression. In all the circumstances of the case, following Lord Macnaghten's rule and following Sir George Jessel's rule, I think we ought to leave the matter to be decided by the imposition of damages. Therefore, there will be an order that the case be remitted for the purpose of ascertaining what damage the plaintiff has suffered, and the mandatory injunction will be discharged.

I come, lastly, to the question what order ought to be made as to costs. The plaintiff below asserted the right, which the judge held he had got, and he claimed that he had suffered an injury to that right, which the learned judge held also, and we have affirmed the learned judge on that point. Therefore no order need be made in reference to the costs below. The only change which will be made in the order made by the learned judge is to discharge the injunction. Upon the appeal here, the appellants have failed upon their main point in the argument, namely, that the plaintiff was not entitled to any assistance from the court; but we have held that the remedy ought to be a different one from that imposed by the learned judge. In all the circumstances of the case we have come to the conclusion that the respondents are entitled to tax their costs and to be paid by the appellants one-half of those costs on the ground that the respondent has succeeded in preventing the appeal succeeding upon the main point upon which it was originally brought. That course will, I think, obviate the procedure in taxation better than if we had ordered separate taxation with a set-off? Therefore the appeal will be allowed to the extent of a variation of the order made by Crossman, J., and the respondent will be entitled to half the taxed costs which have been incurred in the course of the appeal.

ROMER, L.J.—I have arrived at the same conclusion. The attack upon the decision in the court below is made upon the ground that Crossman, J., misdirected himself upon the law applicable to the case in that he disregarded all questions of locality, that is to say, it is said that Crossman, J., paid no attention to the character of the neighbourhood in which the plaintiff's house is situated. I do not think that criticism is well-founded. Crossman, J., in directing himself upon the law, said this:

> "The first question which arises is whether the admitted diminution of light which will be caused by the obstruction is such as to cause an actionable nuisance, and that, as I understand it, means such as to interfere substantially with the comfortable use and enjoyment of the house as a dwelling-house according to the ordinary requirements of mankind."

A little later he said:

> "At one time, of course, many years ago, that was the case [that is to say, that you considered whether the light which the plaintiff had previously been receiving was substantially diminished] but what he is entitled to is what is required for the ordinary purposes of the inhabitants of the tenement according to the ordinary notions of mankind."

It is true that in those passages there is no direct reference made to any question of locality, nor, indeed, is there any direct reference to such a question in any part of the learned judge's judgment, but neither will you find any direct reference to the question of locality in the statement of the law made by Lord Macnaghten in *Colls* v. *Home and Colonial Stores* (4) ([1904] A.C. 179), nor in the passages from *Back* v. *Stacey* (5) and *Parker* v. *Smith* (6), and *Wells* v. *Ody* (13), cited by Lord Macnaghten in his speech. If Crossman, J., misdirected himself, then so did Lord Macnaghten, Best, C.J., misdirected the jury, and in *Parker* v. *Smith* (6) the same charge could be brought against Tindal, C.J., and, in *Wells* v. *Ody* (13), against Baron Parke. But it must be taken that none of those learned judges was ignorant of the fact that in all cases relating to nuisance, the question of locality has to be taken into consideration, though I venture to think that in cases of nuisance by obstruction of ancient lights the question of locality has very much less to do with it than cases relating to other nuisances. In point of fact there is a passage later in the judgment of Crossman, J., which seems to me to indicate pretty clearly that he had in his mind the question of locality, because, after again stating the question he had to decide, which was whether what the defendants had done would interfere substantially with the comfortable use and enjoyment of the plaintiff's house as a dwelling-house according to the ordinary requirements of mankind, he says this:

> "I think that 'according to the ordinary requirements of mankind' does not mean having regard to the precise amount that people in the streets round about have got, but having regard to what a reasonable person—which is the expression to use —would require."

A reasonable person would not expect precisely as much light in Mayfair as he would get in the country, and he would not expect precisely so much light in the city of London as he would get in Mayfair.

But, in truth, having regard to the findings of fact by the learned judge in this case, the question of locality has little or nothing to do with the matter. Crossman, J., heard the plaintiff in the witness-box, and he accepted his evidence. The evidence so accepted by Crossman, J., is stated by him in this way:

> "In the plaintiff's house, the plaintiff lives himself in a flat on the ground floor as you go in—that is to say, the south part of the house—and he tells me in evidence that he now—that is to say, in the last few weeks—has to use artificial light to eat his lunch, though formerly he could do so by daylight. He also tells me that he now has to turn on the light in his room on the ground floor on the south side of the house an hour earlier in the afternoon than he did when Chesterfield House was standing."

—that has been referred to as room No. 4 in this case. "He also tells me that in the room on the other side of the ground floor," and so on. Counsel for the defendants has criticised the evidence of the plaintiff upon that point in this respect, that the plaintiff did not state—because he was not asked in cross-examination—in what particular part of the room he had his lunch, but it does emerge from the evidence, I think, as a reasonable inference to be drawn in the plaintiff's favour, that he was lunching in the same part of the room when he had to use the electric light as he had been previously accustomed to lunch in when he did not have to use the electric light. Whatever may be said about the neighbourhood of Mayfair or the west end of London generally as regards the angles subtended by buildings in front of the ground floor rooms in the streets, I know of no evidence whatsoever in this case which suggests that the inhabitants of Mayfair as a rule always have to have electric light when they are having their lunch. If such evidence had been given, I have no doubt that the learned judge would have disbelieved it, and properly disbelieved it. So we are not here concerned, as it seems to me, with the neighbourhood of this house. In whatever neighbourhood a dwelling-house is situated, a man is entitled to have his ancient lights protected to this extent, that he may be able to go on having his lunch without the use of electric light in places where obviously he had so lunched. The learned judge had no direct evidence of that kind as regards the other room, No. 6, on the ground floor; but a glance at the daylight plans will show that the percentage of diminution of the former light in No. 6 is larger than it is in No. 4, and as regards No. 6 he was told by the plaintiff, and he accepted the plaintiff's evidence that the darkness in No. 6 had become very noticeable during the last few weeks, and this, it is to be observed, was at a time when the defendants' building had not been carried up to anything like the full extent that the defendants intend, unless restrained by injunction, to carry it. The learned judge also found that the rooms in the basement would be darkened, and he accepted the evidence as to the effect of the defendants' building upon the light to the rooms in the basement. It must, however, be remembered that as regards the rooms in the basement, whoever originally built Chesterfield-gardens thought fit for his own purposes to build his basements, as most basements are built, in the ground, and that the light coming to them over Chesterfield House was largely obstructed by the fact that they were built in the ground, and that in front of them—at what height, I do not precisely know—there was the wall of the area. In those circumstances the plaintiff could not complain of any obstruction to the light of the basement if that obstruction would not have been actionable if he had chosen to build his rooms in the basement without the obstruction of the area wall in front. If, however, the defendants' building would cause an actionable nuisance to those rooms if they had been built without the area wall in front, then the plaintiff is entitled to complain. In those circumstances it is only necessary really to consider the question of the rooms on the ground floor because, if the rooms on the ground floor had not been obstructed to an actionable extent, then the rooms in the basement would not have been obstructed. If, on the other hand, the rooms on the ground floor have, as the learned judge found, been obstructed to an actionable extent, then so must the rooms in the basement have been. I am, therefore, of the opinion that the learned judge was right in deciding that the plaintiff had sustained an actionable nuisance in respect of the obstruction of the light to the rooms 4 and 6 on the ground floor, and, therefore, the rooms 1 and 3 in the basement.

The question then arises whether the plaintiff should be granted an injunction, or whether he should merely be granted a remedy in damages. It has been said by counsel for the plaintiff that in all these cases of injunction or damages the court exercises a discretion, and that where the learned judge in the court below has exercised his discretion, this court should not interfere with that exercise of discretion. As regards that I would point out, as the MASTER OF THE ROLLS has pointed out, that in *Kine* v. *Jolly* (9) this court, under Lord Cairn's Act, did interfere with the exercise of discretion by KEKEWICH, J. In *Slack* v. *Leeds Industrial Co-operative* (11) the matter came back to this court from the House of Lords for the purpose of considering an appeal from myself, as I had intimated my opinion that, if I had had power to grant damages in lieu of an injunction, I should have exercised that power. The court here would not merely accept my finding in that respect; they went fully into the facts of the case, and in the end they came to the conclusion that they would exercise their discretion in the same way as I was prepared to exercise it in the court below. But, even assuming that counsel makes good that point, the exercise of discretion by the learned judge can always, of course, be reviewed if it appears that in exercising his discretion, he has proceeded upon a wrong principle. With all respect to CROSSMAN, J., I think that as regards this question of injunction or damages he has misdirected himself because he seems to have come to the conclusion that if, in any case, any one of the four conditions referred to by A. L. SMITH, L.J., in *Shelfer* v. *City of London Electric Lighting Co.* (1), are not fulfilled, the court must grant an injunction. But I do not take that view at all. Where the four conditions enunciated by A. L. SMITH, L.J., are fulfilled, I do not doubt that a court will grant damages in lieu of an injunction, but it by no means follows that A. L. SMITH, L.J., intended to say or did say or in fact could say that in all cases in which those four conditions do not prevail, the injunction must be granted; he could not have intended to have fettered the discretion imposed upon the courts by Lord Cairns' Act. The fact that he did not do that is apparent, I think, from the judgment of LINDLEY, L.J., in the same case. LINDLEY, L.J., said:

> "Without denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances, such jurisdiction ought not to be exercised in such cases except under very exceptional circumstances. I will not attempt to specify them, or to lay down rules for the exercise of judicial discretion. It is sufficient to refer, by way of example, to trivial and occasional nuisances; cases in which a plaintiff has shown that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief. In all such cases as these, and in all others where an action for damages is really an adequate remedy—as where the acts complained of are already finished—an injunction can be properly refused."

It is quite plain, therefore, that in every case, even though the four conditions laid down by A. L. SMITH, L.J., are not to be found, the court has, having regard to all the circumstances of the case, a discretion which it can exercise in the matter. What Lord Macnaghten said in the *Colls Case* (4) is, of course, to be taken very seriously into consideration in all cases relating to light when the question of the exercise of this discretion crops up. I will not read the passage at length; I will only refer to this part of it ([1904] A.C. at p. 193):

> "But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the court ought to incline to damages rather than to an injunction."

He had previously stated that he rather doubted whether the kind of damages which may be supposed to be recovered at law affords a satisfactory test.

In the present case there can be no dispute, I think, that there really was a question whether the obstruction caused by the defendants was legal or not. It cannot, I think, be said that the defendants have not acted fairly or in a neighbourly spirit. But there is one other circumstance to which personally I attach the greatest importance. In my opinion, having regard to the conduct of the plaintiff up to the time of the trial of this action, it would be unfair to grant him an injunction in respect of the main part of the building. When the plaintiff's attention was first called to the proposed erection by the defendants of the flats on the site of Chesterfield House, Mr. Cole, acting on behalf of the plaintiff, wrote to Messrs. Burnett and Eprile, who were acting as architects on behalf of the defendants, saying that he was very perturbed as to the effect of their proposed new building, and that he must ask them to consider some adjustment with regard to the projecting wing. That is the only thing of which he complained at that time. Mr. Burnett has told us that, as a consequence of that fact, namely, that Mr. Cole only complained of the projecting wing, he did not trouble further about the possible effect on the plaintiff's building of the main part of the proposed new flats because he said this:

> "When Mr. Cole wrote to us objecting to the projecting wing, and did not mention the main building at all, I assumed, and I think reasonably, that his objection referred to the wing only, so I considered the position if the wing was taken away, and I found the difference between the wing being there and the wing not being there was absolutely insignificant."

If the objection had been taken at that time not only to the wing but to the main building, and Mr. Burnett had gone into the fact of what effect the main building would have on the plaintiff's lights, for aught I know to the contrary he might have been convinced then that some alteration in the height of the main building was necessary. It was not until after Mr. Cole had had the daylight plans prepared by Mr. Swarbrick that he came to the conclusion, as I understand the facts of this case, that the plaintiff's lights would be damaged by the main building, and by the main building more than by the wings themselves. But he never drew the attention of the defendants to that fact. We find the solicitors for the plaintiff writing on Jan. 18, 1935, referring to the wing in particular. What they said was:

> "We are surprised to be informed by our client Mr. Fishenden that your clients are proceeding with the erection of their building, particularly with the wing which is immediately opposite our client's premises."

On Feb. 13 the plaintiff's solicitors wrote as follows:

> "In reply to your letter of the 12th inst., we are instructed by our client that notwithstanding the present proceedings and our previous correspondence your clients are continuing with the erection of the wing of the building immediately opposite our client's premises and have up to to-day's date filled in the framework up to the third floor,"

but there is not a word about any interference with light caused or likely to be caused by the main building. It is true that in the statement of claim, which was delivered at about this time, the plaintiff's objection was not confined to the wing, nor, of course, would it be confined to the wing in a plea by any wise pleader. The fact of the matter is that the defendants' attention was never specifically called to the question that the plaintiff really objected to anything other than the wing. In those circumstances the defendants proceeded with the erection of their main building. As I say, they did not seriously consider the question of whether the main building was likely prejudicially to affect the plaintiff's lights. In those circumstances, speaking entirely for myself, I think that, in the words of Lindley, L.J., in the *Shelfer Case* (1):

> "The plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief in respect of the main building."

The same thing, of course, cannot be said of him as regards his claim in respect of the wing. But when one puts to oneself the question whether an injunction should be granted in respect of the wing alone, or damages in respect of the wing should be granted, it is to be observed, now that we have got the daylight plans before us, that the additional obstruction caused by the wings is very small indeed—the amount of it is more or less accurately shown on Exhibit P.J.W.4, it being the space of light between the brown line and the green line. That is to say, if the wings were not there, the light left to the plaintiff in the rooms indicated on P.J.W.4 would go back to the green line instead of the brown line. That was a very small interference, in fact, with the light—it is an interference which, by itself, would add very little to the damages sustained by the plaintiff, and, in the circumstances, it would, I think, be oppressive to the defendants, having regard to the small amount of damage sustained by the plaintiff in respect of that addition, which certainly is a matter which could be compensated in damages, to grant a mandatory injunction as regards the wing.

For these reasons, in addition to those which have been given by the Master of the Rolls, I am of opinion that this appeal fails on the main point, but succeeds upon the question of an injunction or damages, and that an order should be made such as has been indicated by the Master of the Rolls.

MAUGHAM, L.J.—The plaintiff, who is the leaseholder of No. 8, Chesterfield-gardens, seeks an injunction, or, in the alternative, damages, to restrain the interference with some admitted ancient lights of his premises facing the gardens. The learned judge has granted an injunction in the usual form as regards future building by the defendants, and has granted also a mandatory injunction which puts upon the defendants the obligation to pull down so much of the section now standing upon the defendants' premises as constitutes a nuisance.

I should like to observe, in the first place, that I think a mandatory injunction, except in very exceptional circumstances, ought to be granted in such terms that the person against whom it is granted ought to know exactly what he has to do. I can quite understand that it is impossible in many cases to let the defendant know how far he can go, or to do more than restrain a man continuing with his building, but when the defendant in an action is going to be ordered by the court to take active steps with regard to something to be done on his own premises, I think certainly the better course is and, in my belief, the general course adopted in both divisions of the High Court, has been to tell the defendant precisely what he is bound to do. That, however, is by the way, and I mention it because I think the defendants here had, as was pointed out by counsel, some occasion for complaining of the form of the order, apart from the question of substance.

Coming to the merits of the present case, there are, as my brethren have pointed out, two questions: First, whether the plaintiff has suffered or will suffer an actionable injury by reason of what has been done or what is proposed to be done, and, secondly, the question of the character of the remedy appropriate to the present case if the plaintiff established his first proposition.

In my opinion, there could be no question, and I think it is not very much contended that there is a question what the test is, though a great deal may be said about how you apply the test and as to what the test involves. Since *Colls* v. *Home and Colonial Stores* (4) it has been decided that the proper test is the test which existed before the Prescription Act was passed, and that you must go back to the summing-up of Best, C.J., in *Back* v. *Stacey* (5), and to the statement of the Lord Chancellor in *Clarke* v. *Clark* (14), and that you must, therefore, ascertain whether the obstruction threatened or occasioned by the defendant is such as would deprive the plaintiff of such a degree of light as he might reasonably calculate upon enjoying on the presumption of a lost grant, or, in other words, whether the building of the defendant will cause such an obstruction of light as to amount to an interference with the ordinary occupations of life, which is the same thing as what is required for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind. It should be added that, in answering that question, you must pay regard, as you must pay regard in the ordinary case of alleged nuisance owing to noise and vibration, to the locality in a wide sense. As I understand the argument put forward on behalf of the defendants on this part of the case, it amounted to this, that the test imposed by the House of Lords in the cases I have mentioned might be expressed as being the test afforded by the answer to the question whether the proposed building of the defendants would deprive the plaintiff of the amount of light which is enjoyed by other persons in the locality, or by most other persons in the locality, and both in the court below and in this court great stress has been laid on the fact that a large number of houses in Mayfair, where this house of the plaintiff is situate, do not receive at their ground-floor windows such an amount of light that, if the defendants' premises are erected to the full, the plaintiff will be in a worse position. I do not agree that that is a proper test. As has been pointed out, "nuisance" as a word applied to a light case differs in many respects from the ordinary common law nuisance in which the plaintiff seeks to restrain the making or causing of noise, smell, vibration, and so forth, so as to interfere with his ordinary comfort. If the plaintiff has lived for twenty years in a clearing in the forest of buildings in either Mayfair or in the city, I am of opinion that it is no answer to him to say that his neighbours, or people in the locality, either because they have consented, perhaps for a consideration or because their premises have been built by landlords who own houses on both sides of the street, or for any other reason, have come to be so situated that the premises opposite obstruct so much light that the ground floors of the premises are exceedingly inconvenient, and that the conditions possibly amount to a nuisance, using the word in the artificial sense in which it is used in this connection. To my mind, it is far better to keep to what was decided by the House of Lords in the *Colls Case* (4) or to the directions to juries upon which the House of Lords laid such stress, and to ask oneself the questions which they suggested should be asked, not, I agree, entirely omitting the locality, but not placing any such hard and fast reliance upon the enjoyment of light by other people in the locality as has been suggested on behalf of the appellants here. I would add that LORD LINDLEY, at any rate, most pointedly refused to agree to the fact that if people in the locality had a certain amount of light left, and only a certain amount, that afforded the proper test. The passage will be found [1904] A.C. at p. 210, and I need not repeat it.

Having regard to what has already been said, I am not going into any elaborate consideration of the facts in the present case so far as they relate to the question whether in the circumstances there has been, or will be, an actionable nuisance by the defendants' building. It should be pointed out that the action originally was largely a quia timet action. The result is that the inhabitants of the plaintiff's premises have been unable to tell exactly the obstruction that the house will cause when complete so far as regards light, and expert evidence has necessarily had to be very largely relied upon. It has to be remembered, however, and this point is, I think, of importance in regard to the question of remedy, that the original buildings on the defendants' property were very low, and that the plaintiff enjoyed in respect of his ground floor windows, to take them only for the present purposes, an exceptional degree of light before the demolition of the defendants' building. The angle from the sill of the plaintiff's ground floor windows to the obstructing point of the main part of the old building was 27 deg. Accordingly, there were 63 deg. of unobstructed light. If you looked at the stables of the old buildings, the angle from the plaintiff's ground floor windows to the obstructing point was as little as 24½ deg. Another thing which has to be considered to some extent in weighing evidence such as has been given by the plaintiff himself is that when the demolition of certain buildings takes place in order to erect some other building, there is a time when the access of light to the plaintiff's property is almost unobstructed, and,

accordingly, people in that position are a little bit tempted to exaggerate the injury A
that they are going to suffer as the defendants' buildings actually go up. The comparison in their mind sometimes, at any rate, is between what happened when there was no building, and the obstruction day by day and week by week as the erection proceeds. The proposed new building does not, I think it must be admitted, cause anything like the serious obstruction which all of us who are acquainted with light cases have often found to be involved in those cases. It is argued on behalf of the defendants that an B
average amount of light over 45 deg. unobstructed, will remain, taking into consideration the whole ridge of the main proposed building and taking into consideration the projected wing. It is agreed that at the projecting wing an obstruction of more than 45 deg. is caused, but it is contended that on the whole ridge of the main proposed building 45 deg. is left to the plaintiff, and that, as I understand what was argued in the court below, was the main point upon which this case, so far as that part of it is con- C
cerned, was fought.

I want to make one observation with regard to the daylight plans upon which the plaintiff relied in this case. I think the so-called daylight plans are exceedingly useful as showing the court what amount of obstruction will be caused by the proposed building, and for my part I think they have been very useful in this case. I think also that sections showing the angle of light which will be obstructed by the proposed building D
as compared with the light which was previously enjoyed and as compared with the light which the plaintiff might reasonably expect to enjoy, are of great use. But I do not think myself that either daylight plans or sections or angles, or anything like that, can be regarded as in any way conclusive in such a case. I think that so many surrounding circumstances have to be considered, including, of course, the element of locality and including the question whether the plaintiff's premises are situated in town E
or country, that no hard and fast mathematical standards can be applied, and I think the House of Lords clearly so decided in the case of *Colls* (4). The Court of Appeal must have clearly decided it in *Kine* v. *Jolly* (9), and the House of Lords, when that case (sub nom. *Jolly* v. *Kine* (9)) came to them, never attempted for one moment to restore or to apply the hard and fast mathematical test of an angle of 45 deg. I think myself that the learned judge who heard the evidence has not misdirected himself on this part of F
the case at all. He has taken a perfectly correct view as to the weight to be attached in the particular case to the angle of 45 deg. He has cited a number of cases, which I do not think it is necessary for me to repeat, showing what views have been taken by a number of judges on this question of the angle, and, in my opinion, it is impossible for this court to avoid coming to the same conclusion of fact as that to which he has come, namely, that some, at any rate, of the windows of the plaintiff's house, either one or G
more of the windows in rooms numbers 1, 3, 4 and 6, have suffered or will suffer an actionable injury by reason of the defendants' proposed building in this sense, that there will be left to some or one of those windows an amount of light such that the enjoyment of the rooms lit by those windows, within the meaning of the phrase as used in the House of Lords, will suffer an actionable nuisance. I should add that daylight plans may, I think, often be exceedingly misleading if the so-called 50–50 rule with regard to the H
amount of light which the rooms should enjoy is applied to a room which has any unusual depth in it, or applied to a room where the windows are in any sense unusual, because the light falling at table height from the window at a particular part of the room depends directly upon the depth of the room and the height of the window, and obviously those things have got to be carefully considered in applying the rule.

One thing more will I say on the question whether an actionable injury has been I
caused. I should like to express my regret that LORD MACNAGHTEN's suggestion in the *Colls Case* (4) ([1904] A.C. at p. 192) is so little used in cases of light. A recent rule has been passed, Order XXXVIIA, under which there may be, in certain circumstances, a court expert. But if, for any reason, there is no such expert, I feel very strongly that the words of wisdom of LORD MACNAGHTEN should be remembered—the words where he wonders why the court does not more frequently avail itself of the power of calling in a competent adviser to report to the court upon the question. In all these cases, as we know, there is a great amount of expense involved by the fact that the experts

on both sides have diametrically opposed views as to whether there is or is not an actionable injury, and a great deal of time and money is spent in a case where very often an independent expert could give to the court evidence which would help the court very materially in deciding the case and therefore save a great deal of expense.

I turn to the question of remedy, and there I want to say at the outset that, in my opinion, the statement of A. L. SMITH, L.J., in *Shelfer* v. *City of London Electric Lighting Co.* (1) ([1895] 1 Ch. at p. 322) has been in certain cases misunderstood, and is, at any rate, not being properly understood, when counsel are arguing that there is a definite working rule applicable to all cases for determining the question whether there should be an injunction or whether the plaintiff should be left to seek his remedy in damages. In the first place, I want to say quite clearly that, for my part, I am of opinion that the learned lord justice, when he laid down what he called a "good working rule," was in that case saying something which was an obiter dictum, for it was not necessary for the decision of the case. The *Shelfer Case* (1) was, as I think my brethren have pointed out, a case where the vibration and noise caused by the construction and the working of the electric lighting plant were causing actual structural injury to the house, cracks were being created in the building, and the enjoyment of the premises was apparently being rendered almost impossible; as LORD HALSBURY says at the beginning of his judgment ([1895] 1 Ch. at p. 308),

> "of the reality and gravity of the nuisance no serious denial has been made before us,"

and there are other passages which show how serious the injury was. In such a case, apart from any special working rule, there was ample ground for the granting of an injunction. It was a case of continuous injury by noise and vibration, and it is apparent that that case differs enormously from a case where the injury is an interference with an easement of light. Before applying the general rule, which I agree may be of value in a certain number of cases, you have to consider the enormous difference which exists between such a case as there was in *Shelfer* (1), and such a case as there is here. In the *Shelfer Case* (1) the plaintiff, if the injunction was refused, was bound to have his house shaken down unless he was constantly underpinning it or repairing cracks, and it looked as though, owing to his proximity to the electric lighting works which were being created, he would never be able to enjoy his house in peace at any time of the year. But in a light case you have a totally different state of things. Take the room where the plaintiff lives here. It cannot be alleged to be uninhabitable now, as the plaintiff could have said his room was in the *Shelfer Case* (1). That is proved, among other things, by the fact upon which I think counsel for the defendants was entitled to rely for this purpose, that many other ground floor rooms in the locality all over Mayfair will have less light than this room will have when the defendants' premises are completed. The test of nuisance in the case of a light obstruction involves a kind of average based upon the daylight hours during which light comes through the aperture alleged to possess an easement throughout the year. Everybody knows what an enormous difference there is between dawn and midday, but not everybody knows, I think, how enormous the difference is in the light coming through a particular aperture between December and June. It is within the mark, I think, to say that at least five times as much light comes to an ordinary house in June, all other things being equal, as in December, and the effect of an obstruction is not to render a room left with 45 deg. of light uninhabitable, though no doubt it means that a little more artificial light will be used after the obstruction is erected. If I may give an example to show clearly what I mean in this case, I should imagine that if we take an average day as being, say, about April 14, it may be that the plaintiff will find that on April 14 in a particular year he will have only as much light as he would have enjoyed in the old days when Chesterfield House was up, about a fortnight earlier. That is the sort of injury which a plaintiff suffers in such a case as this, and in June and July the possibility is that he will have partly to draw his curtains because he will be getting too much light in his rooms for the ordinary, convenient enjoyment of it. Then I ask myself whether in the *Shelfer Case* (1) the same rule would have been applied or suggested by A. L. SMITH, L.J., if it had been shown that the City of London Electric Lighting Co. proposed to cause an injury for A ten days, or perhaps a fortnight, and then not one which was of a very serious character. The injury caused by the obstruction of light is of the nature of a temporary nuisance during certain hours of the day. It does not follow from these considerations that the injury does not justify any relief in such a case as this. But the injury may be of a comparatively small character, very different from that which would be occasioned, for instance, if the main building proposed, instead of being 99 ft. way, were merely 50 ft. B away. Accordingly, as I think, the working rule laid down by A. L. SMITH, L.J., is not a universal or even a sound rule in all cases of injury to light, and I would observe, as my brother ROMER has observed, that LINDLEY, L.J., suggested a different rule, which I, for my part, would be perfectly willing to accept. It may be added that he used similar language in the House of Lords in the *Colls Case* (4), and I rely also on the passage to which ROMER, L.J., has referred in the judgment of LORD MACNAGHTEN. If C I may respectfully follow the view expressed by LORD MACNAGHTEN, I think myself that the amount of damages in a light case, unless considered in relation to all the other circumstances, does not afford a satisfactory test.

There is one other short passage to which I want to refer, and that is only a few lines in the judgment of SARGANT, L.J., in the case of *Slack* v. *Leeds Industrial Co-operative Society* (11) ([1924] 2 Ch. at p. 494); it is a passage with which I think, so far D as I can judge, the MASTER OF THE ROLLS and WARRINGTON, L.J., agreed. He said this, after considering the argument put forward there on behalf of the plaintiff, which resembled to a great extent the argument put forward here on behalf of the plaintiff:

> "In my judgment there is still left a border-line of cases with regard to the obstruction of light where the injury may be sufficiently substantial to justify some relief, E and yet may be of so comparatively small a character as to be properly and adequately compensated by damages."

That phrase precisely represents the view which, after very careful consideration, I have formed with regard to the facts in the present case, and accordingly I agree with my learned brethren in thinking that there must be here an inquiry as to damages in lieu of an injunction, and in other respects I fully concur with what they have said. F

Appeal allowed on first point. On second point case remitted to Crossman, J., for assessment of damages.

Solicitors: *Simmons & Simmons*; *J. & P. J. F. Chapman-Walker.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

IN THE ESTATE OF LEVER

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), October 23, December 5, 1935]

[Reported 105 L.J.P. 9; 154 L.T. 270; 52 T.L.R. 97; 79 Sol. Jo. 861]

Probate—Leave to swear to death—Special grant of administration—Grant to person not primarily entitled—Applications in single motion—Court of Probate Act, 1857 (20 *&* 21 *Vict., c.* 77), *s.* 73—*Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 162—*Administration of Justice Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 26), *s.* 9.

It is open to the court to grant leave to swear that a person died on or since a certain date and to grant letters of administration under the special statutory powers of the court to someone not primarily entitled to representation on a motion combining the two applications.

Where it is uncertain if a person presumed deceased died before or after Jan. 1, 1926, the special powers of the court under s. 73 of the Court of Probate Act, 1857, or under the equivalent provisions relating to deaths after 1925, may be alternatively exercised in making a grant to someone not primarily entitled, if the persons entitled in priority decline to take out representation.

Notes. As to applications for leave to swear death, see 16 HALSBURY'S LAWS (3rd Edn.) 191, para. 326. As to grants of administration under the special statutory powers of the court, see 16 HALSBURY'S LAWS (3rd Edn.) 224, para. 410. For the Court of Probate Act, 1857, s. 73 and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162, see 9 HALSBURY'S STATUTES (2nd Edn.) 692, 777.

Probate Motion

The court was prayed for leave to swear that the death of Mrs. Ida Gertrude Lever had occurred on or since Jan. 1, 1894, and for a grant of administration of her estate under the special powers provided by s. 73 of the Court of Probate Act, 1857, or the equivalent provisions relating to deaths after 1925.

The presumed deceased, who had been living apart from her husband, was last heard of in Paris in 1893. Her husband died in 1914. She was entitled to an interest in one-third of the unappointed funds subject to the marriage settlement of her parents, now deceased.

The applicant, Miss Evelyn E. W. Gardner, was the residuary legatee under the will of the deceased's mother (who died in 1932), and she prayed for a joint grant to herself and an assurance company. Inquiries had been made in vain to discover if the deceased were still alive, or if she had left any children. Thus there was no evidence to show whether the deceased survived her husband or a sister of hers, who had died in 1923, a spinster, intestate. In the latter event the deceased (Mrs. Lever), if alive, would have been entitled to further trust funds. It had been arranged that the administrators of the deceased should pay over her estate to the executor of the deceased's mother and the executor of the deceased's husband in two equal shares, and an insurance policy had been taken out covering all risks incurred by the arrangement.

F. L. C. Hodson, on behalf of the applicant, asked for leave to swear that the deceased had died on or since Jan. 1, 1894, and for a joint grant to Miss Gardner and the Guardian Assurance Company.

LANGTON, J., raised the question whether the two applications could be made in one motion according to practice.

Hodson.—There is no rule to the contrary, and a precedent for such a course appears in Form No. 47 at p. 1055 of MORTIMER ON PROBATE (2nd Edn.).

LANGTON, J., made an order in the terms of the motion, having regard to the special circumstances.

Solicitors: *Evans, Barraclough & Co.*

[*Reported by* WILLIAM LATEY, ESQ., *Barrister-at-Law.*]

JOHN SHAW & SONS (SALFORD), LTD. *v.* SHAW

[COURT OF APPEAL (Greer, Slesser and Roche, L.JJ.), February 5, 6, 7, March 1, 1935]

[Reported [1935] 2 K.B. 113; 104 L.J.K.B. 549; 153 L.T. 245]

Account Stated—Action on—Entries in balance sheet of company showing indebtedness of director—Claim against director.

Company—Director—Powers of management given to directors—Control by shareholders.

Practice—Striking out action—Want of authority—Procedure.

An objection by the defendant to an action to the plaintiff's right to sue should be taken by an interlocutory motion or summons, but, if that procedure is not adopted and the matter goes to trial and the court is informed of facts which prove conclusively that the action before the court has been brought without the authority of the person named as plaintiff, the action should be struck out: *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co.* (*Great Britain*), *Ltd.* (1), [1916] 2 A.C. 307, applied. The court ought not to ignore evidence of lack of authority either to bring an action or to defend it and give judgment in favour of or against a party who, ex hypothesi, is not in court. If the question of authority is left in doubt the right course for the court to take is to try the action and give judgment according to the evidence, leaving the losing party to apply to set aside the judgment on the ground that he had never authorised the action or the defence as the case might be: *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (2), [1925] A.C. 112, explained.

If powers of management are vested in the directors of a company, they and they alone can exercise those powers. The only way in which the general body of the shareholders can control the exercise of powers vested by the articles in the directors is by altering the articles of the company or refusing to re-elect the directors of whose actions they disapprove. They cannot usurp the powers which by the articles are vested in the directors: *Quin & Axtens, Ltd.* v. *Salmon* (3), [1909] A.C. 442, applied.

The balance sheet of a company was signed by two directors of the company who were indebted to the company in sums specified in the balance sheet.

Held: the balance sheet was not an account rendered to the directors by the company as creditors and accepted by the directors as debtors; it was a statement by the company of the state of their assets and liabilities, and not a debtor and creditor statement between the company and the directors; it was signed by the directors as directors and not in their personal capacity; and, therefore, it was not an account stated between the parties on which the company could sue the directors for the amount of their indebtedness.

Notes. As to powers and duties of directors, see 6 HALSBURY'S LAWS (3rd Edn.) 293 et seq.; balance sheets, ibid., 363 et seq.; and actions by companies, ibid., 444 et seq.; and for cases, see 9 DIGEST (Repl.) 497 et seq., 714 et seq. As to an action on an account stated, see 8 HALSBURY'S LAWS (3rd Edn.) 252 et seq., and for cases, see 12 DIGEST (Repl.) 642 et seq.

Cases referred to:

(1) *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co.* (*Great Britain*), *Ltd.*, [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 32 T.L.R. 624; 60 Sol. Jo. 602; 22 Com. Cas. 32, H.L.; 9 Digest (Repl.) 718, *4762*.

(2) *Russian Commercial and Industrial Bank* v. *Comptoir D'Escompte de Mulhouse*, [1925] A.C. 112; 93 L.J.K.B. 1098; 132 L.T. 99; 40 T.L.R. 837; 68 Sol. Jo. 841, H.L.; 10 Digest (Repl.) 1297, *9151*.

(3) *Quin and Axtens, Ltd.* v. *Salmon, Ltd.*, [1909] A.C. 442; 78 L.J.Ch. 506; 100 L.T. 820; 25 T.L.R. 590; 53 Sol. Jo. 575; 16 Mans. 230, H.L.; 9 Digest (Repl.) 498, *3283*.

(4) *Young* v. *Ladies Imperial Club, Ltd.*, [1920] 2 K.B. 523; 89 L.J.K.B. 563; 123 L.T. 191; 36 T.L.R. 392; 64 Sol. Jo. 374, C.A.; 8 Digest (Repl.) 655, *31*.

(5) *Re Portuguese Consolidated Copper Mines, Ltd., Ex parte Badman, Ex parte Bosanquet* (1890), 45 Ch.D. 16; 63 L.T. 423; 39 W.R. 25; 2 Meg. 249, C.A.; 9 Digest (Repl.) 278, *1745*.

(6) *Camillo Tank S.S. Co., Ltd.* v. *Alexandria Engineering Works* (1921), 38 T.L.R. 134, H.L.; Digest Supp.

(7) *Re Homer District Consolidated Mines, Ex parte Smith* (1888), 39 Ch.D. 546; 58 L.J.Ch. 134; 60 L.T. 97; 4 T.L.R. 466, 712, C.A.; 9 Digest (Repl.) 543, *3573*.

(8) *D'Arcy* v. *The Tamar, Kit Hill and Callington Rail. Co.* (1867), L.R. 2 Exch. 158; 4 H. & C. 463; 36 L.J.Ex. 37; 14 L.T. 626; 30 J.P. 792; 12 Jur. N.S. 548; 14 W.R. 968; 10 Digest (Repl.) 1243, *8750*.

(9) *Re Greymouth Point Elizabeth Rail. and Coal Co., Ltd., Yuill* v. *Greymouth Point Elizabeth Rail. and Coal Co., Ltd.*, [1904] 1 Ch. 32; 73 L.J.Ch. 92; 11 Mans. 85; 9 Digest (Repl.) 546, *3591*.

(10) *John Morley Building Co., Ltd.* v. *Barras*, [1891] 2 Ch. 386; 60 L.J.Ch. 496; 64 L.T. 856; 39 W.R. 619; 9 Digest (Repl.) 591, *3907*.

(11) *Irving* v. *Veitch* (1837), 3 M. & W. 90; Murp. & H. 313; 7 L.J.Ex. 25; 1 Digest 275, *73*.

(12) *Marshall's Valve Gear Co., Ltd.* v. *Manning, Wardle & Co., Ltd.*, [1909] 1 Ch. 267; 78 L.J.Ch. 46; 100 L.T. 65; 25 T.L.R. 69; 15 Mans. 379; 9 Digest (Repl.) 498, *3284*.

(13) *Thomas Logan, Ltd.* v. *Davis* (1911), 104 L.T. 914; 55 Sol. Jo. 498; 9 Digest (Repl.) 556, *3679*.

(14) *Simmons* v. *Liberal Opinion, Ltd.*, [1911] 1 K.B. 966; 80 L.J.K.B. 617; 104 L.T. 264; 27 T.L.R. 278; 55 Sol. Jo. 315, C.A.; 1 Digest 660, *2764*.

(15) *Richmond* v. *Branson & Son*, [1914] 1 Ch. 968; 83 L.J.Ch. 749; 110 L.T. 763; 58 Sol. Jo. 455; 33 Digest 236, *1526*.

Appeals from orders made by du Parcq, J., in two actions tried together by him at Manchester Assizes.

The actions were brought by the plaintiff company, which was registered as a private company, against John Shaw and Peter Shaw, who were, with others, directors of the company, claiming against Peter Shaw £11,483 4s., and against John Shaw £15,088 18s. 9d., being the amounts "found and admitted to be due to the plaintiffs as shown by the plaintiffs' balance sheet" dated Dec. 31, 1932. By their defences each defendant denied that the alleged or any account was stated between the plaintiffs and him. Each defendant pleaded that the demand for payment had been made without the authority required under the articles of association of the company, and they relied on a resolution passed at an extraordinary meeting of the company requiring the chairman to instruct the company's solicitors to discontinue the action.

The facts are set out in the judgment of Greer, L.J.

By art. 95 of the articles of association:

> "The business of the company shall be managed by the directors who . . . may exercise all such powers of the company and do on behalf of the company all such acts as may be exercised and done by the company and as are not by the statutes or by these articles required to be exercised or done by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the statutes, and to such regulations being not inconsistent with the aforesaid regulations or provisions as may be prescribed by the company in general meeting, but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made."

The articles of association as subsequently altered provided:

> "84. The directors of the company shall be eight in number of whom three shall hold office as permanent directors as hereinafter defined and five shall be ordinary directors. The first permanent directors shall be Ernest Farrell, Charles Halliday,

and Mark Wheatley Jones. The ordinary directors shall, subject to the provisions of these articles, be the present board, namely, Peter Shaw, John Shaw, Percy Shaw, John Bryan Shaw, and James Fitzgerald Fern. . . . A

"86. As from Aug. 18, 1933, three of the ordinary directors of the company shall be Peter Shaw, John Shaw, and Percy Shaw, and they shall remain as ordinary directors during their respective lives, so long as they devote their whole time and attention to the business of the company. . . . B

"86A. The said Peter Shaw, John Shaw, and Percy Shaw as directors shall have no control over, and no right to deal with, on behalf of the company, any of the debts due from them or any of them mentioned in the said terms of settlement, and shall have no right as shareholders to vote on any matter connected with such debts and shall have no right either themselves or through their nominees to vote on any question affecting their position as directors either directly or indirectly. C

"87. The ordinary directors, including the said Peter Shaw, John Shaw, and Percy Shaw, shall have no right at directors' meetings to vote in respect of, nor shall they have any control over, the financial affairs of the company, and with regard to the management of the company's business they shall have only such rights of voting and such control over the management as may from time to time be conferred upon them by the permanent directors. . . . D

"111. The permanent directors shall appoint one of themselves as chairman of the company, and another permanent director vice-chairman, and the chairman or in his absence the vice-chairman shall preside at meetings of directors. If at any meeting neither the chairman nor vice-chairman is present within five minutes after the time appointed for holding the same the remaining permanent director shall be chairman. No board meeting shall be held unless at least one permanent E director is present.

"121A. All dividends payable on the ordinary shares held by Peter Shaw, John Shaw, and Percy Shaw at the date of this resolution shall be retained by the company on account of the debts mentioned in the said terms of settlement until the said debts are liquidated. Except as above provided that said debts shall not be called in or the charges mentioned in the said agreement enforced for a period F of twenty years from the date of this resolution except in the event of a creditors' winding-up of the company, and this clause shall be so construed that after the death of any one or more of them the said Peter Shaw, John Shaw, and Percy Shaw his estate shall be entitled to the benefit thereof."

DU PARCQ, J., gave judgment in favour of the plaintiff company and the defendants appealed. G

H. I. P. Hallett for the defendants.

Lynskey, K.C., and *P. R. Barry* for the company.

Cur. adv. vult.

March 1.—The following judgments were read.

GREER, L.J.—The defendant Peter Shaw in the first of these two appeals, which were H heard together, and the defendant John Shaw in the second, ask this court to reverse the judgment of the trial judge who decided that they were liable to pay to the plaintiff company the respective sums of £11,483 4s. in their action against Peter Shaw, and the sum of £15,088 18s. 9d. in their action against John Shaw.

The cause of action alleged in both actions was money due on an account stated. The claim was based on the defendants' signatures as directors of the company to a I balance sheet in which the sums above mentioned were entered as balances at debit of the defendants respectively. The facts relevant to the determination of the questions involved in the appeal are fully and accurately stated in the judgment of the trial judge, DU PARCQ, J., and I need not state them in detail, but in order to make my judgment intelligible I find it necessary to state what the situation of the parties was immediately before June 17, 1932, when the terms of settlement of two actions were provisionally agreed by the company and the defendants and their brother Percy Shaw, and the events that followed the settlement.

These three brothers were the principal shareholders in the company, and together with James Bryan Shaw and James Fitzgerald Fern they formed the board of directors. Peter Shaw was governing director with large powers which, under the articles of association, as they then were, gave him absolute power to carry on the business of the company as he thought fit, without consulting the other members of the directorate. Subject to his overriding powers, the other two brothers and Mr. Fern were entitled to exercise the powers exercisable by the directors under the articles. Percy Shaw had, in 1925, admitted that he had become indebted to the company in respect of moneys and property of the company which he had wrongfully used for his own purposes in the sum of £13,150, and had given to the company a mortgage or charge on all his assets to secure the payment of this debt.

In 1931 Percy Shaw appears to have discovered, as the fact was, that his two brothers, Peter and John, had been guilty of similar defalcations or breaches of duty to the company. It seems probable that this course had been pursued by the three brothers in order to conceal their true incomes from the income tax authorities. In all probability they did not defraud the other shareholders of the company to any serious extent, as, if they had not in years of prosperity taken the money or property of the company for their private purposes directly, they would have been entitled to much larger dividends than they received on their share, but in that case the income tax authorities would have received from the company and from the three brothers much larger sums in respect of income tax and super tax than they in fact received.

When Percy Shaw discovered that he was not the only black sheep in the flock, he instituted two actions in the Chancery Court of the county palatine of Lancaster. In the first of these actions he claimed that an account should be decreed against his brothers, and payment to the company of the amount found due on taking the account. The parties to this action were Percy Shaw as plaintiff, Peter Shaw, John Shaw and the company as defendants. The other action was for an injunction to restrain his removal from the offices of manager and secretary, which he then held. The defendants Peter Shaw and John Shaw delivered a defence to the first of these two actions in these words:

> "1. Save that there are certain inaccuracies in the particulars given in para. 6 of the statement of claim, these defendants admit all the allegations contained in the statement of claim and will submit to judgment as claimed therein."

The business of the company was a family business, the shares in the main being held by the three brothers and their relations, and it was felt by their advisers for many reasons eminently desirable that the action and all disputes should be settled. Negotiations for a settlement resulted in an agreement signed by counsel for the company, for Peter Shaw and John Shaw, and for Percy Shaw. The agreement is dated June 7, 1932. It is not in dispute that the three brothers authorised the signing of this agreement, and were bound by it from the time of its signature. But by cl. 14 of the agreement it was stated that the agreement was not to be binding on the company until the consent of the shareholders was obtained by the three brothers "so as to make the said arrangements binding on the company." This clause and cl. 15 have such an important bearing on the questions to be decided in this appeal that I think it necessary to read both of these clauses in full:

> "14. For the carrying out of the above terms the said Peter John and Percy Shaw shall execute and do all such deeds agreements acts and things as may be necessary and shall procure that the company's articles of association are altered and the consent of the shareholders obtained so as to make the said arrangements binding on the company. Peter John and Percy Shaw shall not vote at any meeting of the company called for the purpose of approving or carrying out the said arrangements."
>
> "15. The costs of altering the company's articles and the costs of Peter John and Percy Shaw of any negotiations deeds agreements acts and things preliminary to or executed or done for the purpose of carrying out this agreement are to be paid by the company. These terms must be embodied in an agreement under seal between Peter John and Percy Shaw and the company such agreement to be

> conditional on the company passing the necessary special resolutions and the company's bank being willing to allow the same to be carried out." A

In my judgment, as soon as the shareholders approved the agreement it became binding on all the parties. It was not a mere proposal of the terms to be embodied in a deed. It was, in my judgment, a concluded agreement, subject to the condition that the company should pass the necessary resolutions, and the company's bank should allow the same to be carried out. It was common ground that these conditions were complied with. B The agreement was not conditional on the execution of a contract under seal. It merely contained as one of its terms that such a deed should be executed.

The material terms of this agreement are accurately stated by DU PARCQ, J., in these words:

> "Those terms of settlement provided that Peter Shaw should resign his office of C governing director and that the company should appoint two quite independent persons to be permanent directors of the company; Peter, John and Percy Shaw were to be ordinary directors; the articles were to be regulated, so as to provide that Peter, John and Percy Shaw should have no control over and no right to vote in respect of the debts due from them or any of them; Mr. Halliday, an accountant, was to be appointed to investigate the affairs of the company and certify the aggregate D liability of the three brothers to the company; Peter, John and Percy Shaw were to admit that they were responsible for all defalcations which had occurred and their liability was to be made one undivided fund, but without interest, and for this fund each of them was to be jointly and severally liable, but as between themselves and their personal representatives liable in equal one-third shares. No interest was to be charged on the fund. The deed of mortgage given by Percy Shaw E in 1926 was to be cancelled, and in its place, Peter, John and Percy Shaw were to charge all their private assets still remaining to the company on account of the joint indebtedness—I say in passing, it seems to me that there could be no doubt still remaining at the date of these terms of agreement. Then there is a provision that dividends were to be paid by the company; dividends payable to Peter, John and Percy Shaw were to be retained by the company on account of the debt F and the debt was not to be called in or the charges enforced for a period of twenty years except in the event of a creditors' winding-up of the company. The articles of association were to be altered and the brothers were to procure that they should be altered. Then finally comes this clause: 'These terms must be embodied in an agreement under seal'—there was an obvious reason for that, the debt was not to be called in for twenty years—'between Peter, John and Percy Shaw and the company G such agreement to be conditional on the company passing the necessary special resolutions and the company's bank being willing to allow the same to be carried out.' There was a modification of those terms of settlement on July 18, 1933, to which I think I need not refer."

It is clear that these terms of settlement were provisional in the sense that they would only become the terms of a contract binding as between the company and the three H brothers when the shareholders at an extraordinary general meeting should pass a resolution approving of the terms—see cls. 4 and 14 of the terms of settlement. It seems equally clear that when such a resolution was passed, the terms of settlement became a contract binding on all parties, to be carried out in the manner there set out.

As it seemed reasonably certain that the terms would be approved by the shareholders, Mr. Halliday commenced his investigations without waiting for the share- I holders' approval. By such investigations he assessed at the figure of £47,226 18s. 8d., the amount which was to be debited to the three brothers as owing by them to the company jointly and severally, and payable as set out in the terms of settlement. Though they were all to be jointly and severally indebted to the company, and were entitled to have set off against the total indebtedness all sums due from the company to them or any of them, as between themselves they were to be debited with one-third of the total, and have credit for any moneys due to them respectively by the company, and any payments they might make an account as against their several third shares of the total. Having ascertained these figures, Mr. Halliday prepared the balance sheet which is dated Dec. 31, 1932. He admitted at the trial that he carried out his investigations and prepared his figures under the terms of settlement. On March 18, 1933, he sent a copy of the proposed balance sheet to Peter Shaw with a copy for John Shaw. Peter Shaw took Mr. Halliday's letter and the balance sheet to his solicitors, Messrs. Richard Hilditch and Sons, and correspondence took place between them and Mr. Halliday's firm. It is unnecessary to refer to this correspondence. Its substance was that it raised several points for the consideration of Mr. Halliday, and, in particular, pointed out that the balance sheet should show that the total liability was a joint liability of the three brothers. Mr. Halliday answered that, having regard to the accounts, he had to show the amount as divided in equal parts, because "drawings and repayments were dealt with in each director's account," and he added: "The total amount due by directors is clearly shown on the face of the balance sheet." He obviously did not intend his balance sheet to be inconsistent with the terms of the settlement. He regarded it as showing the total debt payable as provided by the terms of settlement, and entered the several debts in order to show how much the three directors were entitled to by way of set-off or payment on account. It is, however, manifest that the balance sheet as it stands would be very misleading to anyone unacquainted with the terms of settlement. The total amount of the joint and several indebtedness of the three brothers should have appeared as one item, and its value as an asset ought to have been discounted by the fact that it was not payable for twenty years. However this may be, it is clear that in putting forward the balance sheet Mr. Halliday was not presenting it for signature by the directors as an account independent of the terms of settlement, but rather as one which was intentionally drawn up in consequence of the settlement terms, and as in no way inconsistent therewith.

On Aug. 18, 1933, an extraordinary general meeting of the shareholders was held, and resolutions were passed as required by the terms of settlement approving those terms with some amendments that had in the meantime been agreed to by counsel for all parties, and altering the articles of association in such a way as to carry out the terms of the agreement so approved. The minutes of this meeting were not put in, but it was not in dispute that the resolutions were duly passed. They are recited in the deed afterwards prepared for sealing and in fact sealed by the company.

Clause 8 of the terms of settlement provides that the three brothers were to be bound by the total liability as certified by Mr. Halliday. No formal certificate was produced at the trial, but the brothers on Sept. 25 signed the following letter:

> "To the Permanent Board of Directors, John Shaw & Sons (Salford) Ltd.—Dear Sirs,—In accordance with clause 8 of the terms of settlement, dated June 17, 1933, we hereby agree our liability to the company (which has been made one undivided fund for which each of us is jointly and severally liable in equal one-third shares) to be £47,226 18s. 3d. as certified by Mr. Halliday. (Signed) Peter Shaw, John Shaw, Percy Shaw."

The annual general meeting of the company was held on Oct. 23, and the balance sheet prepared by Mr. Halliday, and by this time signed by Peter and John Shaw as directors, was passed by the shareholders. It did not appear from any evidence given at the trial when they signed the balance sheet. I think it was probably signed on some date between Sept. 25 and Oct. 23. However this may be, it is clear that they signed it after the terms of settlement had become a binding agreement. As Mr. Halliday and his co-directors, and I think all the shareholders, had approved the agreement, their signatures, if they could be treated as an admission at all, could only be an admission of a debt ascertained and admitted by them under the terms of settlement, and therefore as a debt not presently payable, but payable in twenty years. The fact that they afterwards failed or refused to comply with one of the terms of the agreement could not alter the meaning of their signature, which must be interpreted having regard to the circumstances as they existed at the date when they signed the document.

In December, 1933, disputes arose as to the meaning of the terms of settlement which still remained to be performed, and letters passed between the solicitors for Peter and

John Shaw, and the solicitors for the company. Most of the points raised were satisfactorily settled by agreement between the two firms, but it transpired that the two brothers had disposed of some of their assets which remained at the date of the terms of settlement to enable them to settle certain claims of the revenue authorities, and they wanted a clause in the deed, the draft of which was under consideration, relieving them from responsibility, and they refused to sign the deed, as it was not within their power to charge their assets as they were at the date when the terms of settlement were signed, or even as they were when those terms were approved by the company. They, undoubtedly, committed a serious breach of the terms of settlement.

At this time, pursuant to the company's articles as they had been altered in accordance with the terms of settlement, the directors consisted of two categories—permanent directors and ordinary directors. The permanent directors were Ernest Farrell, Charles Halliday, and Mark Wheatley Jones; the ordinary directors were Peter Shaw, John Shaw, Percy Shaw, John Bryan Shaw, and James Fitzgerald Fern. John Bryan Shaw was a son of John Shaw.

On March 16, 1934, the three permanent directors held a meeting, to which none of the ordinary directors were summoned. The permanent directors carried a resolution by two to one to instruct the company's solicitors to issue the writs in this action. Accordingly, the solicitors caused two specially indorsed writs to be issued. The statement of claim indorsed on the writ in the action against Peter Shaw was in the words following:

> "The plaintiffs' claim is £11,483 4s. upon an account stated between the plaintiffs and the defendant. Particulars: Dec. 31, 1932: To amount found and admitted by the defendant to be due to the plaintiffs as shown by the plaintiffs' balance sheet of this date £11,483 4s. Amount claimed £11,483 4s."

The statement of claim in the action against John Shaw was similar except that the amount claimed was £15,088 18s. 9d.

The defendants answered the claim in two ways. They contended (i) that the facts as proved or admitted failed to establish a cause of action for money due under an account stated or any cause of action whatsoever; (ii) that the permanent directors had no authority to commence the action on behalf of the company, and as the company were, therefore, not before the court no judgment could be given in their favour.

I deal first with the second of these contentions. No objection was taken at the trial that the court could not decide the second point on the ground that it is not a matter of defence, but only a ground for a motion to stay the action and make the unauthorised individuals and the solicitors pay the costs, and the question of authority was fully argued and decided by the trial judge in the plaintiffs' favour.

In the appeal, however, counsel for the company did contend that the court was bound in law to refuse to consider the question whether the action was instituted by the authorised agents of the company. As will be seen presently, I am of opinion that the action was commenced and carried on by the authority of agents clothed with authority by the company's articles, and that the meeting of the shareholders on April 30, 1934, had no power to order the chairman to instruct the solicitors to discontinue the actions. If this be right, the preliminary question whether this court is entitled or is not entitled to decide the question of authority does not arise, but, as my view as to the meaning and effect of the relevant articles may not be accepted, I propose to say something about the preliminary question whether the court can entertain the question at all.

In my judgment, neither Lord Cave nor Lord Atkinson, nor Atkin, L.J., by what they said in *Russian Commercial and Industrial Bank* v. *Comptoir D'Escompte de Mulhouse* (2), intended to lay down as a rule of law that when it is clear from the evidence given in an action that the supposed plaintiff did not authorise the bringing of the action, the court is bound to allow the action to go on to judgment, and thereby allow judgment to be obtained in favour of a person or company ex hypothesi not present in court and not asking for a judgment, or against a person or company who have not been served with process and have never instructed anyone to appear on their behalf.

I understand *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co.* (*Great Britain*), *Ltd.* (1) to be a decision to the effect that where the court is informed of facts which prove conclusively that the solicitors had an authority to bring the action, the action should be struck out. The want of authority was established by the failure of proof that the Continental Company had before the war clothed the English secretary with authority to commence actions on their behalf, and the incapacity of the enemy directors in whom authority to bring actions was vested after the war had begun made it clear to demonstration that the action was unauthorised.

In *Russian Commercial and Industrial Bank* v. *Comptoir D'Escompte de Mulhouse* (2) the court held that the evidence established that the English representative of the Russian corporation had authority to bring the action, but LORD CAVE, LORD ATKINSON and ATKIN, L.J., went beyond what was necessary to decide the case and expressed the opinion that the point of want of authority could not be raised by way of defence, but ought to be raised by notice of motion to stay or dismiss the action. These observations do not, in my judgment, mean that if the facts actually put in evidence prove that the solicitors commenced the proceedings without any authority from the named plaintiff, the court ought to ignore those facts and give judgment in favour of or against a party who ex hypothesi is not present in court. In my opinion, the court has inherent jurisdiction to say:

> "As it is clearly established that the action has been brought by solicitors who were not authorised by the named plaintiff to bring it, we will strike it out."

They would not, then, be entitled to award costs against the nominal plaintiff, nor would they as a rule make any order that the solicitor should pay the costs, but would leave these matters to be determined on a motion to which the solicitors would be parties. On the other hand, if the question of authority were left in doubt, the right course for the court to take would be to try the action, and give judgment according to the evidence, leaving the losing party to apply to set aside the judgment on the ground that he had never authorised the action or the defence, as the case might be.

In the present case, in the view I take of the company's new articles, the preliminary point does not arise. Articles 86A and 87 of the articles are couched in the negative. In form they say what powers the three brothers and the ordinary directors shall not have, but they necessarily have the same meaning they would have if framed in a positive form. Article 86A restricts the rights and duties of the three brothers, and prohibits them as directors from dealing on behalf of the company with any of the debts due from them under the terms of settlement. It has the same effect as it would have had if it had said: "the directors other than the three brothers shall alone have power on behalf of the company to control the conduct of the company with regard to such debts, and the sole right to deal with them." Article 86A alone would not have had the effect of excluding the two additional directors, John Bryan Shaw and James Fitzgerald Fern, from control over or from dealing with these debts, but art. 87 has a wider effect than 86A. This article applies to all the ordinary directors, and not only restricts their rights at directors' meetings to vote in respect of, but it also provides that they shall have no control over, the financial affairs of the company, and that they shall only have such rights of voting and such control over the management as may from time to time be conferred upon them by the permanent directors. The effect of this article is the same as it would have been if it had provided that the power of control over the financial affairs of the company, and all powers of management of the affairs of the company, except such as might from time to time be conferred upon the ordinary directors by the permanent directors, should be vested in the three permanent directors alone. The effect of these articles may be illustrated by saying the same result is achieved if you say eight minus five, as if you say three. There is no evidence that any, or, if so, what, powers of management had been conferred on the ordinary directors by the permanent directors.

In my judgment, on March 23, 1934, when the permanent directors decided to instruct the company's solicitors to bring these actions on behalf of the company, they had power under the articles to do so. The power was not in the board of directors, but in the permanent directors. The ordinary directors were not entitled to any say on the question, which was the only one considered at the meeting. If they had been summoned and had come to the meeting they could have been directed by the permanent directors to retire and could not have refused.

It seems to me in any case to be carrying technicality to an absurd length to say they ought to have been summoned to the meeting in order that they might be directed to retire. I do not, and am not entitled to differ from the decision of this court in *Young* v. *Ladies' Imperial Club, Ltd.* (4), and *Re Portuguese Consolidated Copper Mines, Ltd., Badman's Case, Bosanquet's Case* (5). Those decisions mean that a meeting of directors having power to make a decision on a given matter is invalid if one of the directors entitled to take part has not been summoned. The decisions have no relation to the question we have to determine.

It was further argued that the power of the permanent directors to institute actions on behalf of the company was so restricted by art. 121A that it did not extend to the present actions. I fail to appreciate the force of this argument. Assuming that an agent's authority to bring actions is established, the principal is bound by what the agent does within the scope of his authority. The fact that the action is one that cannot succeed does not limit the authority of the agent, though it may give the principal a right to complain of the conduct of his agent, and to recover damages from him for his breach of duty as agent. Further, in this case the action was not brought for money due under the terms of settlement, or for money due under art. 121A. The action was based on a cause of action which arose out of the defendants' signature to the balance sheet, and this cause of action, whether likely to succeed or not, was one in respect of which the permanent directors were, in my opinion, empowered to commence the suit and carry it on.

I am, therefore, of opinion that the learned judge was right in refusing to dismiss the action on the plea that it was commenced without the authority of the plaintiff company. I think the judge was also right in refusing to give effect to the resolution of the meeting of the shareholders requiring the chairman to instruct the company's solicitors not to proceed further with the action. A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors; certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders. The law on this subject is, I think, accurately stated in Buckley on Companies (11th Edn.) at p. 723, as the effect of the decisions there mentioned.

For these reasons I am of opinion that the court ought not to dismiss the action on the ground that it was instituted and carried on without the authority of the plaintiff company.

It remains for me to consider whether the action ought to have failed on other grounds. I am satisfied that judgment should have been given for the defendants on the ground that no cause of action for money due on an account stated was established by the proved or admitted facts. If the balance sheet could in any sense be treated as an account stated, I am inclined to think that it would be one of the second class of cases referred to by Lord Cave in *Camillo Tank Steamship Co.* v. *Alexandria Engineering Works* (6), but it is unnecessary to decide this point because, for reasons I am about to state, I think the balance sheet was not an account stated at all, either of the first, second, or third kind mentioned by Lord Cave.

I am of opinion, first, that the balance sheet was not an account stated between the company as creditors, and accepted by the defendants, so as to involve a fresh promise to pay the amounts stated at debit of the defendants, and, secondly, if it be an account stated in the sense of an admission by a debtor or an agreement to pay a balance of account, the only promise to pay which can in the circumstances be implied is a promise not to pay in præsenti, but a promise to pay in twenty years' time.

As to the first point, the balance sheet was not an account rendered to the defendants by the company as creditors and accepted by the defendants as debtors. It was a statement by the company of the state of their assets and liabilities. As such a statement it was inaccurate, but, though by signing it the directors who signed and those who did not sign, but agreed to the presentation of the balance sheet to the shareholders, vouched its accuracy, this did not make it a debtor and creditor statement between the company and the defendants. It was not signed by the defendants in their personal capacity; it was signed on behalf of all the directors as a statement by the directors to the shareholders of the state of their assets and liabilities. It was not a contract by the company to accept in place of the £47,226 18s. 3d. to which they were entitled in twenty years' time from the two defendants the sums debited to them in the balance sheet. Nor was it a contract by the two defendants severally to pay immediately the sums debited to them in the balance sheet. It was only an inaccurate statement by the board of the assets of the company, which might have landed them in difficulties and liabilities to shareholders who suffered damage by acting in the belief that the statements in the balance sheet were true. I have, however, very little doubt but that most, if not all, of the shareholders knew the real state of the facts. The company was a family concern.

As to the second point, all the directors knew at the time the balance sheet was signed that it was not intended in any way to alter the effect of the terms of settlement. It falls to be interpreted in the light of the surrounding circumstances, and if the defendants can be treated as making any promise to pay, such promise is implied and not express, and in the light of the surrounding circumstances it should have been held to be a promise to pay in twenty years, and not a promise to pay immediately.

For these reasons the action should have failed, and it seems unnecessary to deal with the contention of the company that when the writ was issued the settlement agreement had ceased to be binding by reason of the defendants' liability to grant the agreed charges on their assets, and their refusal to sign the deed. This is not a case of repudiation before the date of performance has arrived. When the defendants refused to perform the terms of the contract that still remained, that is, to give the agreed charges, and to sign the deed, the greater part of the agreement had been already performed by the defendants, and the company had had the benefit of the terms so performed. All the terms numbered one to eight inclusive had been effectually carried out. Peter Shaw had given up his exceptional powers as governing director; the articles had been altered so as to deprive the ordinary directors of such powers of management as they previously had, and to leave their powers subject to the discretion of the permanent directors. It is possible that the company might have been entitled to rescind the contract, by reason of a breach of a fundamental term, but they could not continue to retain the benefits of the agreement so far as it had been performed and at the same time insist that the agreement was no longer binding on them. It does not seem reasonable or just that the permanent directors should exercise the power to commence and carry on an action which they never would have had if the terms of settlement had not been agreed to, while at the same time saying the other contracting parties have ceased to have any right to the benefits conferred by the agreement. They cannot exercise the powers given to them by art. 86A and 87 and successfully contend that the appellants were not entitled to the suspension of liability for twenty years provided for under the terms of settlement and in art. 121A, which continued to operate as one of the articles of association of the company.

For these reasons I am of opinion that the appeal succeeds, and judgment should be entered for the defendants against the company.

SLESSER, L.J.—In this case the material facts have been stated by GREER, L.J., in his judgment, and on them two fundamental questions fall to be decided. First, the initial question whether the plaintiff company have shown any title in the circumstances of the case to sue at all, and, secondly, if they are before the court, whether their claim is well founded.

The action is brought against two defendants, John and Peter Shaw, who were at all material times directors of the plaintiff company, for amounts said to be found and admitted by them to be due upon accounts stated between the plaintiff company and the defendants respectively. The sums claimed in each case differ, but the issues in the two cases are identical; the actions have been consolidated and have been treated throughout as one matter.

The procedural grounds upon which the appellants contend that the "action is altogether irregular and should be struck out"—to use the language of Lord Parker in *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co.* (*Great Britain*) *Ltd.* (1) ([1916] 2 A.C. at p. 348),

> "are three in number: first, they say that the persons who authorised the issue of the writs on behalf of the company had no power in the circumstances so to act, in that they purported to act as, but were not, a meeting of the directors, who alone could exercise such power; secondly, they say that under the articles, in particular art. 95, the power of the directors to do, on behalf of the company, all such acts as the company might do is limited in that they must act in a manner subject to the articles and that the amended art. 121A of the articles of association expressly excludes such an action at law as was here taken; and, thirdly, they contend that, by reason of a resolution passed by the shareholders at an extraordinary meeting on April 30, 1934, directing the chairman of directors to instruct the company's solicitors to discontinue the action forthwith, thereafter, whatever authority the directors or any of them had to bring or continue the action was determined."

To all these objections counsel for the respondents argues that, in any event, the whole matter cannot properly be raised as a defence in these proceedings.

I propose to deal with these contentions seriatim. First, as to the authority of the persons who started the actions to act for the company: under the articles of association, as amended on Aug. 18, 1932, there are constituted, by art. 84, eight directors, of whom three hold office as permanent directors, and five are ordinary directors. The permanent directors were a Mr. Farrell, Mr. Halliday, and Mr. Jones. These three alone were summoned to a meeting at Mr. Farrell's office some time before the issue of the writs, when the actions were then decided upon and solicitors instructed by a majority vote of Mr. Farrell and Mr. Halliday, Mr. Jones dissenting. The five ordinary directors, who were, admittedly, not summoned or present, consisted of the defendants, their brother Percy Shaw and two other gentlemen—John Bryan Shaw and James Fitzgerald Fern.

I entertain no doubt that if it was necessary under the articles that a valid decision to bring an action must be arrived at at a meeting of the directors, that no such meeting was then held, by reason of the failure to summon the ordinary directors. The authority, if authority be needed for such a conclusion, is to be found in the case of *Re Homer District Consolidated Mines, Ex parte Smith* (7), where, on a failure to summon certain directors to a board meeting, North, J., said (39 Ch. D. at p. 551):

> "I come to the conclusion that what was done on that occasion was not the act of the board of directors, and did not bind the company"

(*Re Portuguese Consolidated Copper Mines, Ltd., Badman's Case, Bosanquet's Case* (5); and on the same principle in this court, *Young* v. *Ladies' Imperial Club, Ltd.* (4) are to the same effect.) As was stated in *D'Arcy* v. *The Tamar, Kit Hill, and Callington Rail. Co.* (8) it is

> "quite clear that the directors are to act together, and in a meeting"

—per Martin, B. (L.R. 2 Exch. at p. 161). But the argument in this case proceeds upon another footing, for it is said that the peculiar powers conferred upon the permanent directors by these articles, and the exclusion of the ordinary directors from all the management of the affairs of the company, enabled the permanent directors to authorise the starting of proceedings as a part of their exclusive powers.

It, therefore, becomes necessary to examine in some detail what powers are so given to the permanent directors to the exclusion of the ordinary directors. It is clear from art. 111, as amended in the revised articles of Aug. 18, 1932, that it is contemplated that at a board meeting the ordinary members shall normally have the right to attend, for it is there provided that "no board meeting shall be held unless at least one permanent director is present," and further, that, the chairman and vice-chairman being absent, "the remaining permanent director shall be chairman." This may be construed in connection with art. 109, which provides, inter alia, that "unless otherwise determined two shall be a quorum, and in the case of an equality of votes, the chairman shall have a second or casting vote." So that at a board meeting it is clearly contemplated that ordinary members have a right to attend and constitute a part of the board.

The articles which give special powers to the permanent directors must next be considered. Under art. 95 of the original articles it was provided that, generally subject to the powers of the governing director under arts. 89–92, the business of the company should be managed by the directors. By art. 93 the directors might, from time to time, appoint some of their body to be managing directors and vest such of the powers as were in the directors in the managing directors on such terms as they might think fit. By the amended articles, arts. 89–92 as to the governing director were cancelled, but not art. 95, the provisions of which, however, became subject to the amending arts. 86A and 87. Art. 86A is concerned only with the two defendants and their brother, Percy Shaw. Art. 87 concerns all the ordinary directors, that is to say, in addition to those three gentlemen, it affects John Bryan Shaw and James Fern. It is convenient to consider art. 87 first, because, if the permanent directors had no authority to authorise these proceedings without inviting John Bryan Shaw and James Fern to their meeting, it must follow, subject to matters still to be considered, that the authorisation would be defective, apart altogether from the special cases of the two defendants and their brother, Percy Shaw. I do not find that the learned judge, in his judgment, deals with the cases of John Bryan Shaw and Mr. Fern at all. They had no interest in any of the debts due from Peter, John, and Percy Shaw to the company, which are dealt with under art. 86A, and the observations of FARWELL, J., in *Re Greymouth Point Elizabeth Rail. and Coal Co., Yuill* v. *Greymouth Point Elizabeth Rail. and Coal Co.* (9) ([1904] 1 Ch. at p. 35), as to their being "interested against the company" can have no application to them on any general principle, and, if they could be excluded, it could only be by reason of the specific provisions of art. 87.

Article 87, so far as it is here material, provides that

> "the ordinary directors . . . shall have no right at directors' meetings to vote in respect of, nor shall they have any control over, the financial affairs of the company, and with regard to the management of the company's business they shall have only such rights of voting and such control over the management as may from time to time be conferred upon them by the permanent directors."

In fact, the permanent directors did not at any time confer upon them any rights of voting or control over management. So that, in the result, the ordinary directors have no vote either on financial affairs or the management of the company's business. But it is to be noticed that it is at a directors' meeting, which for the reasons I have given they would be entitled to attend, that the article provides that they are debarred from the right to vote. Article 87 appears to contemplate their presence, but a limitation of their powers at such a meeting. So far as regards a directors' meeting, I cannot see why they are not entitled to attend and do all things at such meeting, except vote, in respect of the financial affairs of the company or the management. Thus art. 118, as amended, for example, seems to assume their presence, if one permanent director is also present, under art. 111, to authorise the affixing of the seal to an instrument.

Article 86A, which I have postponed for consideration, further provides that Peter, John, and Percy Shaw, as directors, shall have no right to deal with, on behalf of the company, any of the debts due from them mentioned in certain terms of settlement, but this does not apply, as I have said, to John Bryan Shaw or to James Fern. I think that these two directors, at any rate, by consultation, exhortation or opposition, were entitled to endeavour to influence the minds of the permanent directors although they themselves had no franchise.

But next, it may be said that their exclusion from the management of the company's financial affairs and business enabled the permanent directors as part of their management, outside altogether of a directors' meeting, irrespective of voting, to authorise these proceedings. I cannot agree. In fact, in this case, the decision was taken by voting with a division of opinion at what appears to have been regarded by those present as a directors' meeting. Mr. Halliday calls it a meeting of the permanent directors and the learned judge seems to regard it as a purported directors' meeting. In any event, art. 95, subject to its consequential alterations, is still extant, and that article distinguishes between the business of the company which is to be managed by directors and the exercise of powers and doing of acts on behalf of the company by them.

In art. 87 of the amended articles, a distinction is drawn between management of the business and control over the financial affairs, and the proper way to regard such a power as the power to authorise actions on behalf of the company is, I think, to hold that such powers can only be exercised by the directors as such at a proper meeting. In *John Morley Building Co., Ltd.* v. *Barras* (10) I read the judgment of Stirling, J., to indicate that the directors as such are the proper persons to authorise proceedings in the name of the company; for a motion having been instituted in that case on the ground that an action in the name of a company had been instituted without the authority of the applicants, he said ([1891] 2 Ch. at p. 391):

> "The real applicants are, no doubt, the defendants, and I have to decide whether they have been appointed directors of the company."

For these reasons, I think that this first ground succeeds and that this action was improperly started for want of authority of the directors.

But, secondly, if the action was competent to the permanent directors to authorise, it is said that their powers were limited by art. 121A, which provides that

> "all dividends payable on ordinary shares held by Peter Shaw, John Shaw, and Percy Shaw [the first two being the defendants] shall be retained by the company on account of the debts mentioned in the said terms of settlement until such debts are liquidated," and, "except as above provided, the said debts shall not be called in . . . for a period of twenty years from the date of the resolution except in the event of a creditors' winding-up."

In my view, if the present action were one for calling in the debts which has been brought within twenty years of the passing of the resolution amending the articles, it is one of the matters which might arguably be excluded from the powers of the directors under art. 95 and under the amending arts. 86A and 87, but if the present action on the account stated is not a calling-in of the debts, this argument does not avail. In form it is certainly not such an action, and if the respondents' case is well founded it is an action on an account stated, which is a separate cause of action: (2 Williams' Saunders, 122; *Irving* v. *Veitch* (11)). The appellants, on this head, are in a dilemma, for if the action is well founded on an account stated it is not a mere calling-in of the debts, and art. 121A would not limit the powers of the permanent directors, if otherwise they have them, to bring the action. If, on the other hand, the action does not succeed on the account stated, the point does not arise. I think, therefore, that this ground of objection to the action fails.

As to the third ground of want of authority, that the shareholders instructed the directors to discontinue the action on April 30, 1934; if the permanent directors had power under the articles to bring the action, I do not see how the shareholders could interfere with that power, otherwise than by altering the articles, which they have not proposed to do. This would seem to be the effect of the decision of the House of Lords in *Quin and Axtens* v. *Salmon, Ltd.* (3), though the decision of Neville, J., in *Marshall's Valve Gear Co., Ltd.* v. *Manning, Wardle & Co.* (12) is difficult to reconcile with that case. However, I do not think it necessary in the present circumstances to decide the point finally, but I incline to the view that art. 95 in matters within the powers of the permanent directors would require an alteration of the regulations by special resolution to prevent this action continuing; that is to say, that Lord Loreburn's dictum in *Quin and Axten's Case* (3) is correct, that the words "regulation" and "article" in the articles in that case, which were substantially similar to the present art. 95, mean the same thing (see also *Thomas Logan, Ltd.* v. *Davis* (13)).

To summarise, therefore, on this head, I think that the defendants are right on their first ground that the permanent directors, in that they failed to summon to their meeting the ordinary directors, were incompetent to pass the vote to authorise proceedings in this case, and so find it unnecessary to conclude finally on the second or third propositions.

My view thus being that the action is misconceived because the directors have not authorised its institution, counsel for the company argues, in reply, that, even if this be right, this court has no power "to strike out and discharge the action," because the defendants failed properly to proceed by motion to ask for this relief and relied upon their pleading in defence in this case and the argument before the judge, which is not the right way to raise the matter. His difficulty in this contention is not rendered easier by the fact that the learned judge has, on the invitation of both sides, considered this aspect of the case in his judgment, has dealt with it, and decided in the respondents' favour, holding that the action was authorised.

The various dicta in the authorities as to the methods open to a defendant to contest the authority to bring an action are not altogether easy to reconcile or understand, but having come to a conclusion in this case on the matter I think it right to express it. There is no doubt that the case of *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain), Ltd.* (1) is authority, if one be needed, that an action can be struck out if it be brought in the name of a company which is incompetent to authorise its agents to give a retainer. The majority of the House in that case did not decide that the respondent company was incapable of suing, though that was the view of LORD HALSBURY, but that the action was commenced without authority and that the directors were incapable of acting, being, all but one, enemy aliens, and that they could not, therefore, properly authorise their secretary to bring the action. But also it has been decided in the case of a non-extant company that an action could not be defended: (*Simmons* v. *Liberal Opinion, Ltd.* (14)). But here it is argued that a different position exists, that the company is admittedly incompetent, and that at most it may be said that authority, though it might have been given, in fact was given by the directors to sue, was not given on this matter. Counsel for the company relies upon the judgment of ATKIN, L.J., in *Russian Commercial and Industrial Bank* v. *Comptoir D'Escompte de Mulhouse* (2) ([1923] 2 K.B. at p. 672)—approved in the House of Lords ([1923] A.C. at p. 148), per LORD ATKINSON—adopting and approving the words of WARRINGTON, J., in *Richmond* v. *Branson & Son* (15) ([1914] 1 Ch. at p. 974) to the effect that

> "the real question is the authority of the solicitor. Is that a question which can be raised as a relevant issue in the action and at the trial? . . . The business of this court could not be carried on if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shown not to exist in the proper form of proceeding, *namely, a substantive application on the part of the parties concerned to stay the proceedings on the ground of want of authority.*"

The italics are my own. ATKIN, L.J., continued in the *Russian Bank Case* (2) ([1923] 2 K.B. at p. 672):

> "The *Daimler Case* (1) does not appear to be inconsistent with this view. That was a case where no retainer could be given at all, and in such a case the court may very well refuse to hear the action on being informed of the facts."

In my view, the reasons for the conclusion of the House of Lords and of ATKIN, L.J., in the *Russian Bank Case* (2) and of WARRINGTON, J., in *Richmond* v. *Branson* (15) were that in those cases questions of fact on which it needed to be decided whether there was or was not authority had to be considered, and the court declined to go into such matters of evidence except upon a substantive motion. But the rights of the court in its inherent jurisdiction to stay actions which would be an abuse of its process if they are not properly upon the record, either because the plaintiff was not existent at the time of the issue of the writ or because they are satisfied on the facts that he had not authorised the proceedings, has so far been undoubted, and this, altogether apart from the desire of either party, if the facts are before the court. Where the court may properly come to a conclusion on sufficient or admitted evidence that there is no action properly before it, it may well think it right to act in accordance with that inherent jurisdiction, to refuse to proceed, and the difference which has been sought to be found between the case where no retainer could be given at all, and the case where what is still in dispute is whether in fact there was or was not authority to give one, is not a difference in principle, but a difference of expediency, depending upon whether a court is or is not so informed of the facts that it does or does not think it right to come to a conclusion on the matter as a question of law.

In the present case, as I have said, the facts which have been found by the learned judge are before the court; they show, to my mind, a complete absence of authority of the company to sue in this action. In other words, I have come to the conclusion that the company is not before the court at all, and that, therefore, for this reason, the appeal succeeds and the action must be struck out; but as there is no one who is before the court who can be made liable for costs, the defendants, if they desire costs, must pursue such other remedies in other proceedings on this head as they may think advisable.

In these circumstances, I have not thought fit to deal with the merits of the case; but in case this action should go further, I would say that if I am wrong in my view as to the incapacity of the company to sue, I agree with the views of the Lords Justices that the action on the account stated must fail for the reasons by them given.

In my view, this appeal should succeed without costs, here or below, but, as this is not the opinion of the majority of the court, judgment will be as they decide.

ROCHE, L.J.—I agree that this appeal should be allowed. As to the substance of the matter, that is to say, whether assuming the action to be properly brought the plaintiff company is entitled to succeed, I agree with the conclusion arrived at by the Lords Justices who have given judgment. There was, in my opinion, no such account stated between the parties as was alleged and relied upon by the plaintiff company. I have nothing to add to the reasons assigned by Greer, L.J., for this conclusion.

As to the preliminary question whether the plaintiff company was properly before the court, that is to say, whether the action was instituted and carried on with its authority, I have arrived at the same result as Greer, L.J., but for different reasons, which I propose briefly to state.

I agree with both the Lords Justices as to the result of the decided cases, and particularly of the *Daimler Case* (1) and of the *Russian Commercial Bank Case* (2). The principles to be derived from them are that such an objection to a right to sue as is here taken should be taken, not at the trial, but by an interlocutory motion or summons; that, if such procedure is not adopted, the court need not, and ordinarily should not, entertain such an objection at the trial as if it were a defence. If it were otherwise, then, for reasons pointed out by Warrington, J., in *Richmond* v. *Branson & Son* (15), the position of the court would be wellnigh intolerable. Nevertheless, as appears from the decision in the *Daimler Case* (1), if want of capacity or authority to sue plainly appears at any stage the court may then strike out the action. It was argued for the company that the application of the latter principle was limited to objections on the issue of want of capacity to sue and did not extend to objections to want of authority to sue. I see no reason for such limitation of the powers of the court, and in my opinion the argument is not well founded. When it clearly appears that there is want of authority to sue, for example, if an admission in that sense were made in the course of the hearing, the same result, in my opinion, ought to follow and the action in question ought to be struck out. In the present case the defendants did not proceed by motion or summons, but pleaded the matter in their defences, and the learned judge, apparently without objection from the plaintiffs, adjudicated upon the matter at the trial and reached an affirmative conclusion adverse to the defendants, as has Greer, L.J., upon the hearing of the appeals. Speaking for myself, I do not find materials for reaching such an affirmative conclusion, and before feeling myself able to adhere either to the opinion of the trial judge and Greer, L.J., or to the contrary opinion of Slesser, L.J., I should require more information as to several facts which, as it seems to me, might make all the difference in the decision of a point where the balance rests so even.

The case was left at the trial singularly bare of such evidence, and the minute books do not seem to have been produced. I will mention in support of my view only one matter. The court does not know whether, before the meeting at which these actions were decided upon, the permanent directors had conferred any, and, if so, what, powers upon the ordinary directors, nor does it know whether the meeting purported to be a meeting of directors and appeared as such in the minute book, or whether it was in form, as well as in fact, a meeting of permanent directors on a matter within a class of matters previously excluded by them from the purview of the ordinary directors. It appears to me that such information and other similar information has or may have a bearing on the right of the ordinary directors to be summoned to attend the meeting. The result of this reasoning is that by a different road I reach the same result as GREER, L.J., and it follows that, with great respect to SLESSER, L.J., I am unable to concur in his affirmative conclusion in favour of the defendants upon this point. In short, in my opinion, this is a case where, apart from the nicety of the matters of law and constructions involved, the court has not, with regard to matters of fact, the information necessary for a decision whether effect should be given to this objection of the defendants to the competence of the actions. The onus was upon the defendants and they have failed to satisfy me clearly or at all that the objection is a good one.

Accordingly, I agree with GREER, L.J., as to the form of order he proposes.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co.*, for *Richard Hilditch & Son*, Manchester; *Patersons, Snow & Co.*, for *Wilson, Wright, Earle & Co.*, Manchester.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

LONDON COUNTY COUNCIL *v.* ROYAL ARSENAL CO-OPERATIVE SOCIETY, LTD.

[KING'S BENCH DIVISION (Lord Hewart, C.J., Humphreys and Singleton, JJ.), November 8, 1935]

[Reported [1936] 1 K.B. 154; 105 L.J.K.B. 58; 154 L.T. 214; 100 J.P. 25; 52 T.L.R. 98; 80 Sol. Jo. 77; 34 L.G.R. 42; 30 Cox, C.C. 318]

Weights and Measures—Food—Prepacked article—Deficiency in weight—Material time—Deficiency at time of inspection—Sale of Food (Weights and Measures) Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 63), *s.* 4 (2) (a).

By the Sale of Food (Weights and Measures) Act, 1926, s. 4 (2): "A person shall not sell or have in his possession for sale any pre-packed article of food of any of the kinds set forth in Sched. I to this Act, unless—(*a*) the article is made up for sale in quantities of two ounces, or in multiples of two ounces up to a limit of eight ounces, in multiples of a quarter of a pound up to a limit of two pounds, in multiples of half a pound up to a limit of four pounds, or in multiples of one pound. . . ."

The meaning of the above subsection is that a person shall not have in his possession for sale a pre-packed article of food unless the article at the time of inspection is in a condition of being made up for sale in the proper quantity. An offence, therefore, is committed if a deficiency in weight exists at that time, although no such deficiency may have existed at the time when the article was put in its package.

Notes. As to provisions regarding weight applied to the sale of food, see 33 HALSBURY'S LAWS (2nd Edn.) 665 et. seq., and for cases, see 44 DIGEST 143 et seq. For Sale of Food (Weights and Measures) Act, 1926, see 26 HALSBURY'S STATUTES (2nd Edn.) 1292.

Case Stated by justices for the county of London.

An information was preferred before a court of summary jurisdiction sitting at Catford by an inspector of weights and measures authorised and appointed by the appellants, the London County Council, against the respondents, Royal Arsenal Co-operative Society, Ltd, charging them that on March 22, 1935, at 50, Rushey-green, Catford, they had in their possession for sale pre-packed articles of food, namely, 113 packages of butter, the said butter not being made up in the quantities prescribed by s. 4 (2) of the Sale of Food (Weights and Measures) Act, 1926.

On the hearing of the information it was proved or admitted that the inspector entered the respondents' shop at 50, Rushey-green on March 22, 1935. Behind the provision counter there were a number of boxes of pre-packed butter, one of which contained seventy-seven packages of fresh butter, each package being marked "½ lb. net." The inspector weighed each package in that box, and each was deficient in weight by from seven to two drams. The total deficiency on the seventy-seven packages was 21 oz., 14 drams, an average of 4·3 drams per package, being 3·3 per cent. of the marked weight. The inspector also weighed five other boxes containing salt butter, marked "½ lb. net," which turned out to have an average deficiency of 2·1 per cent. of the marked weight. The manager of the shop alleged that all the packages had been weighed on March 18 by the staff at the shop. The inspector tested the respondents' scales and found them in order.

The respondents contended that it was not proved that the packages of butter were made up for sale in quantities other than those prescribed by s. 4 (2) of the Act, and that the alleged deficiencies in weight on March 22 were not evidence of an offence committed when the goods were packed. The appellants contended that the respondents had been proved to have in their possession for sale pre-packed articles of food which were made up for sale in quantities not in accordance with the requirements of s. 4 (2) (*a*), and that that subsection was applicable to cases where a person had in his possession a pre-packed article of food which was deficient in weight.

The justices held that s. 4 (2), did not deal with the question of deficiencies of weight, but only prescribed the units in which pre-packed articles were to be made up for sale and that the words "made up for sale" referred to the act of putting the article in its package ready for sale and to the time when that was performed. The prosecution, the justices found, had not proved that the butter was not made up for sale in the prescribed quantities, as the fact that some of the packages were deficient at the time of inspection was not sufficient evidence that they had not been made up for sale in those quantities. The justices were of opinion that a deficiency in weight would be a separate offence either under s. 4 (2) (*b*), or under s. 3 of the Act of 1926. They, accordingly, dismissed the information.

The London County Council appealed to the Divisional Court.

The Sale of Food (Weights and Measures) Act, 1926, provides:

> Section 4 (2): "A person shall not sell or have in his possession for sale any pre-packed article of food of any of the kinds set forth in Sched. I to this Act [which included butter], unless—(*a*) the article is made up for sale in quantities of two ounces, or in multiples of two ounces up to a limit of eight ounces, in multiples of a quarter of a pound up to a limit of two pounds, in multiples of half a pound up to a limit of four pounds, or in multiples of one pound; and (*b*) the wrapper or container bears thereon, or on a label securely attached thereto, a true statement in plain characters of the minimum net weight of the article contained therein, or, in any case where the weight of the wrapper or container is permitted by [s. 4 (1)] to be included in the weight purported to be sold, of the minimum weight of the article with its wrapper or container: Provided that, in the case where the article is made up for sale on the premises where it is sold or kept for sale by a retailer and

> is made up in quantities of two ounces, four ounces, eight ounces, one pound, or a multiple of one pound, it shall not be necessary that such a statement as aforesaid should be borne on or attached to the wrapper or container." (3) "Any such statement as aforesaid shall not be deemed to be untrue if it is shown that it was true at the time of packing or of importation, whichever was the later, and the original wrapper or container has remained intact."
>
> Section 12 (3): "In any proceedings under this Act in respect of an alleged deficiency in the weight of any article of food delivered to a purchaser, the defendant shall be discharged from the prosecution if he proves to the satisfaction of the court that the alleged deficiency was due to unavoidable evaporation or drainage and that due care and precaution had been taken to avoid such deficiency."

Vernon Gattie for the appellants.
H. Glyn-Jones for the respondents.

LORD HEWART, C.J.—This is a Case stated by justices of the peace for the county of London, sitting at Catford. It concerns an information preferred by an inspector of weights and measures of the London County Council under the Sale of Food (Weights and Measures) Act, 1926, against the respondents for that they, on March 22, 1935, at premises in Catford, unlawfully had in their possession for sale pre-packed articles of food, namely, 113 packages of butter, the said butter not being made up in the quantities prescribed by s. 4 (2) of the Act. The justices dismissed the information, and the question which is raised by this Special Case is whether, in so deciding, they came to a correct determination in point of law.

On March 22, 1935, the county council's inspector went into the respondents' shop and found that there were there, behind the provision counter, a number of boxes of pre-packed butter. One of those boxes contained seventy-seven packages of fresh butter and each of those packages was marked "$\frac{1}{2}$ lb. net." The inspector weighed every package in the box and every one of them was deficient as regards the marked weight to an amount ranging from 7 drams to 2 drams. The total deficiency on the seventy-seven packages was over 20 oz. There were also at that time five other boxes containing packages of salt butter, each of which was marked "$\frac{1}{2}$ lb. net." From each of three of those boxes the inspector weighed twelve packages and every one of those was found to be deficient, so far as the marked weight was concerned, to an amount ranging from $4\frac{1}{2}$ drams to 1 dram. The total deficiency on these thirty-six packages was over 6 oz. The manager of the shop said that all the packages had been weighed on March 18, that is to say, four days before, by the staff of the respondents at that particular shop. The inspector tested the respondents' scales and found that they were in order.

Apparently the sole contention which was put forward on behalf of the respondents was that it was not proved that the packages of butter were made up for sale in quantities other than quantities prescribed by the section, and that the deficiencies in weight were not evidence of any offence. That contention means that it was not proved that, at the time when the packages were being made up, they were made up in the wrong quantity. For the appellants it was contended that the respondents were found to have had in their possession a pre-packed article of food made up for sale in quantities not in accordance with the section, and that the section was applicable to cases where a person had in his possession a pre-packed article of food deficient in weight.

The justices, in expressing their opinion, have gone beyond the contention that was raised. They say:

> "We were of opinion that s. 4 (2) (*a*) of the Act (a breach of the terms of which clause was alleged in the information) does not deal with the subject of deficiency of weight, but only prescribes the units in which (inter alia) pre-packed butter is to be made up for sale; that the expression 'made up for sale' used in that clause refers to the act of putting the article in its package ready for sale, and to the time when that act was performed; that the prosecution had not proved that the butter was not made up for sale in those quantities, as the fact that some of the packages were deficient of those quantities at the time of inspection by the informant was

not sufficient evidence that they had not been made up for sale in those quantities; and that deficiency of weight is a separate offence under s. 4 (2) (*b*), or under s. 3 of the Act, and was not charged in the information." A

In my opinion, with all due respect to these justices and to the long and elaborate argument which we have had the advantage of hearing from counsel for the respondents, their conclusion was entirely wrong. It is too late now to reconsider the scheme and system of this Act, or to call attention to some apparent contradictions or omissions B exhibited or suggested by s. 12 of the Act, which has been inserted for the purpose of protecting traders. This court has to construe the Act as it is. We cannot, if we would, make another, and it seems to me that, upon the plain words of this section, the offence charged in this information was committed and the view which found favour with the justices was erroneous.

In my opinion, it is nothing to the purpose to say, with regard to a penal statute C that it may in some circumstances expose an offender to two different kinds of prosecution, nor is it to the purpose to point out that in some circumstances the Act of Parliament has afforded a protection which, in other circumstances, it has refrained from affording. No Act of Parliament is perfect, and it may be that this Act of Parliament has not gone to the last possible length in providing protection for the trader. That is not the slightest reason why this court should, even if it could, extend that length and D afford further protection.

Here the information was laid under s. 4 (2) of the statute. That section provides, inter alia, that a person shall not have in his possession for sale any pre-packed article of food of any of the kinds set forth in the schedule, unless—and then two conditions follow. What is meant by the expression "shall not . . . have in his possession for sale any pre-packed article of food" unless it fulfils these conditions? This Act, although it E contains s. 12, the marginal note of which is "Safeguards to traders," is an Act, as its title says, and as its provisions confirm, "to provide for the better protection of the public in relation to the sale of food." It is not content to deal with the offence of selling short weight or misrepresenting the weight, or other matters in connection with the sale. It contains also precautionary provisions, and one of them is to be found in s. 4 (2): "A person shall not . . . have in his possession for sale any pre-packed article of food" F unless, &c. In this Act, which is entitled the Weights and Measures Act, 1926, what is being dealt with is an ordinary sale, and in the ordinary course, except for the sake of convenience, the particular commodity might be required to be weighed then and there in the presence of the purchaser, but, for the convenience of persons carrying on retail business, shopkeepers may have in their possession articles which are not then and there to be wrapped up and after that be weighed, but which are pre-packed, it being supposed G that they have been weighed beforehand. Shopkeepers are not to be protected against the offence of giving short weight by the mere fact that the articles were pre-packed, made up beforehand. The section provides that a person shall not have in his possession for sale any pre-packed article unless the article is made up for sale in quantities which are named—2 oz., in multiples of 2 oz. up to a limit of 8 oz., in ½ lbs. up to a limit of 2 lb., in ½ lbs. up to a limit of 4 lb., or in multiples of 1 lb. H

What does "made up" mean? It seems to me, with all due respect to the argument we have heard, that it would be fantastic to hold that what is there being referred to is the moment of making up. The person who is being protected is the buyer. Of what use is it to a man, who gets 3 oz. short, to be assured that at the moment when the article was weighed in the packing warehouse of the wholesale dealer it was entirely correct? In my opinion, the clear meaning of the words "shall not . . . have in his possession for I sale any pre-packed article. . . unless the article is made up for sale in quantities of 2 oz.," &c., reinforced by the obvious purpose of the Act, is that the article is to be tested at the moment of its being in the seller's possession, and if a man is charged with having an article in his possession made up apparently in these quantities when it is not accurately made up in these quantities, the offence is committed. It is quite true that two conditions are provided. The pre-packed article is not to be in his possession for sale unless it fulfils each of two conditions. Those conditions are not disjunctive. The word which unites them is "and." An article is to be made up in what may be called the prescribed quantity and the wrapper or container of the pre-packed article must bear a true statement in plain characters of the net weight. The section is, therefore, providing (i) that the article must be of the prescribed weight, and (ii) that it must contain a true statement of that weight, and then follows a proviso which has reference to the small shopkeeper or retailer who makes up the article for sale upon the premises. The Act is intelligible, though perhaps hard to explain, but we have to construe it as it is. Then follows, in sub-s. (3) a provision that the statement upon the wrapper or container shall not be deemed to be untrue if it is shown to have been true at the time of packing or of importation, whichever was the later, and the original wrapper or container has remained intact.

The argument has been presented to us as a case of reductio ad absurdum. It is said, here are two conditions required to be fulfilled, but with regard to the second requirement, namely, the truth of the statement, the seller is protected in a particular case if the statement was true at the time of packing or of importation, and it seems illogical that protection under the second limb should be given if liability still remains under the first limb. I have tried hard to see what is illogical in that state of affairs, and I entirely fail to do so. The requirement that the pre-packed article shall be of the regular or prescribed weight remains. As far as the statement of the minimum net weight is concerned, that additional requirement is foregone in a particular case, subject to certain proof. I cannot understand the argument that, because relief is given in certain circumstances with regard to the second condition, relief therefore should be given with regard to the first condition. It is to be observed that if the statement were not protected, as it is by s. 4 (3), the making of an untrue statement would be a separate offence under s. 2 and s. 3.

It seems to me that the plain meaning of s. 4 (2) is that a person is not to have in his possession for sale a pre-packed article of food unless the article then and there is in a condition of being made up for sale in the proper quantity. He has it in his possession pre-packed and made up in a certain way, and if he has it in his possession when it does not satisfy the requirement as to prescribed weight, he has committed an offence.

It was suggested in argument that, if the broader view taken by the justices prevailed, the apparent contrast suggested by the provisions of s. 12 between the case of the purchased article and the article in possession would be removed. It is not necessary to speculate upon the reasons why Parliament provides for one thing and not for another. It is quite true that under s. 12 (3) in respect of an alleged deficiency in the weight of any article of food delivered to a purchaser, the defendant has an opportunity of proving unavoidable evaporation or drainage plus all due care and precaution taken to avoid such deficiency. The argument is that it is unreasonable that that kind of answer should be contemplated in the case of an alleged deficiency in an article of food delivered to a purchaser, while there is no such provision with reference to pre-packed articles in possession for sale. There may be twenty answers to that conundrum, and I can at once think of one. It is one thing to give the tradesman the opportunity of proving an excuse in the case of a particular article delivered, but it is quite another thing to say that he may have upon his premises ready for sale a whole stock of articles which do not satisfy the requirements of the Act as to weight. It may be expedient to offer a defence in one case, which would open a large door to fraud in another. However that may be, the fact remains that, when s. 12 (3) was passed, it was limited, and we must take it deliberately limited, to the case of an article of food delivered to a purchaser. That is quite a different thing from an article of food held in possession for sale.

The justices have held that s. 4 (2) (*a*) does not deal with the subject of deficiency of weight. That seems to be manifestly at variance with the plain words of the section. They have held that the words "made up for sale" refer to the act of the putting of the article in its package ready for sale, and to the time when that act was performed. They do not refer solely to that time. The article must be made up in the prescribed quantity at the time when it is in possession for sale. Otherwise the section would have had to read in some such way as this, "unless the article has been made up for sale in quantities of two ounces"; but the words are, "unless the article is made up for sale in quantities of two ounces." Any other construction, it seems to me, would render the provision entirely nugatory. The justices go on to say that the prosecution have not proved that the butter was not made up for sale in those quantities. Lex non cogit ad impossibilia: no such extraordinary provision is contained in or suggested by this section.

While I pay great attention to the able and exhaustive argument of counsel for the respondents, I remain of the opinion that the conclusion of the justices was wrong and that this appeal must be allowed and the case go back to the justices with a direction to find that the offence which was charged was proved.

HUMPHREYS, J.—I agree. I have not, myself, had occasion to apply my mind to the construction of this statute before to-day, and the cases which have been very shortly referred to in argument are sufficient, I think, to show that in many respects it is not an easy Act to construe. Counsel for the respondents may be right when he says that in some respects the Act appears to be illogical. I express no opinion whether it is or not, but I think the court must take refuge in the ordinary rule which applies to the construction of statutes, which is that, where the terms of the statute are plain, then effect must be given to those words. Where the language used appears to be ambiguous, then other matters, including the intention of the framers of the Act, may properly be the subject of inquiry by the court.

In this case the court is asked to construe very short words in s. 4 (2) of the Sale of Food (Weights and Measures) Act, 1926. It is to be observed, first of all, that s. 1 of the Act is quite clear. In general terms it makes it an offence for any person to sell articles of food which are of a less weight, measure, or number than is purported to be sold. That section, however, is by no means comprehensive, because it is not essential that an article of food should be sold either by weight, measure, or number. So, in s. 4, Parliament goes on to deal with what has become a very common practice among those who sell food by retail, that is, the practice of selling pre-packed articles of food, and has provided, in sub-s. (2), that a person shall not sell pre-packed articles of food of certain kinds unless two conditions are fulfilled. The first is, that the article is made up for sale in certain specified units or multiples of those units. Upon that counsel contends that the real meaning of that section is that the article must be made up for sale in quantities purporting to contain 2 oz. or multiples of 2 oz., and so forth. I cannot, myself, find any justification for that argument. If Parliament had intended to say so, I think Parliament would have said so, and I cannot see anything illogical or surprising in finding that Parliament has said that pre-packed articles of food shall be sold, first of all, in certain definite quantities and not in any other way, such as in threepennyworths or sixpennyworths, and, secondly, in packets which contain those quantities. For my own part, I entirely decline to read the word "purporting" into that section. That disposes of the first argument.

The subsection says that the article is to be made up for sale in quantities of certain specified amounts. The expression "made up" is, of course, one which may be used in one of two different ways. It may refer to the moment when the article is made up, and it would be true now to say of some article, in answer to a question: "When was it made up?" "It was made up on Wednesday afternoon." It would be equally true to say on Friday of an article made up on Wednesday and continued to be made up on Friday and was then in the same condition: "It is an article which is made up." I think that this section is clearly dealing with articles which are in the condition described, that is, made up, at the time when they become the subject of an inquiry under this particular subsection—in other words, when some person is found selling or having in his possession for sale those particular articles.

As against that, counsel has referred us to what he calls instances of illogicality on the part of Parliament. For my own part, I think it much wiser not to inquire into those matters till it is necessary to do so. If I thought that the construction which I have given to this subsection was a strained construction or anything except the perfectly plain and obvious meaning of the words used, then I would proceed to inquire whether there were other sections of the Act of Parliament which seemed to indicate that some particular construction must be given to this one. While I respectfully agree with

A what fell from my Lord, that when some of those supposed cases of illogicality are
examined there probably is a good explanation to be found for them, I prefer to base
my judgment on this, that, in my opinion, the two constructions suggested by counsel
are wrong. As they appear to be the constructions which were put upon the subsection
by the justices, in my view, the justices were wrong, and I agree that the result will
follow as stated by my Lord.

B

SINGLETON, J.—I am satisfied that the contention of the respondents in the court
below is ill founded, and I am further satisfied that the finding of the justices cannot be
supported. By s. 4 (2) of the Act of 1926: "A person shall not sell or have in his possession
for sale any pre-packed article of food of any of the kinds set forth in Sched. I
to this Act, unless—(*a*) the article is made up for sale in quantities of two ounces. . . ."
C It is to be observed that the words are "the article is made up," not "has been made
up" and not "has at some distant or recent date been made up." Primâ facie, then,
that must be read as meaning "made up at the time of sale or at the time when the
article is in possession for sale"—in this case when it was found in the shop by the
inspector. Furthermore, the two conditions must, in my view, exist at the same time.
The second condition is in para. (*b*): "The wrapper or container bears thereon, or on
D a label securely attached thereto, a true statement in plain characters of the minimum
net weight of the article contained therein. . . ." The statement, if there were no
sub-s. (3) of the Act, must be a statement true at the time. It would be no answer,
apart from sub-s. (3), to say: "That statement was true at the time when it was put
on the label or wrapper, but is no longer true." The two conditions (*a*) and (*b*) must
co-exist at the same time, and I am satisfied that at the time when the article is exposed
E for sale it must be made up for sale in quantities of two ounces, &c. It is not sufficient
to say that it has been made up at some prior date.

Counsel for the respondents, in the course of his argument, referred to sub-s. (3), and
pointed out that that subsection, on the construction which was sought to be put upon
the section by the appellants, would give an answer to a charge under one part of
sub-s. (2), but might not give an answer to a charge under the other part. I am bound
F to say that I think he showed there was something illogical in the framing of the section
or of the Act as a whole, but that does not carry him as far as he wishes. If there is a
statement on the wrapper or container within the meaning of sub-s. (2) (*b*), by reason
of sub-s. (3), that statement is not to be deemed to be untrue if it is shown that it was
true at the time of packing or of importation, whichever was the later, and the original
wrapper or container has remained intact, and I cannot myself see why that concession
G should be given when there is no corresponding concession with regard to the other part
of the subsection. But it seems to me that a matter, which may have been introduced
by way of amendment at the time when the Act was being passed, does not provide
an argument to enable the respondents to escape from the ordinary and natural meaning
of the clause of the subsection under which they were prosecuted. The ordinary
meaning is, I think, plain, and I am of opinion that the justices arrived at a wrong
H conclusion and that the appeal must be allowed.

Appeal allowed.

Solicitors: *J. R. Howard Roberts*; *W. T. Ricketts & Son.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

COUTTS & CO. *v.* SOMERVILLE

[CHANCERY DIVISION (Luxmoore, J.), February 12, 13, 14, 1935]

[Reported [1935] Ch. 438; 104 L.J.Ch. 243; 153 L.T. 216]

Mortgage—Power of leasing—"Best rent reasonably obtainable"—Twenty-one year lease by mortgagor at best rent then reasonably obtainable—Mortgagor landlord's covenant to pay rates, taxes and insurance—Premises subsequently improved voluntarily by mortgagor—Whether lease binding on mortgagee—Law of Property Act, 1925 (15 & 16 *Geo.* 5, *c.* 20), *s.* 99 (6).

In 1927 a mortgagor mortgaged an estate. In May, 1933, he granted a twenty-one year lease of the mortgaged property to his son-in-law at a rent of £125 a year, and covenanted to pay all rates and taxes and insurance and to maintain the roofs, drains and structural work, and told his son-in-law that he intended to put the property in a suitable state for his residence, which he subsequently did at a cost of about £300. The property was not worth more than £125 a year at the date of the lease. The mortgagees contended that the lease to the son-in-law did not reserve the best rent that could reasonably be obtained, and, therefore, failed to satisfy the requirement of the Law of Property Act, 1925, s. 99 (6), and so was not binding on them.

Held: (i) the rent must be considered in the light of the value of the property at the date of the lease; (ii) in the absence of an express covenant by the mortgagor to improve the property, so as to increase its rateable value, his covenant to pay rates, taxes and insurance could not be construed as showing that the best rent had not been reserved.

Notes. As to rent on a lease by a mortgagor under his statutory powers, see 23 HALSBURY'S LAWS (2nd Edn.) 331, para. 494, text and notes (*r*)–(*t*). For the Law of Property Act, 1925, s. 99 (6), see 20 HALSBURY'S STATUTES (2nd Edn.) 644.

Witness Action

The plaintiff mortgagees claimed a declaration that a lease granted on May 12, 1933, to the defendant tenant by their mortgagee under a mortgage made in 1927, and an underlease of part of the property granted by the defendant tenant in October, 1933, were not binding on them. The facts appear in the judgment.

Sir G. Hurst, K.C., and *Rand* for the plaintiffs, the mortgagees.
Roxburgh, K.C., and *A. C. Nesbitt* for the defendant, the tenant.
A. C. Nesbitt for the second defendant, the sub-tenant.

LUXMOORE, J.—The plaintiffs in this action (the mortgagees) seek a declaration that a lease executed on May 12, 1933, by one Walter James Fryer (the mortgagor) in favour of the defendant, Leslie Lloyd Somerville, and an underlease of part of the property demised by the lease and dated Oct. 16, 1933, are not binding on the mortgagees, or either of them, and for ancillary relief. The ground on which the declaration is sought is that the lease of May 12, 1933, being by a mortgagor in possession, does not comply with the requirements of s. 99 of the Law of Property Act, 1925. This section confers the statutory power of leasing on mortgagors and mortgagees respectively in possession of mortgaged land. It is to be observed that the section imposes a limit on the term which can be granted, and requires that the lease shall take effect in possession not later than twelve months after its date, and that the rent reserved shall be the best rent that can reasonably be obtained having regard to the circumstances of the case, but without taking fines. The section contains no provision with regard to the covenants which may be inserted in the lease, except that there must be a covenant for the payment of rent and there must also be a condition of re-entry on non-payment of rent within a specified time which must not exceed thirty days. The sole ground on which the lease is impeached in this action is that the rent reserved is not the best rent which could reasonably have been obtained having regard to the circumstances of the case.

The facts of the case are peculiar and perhaps give rise to a certain amount of suspicion.

Counsel for the mortgagees, both in his opening and in his cross-examination of the defendant tenant, suggested that the grant of the lease was a colourable attempt by the mortgagor to obtain an advantage for himself, if, indeed, he was not beneficially entitled to the lease. Nothing in the pleadings warranted any such case being put forward and the argument was confined to the single question of the sufficiency or otherwise of the rent. The facts are as follows: in May, 1924, the mortgagor acquired by purchase a considerable estate at Sonning in Berkshire, known as the Holme Park Estate. In June, 1927, he charged the estate in favour of the mortgagees, Coutts & Co., the well-known banking firm; the charge was an equitable charge, being effected by a memorandum accompanied by the deposit of the deeds. The memorandum contained the usual undertaking to execute a more formal charge if and when called upon by the mortgagees so to do. There were subsequent memoranda to which I need not refer. It is alleged that in or about March, 1933, the mortgagor was being pressed by the mortgagees to execute a legal mortgage, which was to contain a restriction on his statutory power of leasing so that it was only exercisable with the consent of the mortgagees. That legal mortgage was executed on May 19, 1933. On May 12, 1933, the mortgagor had executed the lease in question. It is expressed to be made between the mortgagor of the one part and the tenant, Mr. Somerville, of the other part. By it the landlord agrees to let and the tenant agrees to take all that messuage or dwelling-house known as Holme Farm House, Sonning, together with the ground and all outbuildings thereunto as shown on the plan attached to the lease, for the term of twenty-one years from May 29, 1933, determinable as hereinafter mentioned at the yearly rent of £125 payable by equal quarterly instalments on the days therein mentioned. The lease contained covenants to pay the rent,

> "to keep the messuage and premises and all fixtures and fittings in and about the same and all additions thereto in good tenantable repair, order and condition, also the sanitary and water apparatus and the fittings thereof in thorough substantial repair, order and condition, and at the expiration or sooner determination of the said term to deliver up to the landlord in the same good substantial repair, order and decorative condition as now."

There are a number of other covenants, all of them more or less usual in form, but none of them appears to have any particular materiality to the issue which I have to try except those which are numbered 14 and 16. They are in these terms:

> "14. The landlord agrees to pay all rates and taxes and insurance imposed or in respect of the said premises. 16. The landlord agrees to be responsible for the maintenance and repair of the roofs, drains and structural work."

This lease was given to the tenant, Mr. Somerville, by the mortgagor, who was his father-in-law. There had been some suggestion by Mrs. Somerville, who was the mortgagor's daughter, before its execution, that she would like to live in part of the property comprised in the lease. There were negotiations as to its terms, and when the mortgagor gave it to his son-in-law he told him that he, the mortgagor, intended to make such alterations to the property and to put it in such a state of decoration and repair that Mr. and Mrs. Somerville might live there. At this time the tenant's resources were insufficient to enable him to support his wife and himself in the manner in which they were accustomed to live. The tenant frankly admitted that his private income was hardly more than sufficient to enable him to meet the rent reserved by the lease.

After the lease was granted, the mortgagor instructed a builder named Russell to do work on the premises. Before referring to this work it is material to state in what condition the premises were on May 12, 1933. They consisted of a block of three cottages, all under the same roof. This block was originally the Holme Park Farmhouse and was apparently so named. The cottage at the north end had been occupied by the mortgagor's bailiff, Pitt, and the other two were occupied by farm hands. There was no hot water supply in any of these cottages; there was a bath which could not be used in the bailiff's cottage, and the sanitary arrangements were certainly not up to modern standards. Water was laid on, but there was no gas or electricity. In addition to those cottages there was a bungalow with two rooms occupied by a pensioner. This bungalow had resulted from the conversion of a calving shed. In addition to the A cottages and bungalow there was a large barn which was used as a stable for the farm horses, another barn used for storing hay and straw, a shed for sheltering cattle and also for the storage of farm implements, and a long, low range of buildings, one-half of which was used for standing the cows when they were being milked and the other half of which had been converted into loose boxes for some hunters kept by the mortgagor. There were other and smaller farm buildings. In addition there was a farmyard and another B yard that was gravelled. This yard was in front of the three cottages and was used in part as a stockyard. The whole of the premises comprised an area of about three and a half acres. The approach was by a lane leading from the Sonning Lane and this approach was not metalled, although I think it had a gravelled surface. After the lease was granted, the mortgagor at his own expense converted the bailiff's cottage and the cottage next to it into a dwelling-house. Two bathrooms were constructed, the kitchen C was re-arranged, the wall was removed for repair, a study was built on and the whole building was modernised and brought up to date; basins with hot and cold water were fitted in the bedrooms and electric light and gas were laid on, new fireplaces were constructed and a modern cooking range was installed. This work was finished about September, 1933. By that time the house was, according to the evidence, an attractive residence. I have no information as to the total cost of these alterations and improve- D ments, but Mr. Russell, the builder who did some of the work, was paid £300 for his work.

Expert evidence was called on behalf of the mortgagees as to the letting value of the premises. Mr. Fraser, a partner in the well-known firm of Nicholas, who was well acquainted with the Sonning district, said that in his opinion the present letting value was £250 per annum, but he frankly admitted that he never went over the premises E until January of last year, and that he knew nothing of the state of the property in May, 1933. Mr. Dunn, who is a partner in Simmons and Son of Reading and Henley-on-Thames, agreed with Mr. Fraser's opinion as to the present letting value of the property, but he did not go over the property until September, 1933; he was not able to speak of the condition of the property on May 12, 1933, and was therefore unable to express an opinion as to its letting value at that date. It is obvious that the mort- F gagees and their advisers were unaware that any alterations had been made to the property after May 12, 1933, until after the evidence on behalf of the tenant had been given. The main evidence on behalf of the tenant was given by Mr. France and Mr. Russell. Mr. France is the manager of Messrs. Wilson and Co. He went over the property in September, 1931, and made on the mortgagor's instructions a valuation of the Holme Park Estate as a whole at that time. His description agrees in the main G features with the fuller description subsequently given by Mr. Russell, the builder, to whose evidence I have already referred. He stated that in his view the three cottages were worth respectively, 12s. to 14s. per week for the bailiff's cottage, 9s. to 10s. per week for the cottage next to it, and 7s. to 8s. per week for the third cottage, while the bungalow was worth in his opinion about 5s. a week. He thought it would be difficult to let any of the additional land, or to get any rent for that part of the property H if let separately, but he put its outside annual value at £25. He put the whole value of the property in 1931 at £120 per annum on the basis of the landlord paying the rates, taxes and insurance. Mr. Russell was the only witness able to speak positively to the condition of the property in May, 1933. He went over it on May 14, 1933, on the invitation of the mortgagor, and was given verbal instructions as to the work he was to carry out. I have already stated the effect of his evidence as to the condition of the I property. On his evidence, which I accept, it is clear that the property required very considerable work repair and redecoration to make it suitable for a residence. He put the weekly rental values of the cottages at 10s. to 12s. a week for the bailiff's cottage, 7s. a week as the outside value of the cottage next to it, which he said was in a very poor state of repair, and 8s. to 9s. a week for the third cottage; the weekly value of the bungalow, which has only two rooms, he put at 3s. to 4s. In his view the letting value of the rest of the property would be very small, as it was of practically no value.

On the evidence before me, it is plain that, on May 12, 1933, the value of the property was certainly not more than £125 a year; indeed it seems to me that it may have been considerably below that figure. The only difficulty in the case is caused by the presence of the covenant by the landlord to pay the rates. Taxes are usually paid by the landlord, and the insurance is a negligible matter. There is no covenant by the landlord, the mortgagor, to do any work on the property; there may have been some agreement to that effect, but I have no sufficient evidence to come to a definite conclusion on that point.

The question I have to determine is whether the existence of this covenant by the landlord to pay the rates is, in the circumstances, one which I ought to take into consideration in determining the question whether the rent reserved by the lease was the best rent reasonably obtainable in the circumstances for the property included in the lease. There was no obligation on the mortgagor to spend any money on the property, and I do not think that the mortgagee is entitled to say that the rent is not the best rent reasonably obtainable for a particular property by reference to its condition as a result of voluntary expenditure at a date subsequent to the date of the lease in question. The rent must be considered in reference to the property in its condition at the date of the lease. It is said that the subsequent expenditure may put a very heavy burden upon the mortgagee, because by reason of it the rateable value may be increased, and, as the landlord is liable under the lease for the rates, the actual rent received will be diminished. It is agreed that in a short letting of property in the state in which this property was at the date of the lease, with a number of cottages suitable for letting at weekly rents, it is usual for the landlord to pay the rates; but it is certainly unusual for the landlord to covenant to pay rates in respect of property which is let for a long time. If the property is to be kept during the term in the same state as it was in the beginning of the lease, there would, so far as I can see, be no objection to the covenant, for the rates might go up or they might go down. It is said, however, that such a covenant in a long term must affect the rent reserved prejudicially if it is possible to alter the property by effecting improvements of a sufficiently substantial nature so as to increase materially the rateable value of the property. There was no direct evidence as to the present rateable value of the property. Indeed it was suggested that during the present year the rates were something under £6. There is no evidence that a higher rent could have been obtained by reason of the landlord's covenant to pay the rates. It is true Mr. Fraser said that he could put no monetary value on the covenant, but that he thought it would make a considerable difference. It may well be that a tenant would refuse to accept a lease at a higher rental in consideration of the insertion of such a covenant. I think, in the absence of any express covenant or agreement by the landlord to improve the property in such a way as to increase the rateable value, I cannot treat the presence of the covenant as a circumstance sufficient to warrant a finding that the rent reserved is not the best rent reasonably obtainable.

On the facts, I am satisfied that the rental of £125 reserved by the lease was the best rent reasonably obtainable for the property in the condition in which it was at the date of the lease, and I do not think I should be justified on the evidence (or perhaps I should say on the lack of it) as to the increase, or possibility of increase, in the rateable value by reason of subsequent alterations, in holding that it was not. Counsel for the mortgagees argued that in fact there was no attempt to ascertain whether a higher rental could be obtained from any independent source, and he argued that that by itself was a sufficient ground for holding that the rent reserved was not the best reasonably obtainable. I am unable to accede to that argument. I agree that the fact that the parties to the lease were not at arm's length, and that there was no independent bargaining before the lease was granted, demands a more critical consideration of the question whether the rent reserved was a proper rent or not, and of the evidence with regard to it, than would be necessary if the parties were strangers. However, the matter does not end there, for I am satisfied that the property as it was at the date of the lease was certainly not worth more than £125 per annum, and was in all probability worth less. I do not think I am justified in taking into consideration the intention of the landlord to expend his own moneys on the improvement of the property after the lease was granted, even though that intention was notified to the tenant before the lease was granted. These facts might or might not be material to another aspect of the case; but that aspect is not raised and cannot be considered in this action. In the result, it is impossible for me to hold that in all the circumstances of the case the rent of £125 per annum reserved by the lease was not the best rent reasonably obtainable, and the action therefore fails.

I have not dealt with the position of the second defendants, the sub-tenants, but it is sufficient to say that on Oct. 16, 1933, the tenant granted to them an underlease of a part of the property included in the original lease, being that part other than the residence and the cottage and part of the land which he reserved. The rent reserved by the underlease was £120 per annum. The underletting was granted to enable the sub-tenants to carry on a pig farm. I do not think that the rent reserved by the underlease demonstrates that the rent reserved by the original lease was not the best rent reasonably obtainable at the date of its execution, and beyond this the underlease has no bearing on the case. In the result the action fails against both defendants and will be dismissed with costs.

Action dismissed.

Solicitors: *Farrer & Co.*; *Holt, Beever & Co.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

HAY *v.* CARTER

[COURT OF APPEAL (Lord Hanworth, M.R., Romer and Maugham, L.JJ.), February 20, 1935]

[Reported [1935] Ch. 397; 104 L.J.Ch. 220; 152 L.T. 445]

Guarantee—Co-sureties—Action for contribution—Principal debtor not a party and not proved insolvent—Principal debtor not sued by creditor—Inference of principal debtor's insolvency

Practice—Parties—Surety's action against co-sureties for contribution—Amendment to allow joinder of principal debtor or showing of good cause for not doing so—R.S.C., Ord. 16, *r.* 11.

The rule that a surety who has paid the principal creditor and is suing his co-sureties for contribution without making the principal debtor a party, must give the court some good reason, such as the principal debtor's insolvency, for not making the principal debtor a party is only a rule of convenience; the court may therefore, in a proper case, conclude for itself on the materials before it that, even though the plaintiff has not given any such reasons, no good purpose would be served by joining the principal debtor, and, if it has done so, should proceed with the trial of the action in his absence. If objection is taken to the absence of the principal debtor the court, unless satisfied that no good purpose would be served by joining him, should grant the plaintiff (if he applies therefor) leave to amend his proceedings, pursuant to R.S.C. Ord. 16, r. 11, so as to add the principal debtor as a defendant or to explain why he was not made a party.

The four directors of A. D., Ltd., guaranteed the account of the company with a bank in 1930; in 1933 the bank claimed from the guarantors a sum of £1,195 16s., and one of them, H., the plaintiff, paid part of that sum. The bank then obtained a judgment against the four guarantors, including H., for the sum remaining unpaid on the guarantee. The plaintiff, having had a petition in bankruptcy lodged against him, paid up the full amount remaining owing to the bank. In this action he claimed contribution from his co-sureties, and also that he was entitled to be

A indemnified from any liability under the guarantee by his co-sureties. One of the defendants objected that the principal debtor, A. D., Ltd., had neither been joined as a party to the action nor been proved insolvent. FARWELL, J., refused the plaintiff's application for leave to amend so as to join the principal debtor or to show good reason for not doing so, and dismissed the action.

Held: the appeal must be allowed, and the action remitted to FARWELL, J., for B further trial, because the fact that the bank sued the guarantors, and not the company itself was sufficient in this case for the court to infer that the company was insolvent, and that, therefore, no good purpose would be served by joining it:

Dering v. *Earl of Winchelsea* (1) (1787), 1 Cox, Eq. Cas. 318, followed. *Lawson* v. *Wright* (2) (1786), 1 Cox, Eq. Cas. 275, explained; *Hitchman* v. *Stewart* (3) (1855), 3 Drew 271, *Madox* v. *Jackson* (4) (1746), 3 Atk. 405, *Collins* v. *Griffith* (5) (1725), C 2 P.Wms. 313, and *Angerstein* v. *Clarke* (6) (1790), 3 Sw. 147 considered.

Notes. As to parties to actions by a surety to enforce contribution, see 18 HALSBURY'S LAWS (3rd Edn.) 490, para. 900, and for cases on the subject, see 26 DIGEST 147–148, 1110–1112.

Cases referred to:

D (1) *Dering* v. *Earl of Winchelsea* (1787), 1 Cox, Eq. Cas. 318; 29 E.R. 1184; 2 Bos. & P. 270; 26 Digest 142, *1050*.

(2) *Lawson* v. *Wright* (1786), 1 Cox, Eq. Cas. 275; 29 E.R. 1164; 26 Digest 136, *990*.

(3) *Hitchman* v. *Stewart* (1855), 3 Drew. 271; 3 Eq. Rep. 838; 24 L.J.Ch. 690; 25 L.T.O.S. 168; 1 Jur. N.S. 839; 3 W.R. 464; 61 E.R. 907; 26 Digest 144, *1074*.

(4) *Madox* v. *Jackson* (1746), 3 Atk. 405; 26 E.R. 1034, L.C.; 26 Digest 101, *697*.

E (5) *Collins* v. *Griffith* (1725), 2 P. Wms. 313; 24 E.R. 745, L.C.; 7 Digest 242, *850*.

(6) *Angerstein* v. *Clarke* (1790), 3 Swan. 147, n.; Dick. 738; 36 E.R. 811, L.C.; 7 Digest 242, *853*.

(7) *Re Snowdon, Ex parte Snowdon* (1881), 17 Ch.D. 44; 50 L.J.Ch. 540; 44 L.T. 830; 29 W.R. 654, C.A.; 26 Digest 144, *1069*.

(8) *Stirling* v. *Burdett*, [1911] 2 Ch. 418; 81 L.J.Ch. 49; 105 L.T. 573; 26 Digest F 144, *1070*.

Appeal from the decision of FARWELL, J., dated Nov. 16, 1934, who dismissed the action.

The facts are shortly stated in the head-note and are fully set out in the judgment of LORD HANWORTH, M.R.

G *J. F. Bowyer* for the plaintiff.
H. F. F. Greenland for the defendant Barker.
R. L. Edwards for the defendants Carter and Duckett.

The arguments appear from the judgment of LORD HANWORTH, M.R.

LORD HANWORTH, M.R.—The plaintiff, A. J. Hay, and the defendants, Carter, H Duckett and Barker, were directors of a company known as Andrew Duckett, Ltd., and they gave two guarantees to the Westminster Bank guaranteeing the account of Andrew Duckett, Ltd., with the bank. Those guarantees were given in 1929 and 1930. In 1933 a demand was made by the bank upon the guarantors for the payment of a sum of £1,195 16s., no doubt the amount of the over-due account of Andrew Duckett, Ltd., both, I suppose, of principal and interest, and in September of that year Mr. Hay, I the plaintiff, paid up a sum of £319 in respect of the principal debt together with £60 for interest. However, although he had played his part, that was not sufficient for the bank, with the result that the bank issued a writ on Sept. 14, against all the guarantors and recovered judgment under Order XIV for the amount then due, which was £913 12s. 7d., together with a sum of £12 9s. 6d. costs. That meant that there was a liability, upon those figures, of £926 and a little more, and that judgment was obtained against all of them on Oct. 16. A bankruptcy notice was issued on Jan. 9 against the plaintiff Hay and served upon him on the 13th. It was not complied with, which meant that he had committed an act of bankruptcy. Thereupon, on Feb. 12 a petition in bankruptcy was lodged against the plaintiff, and the plaintiff, placed in that very serious difficulty, paid up the full amount of the debt and costs then owing to the bank, which by that time had amounted to a little more than the figures I have given, £934 12s. 7d.

On Nov. 17, 1933, the plaintiff commenced an action in the Chancery Division claiming, first of all, a declaration that the defendants were jointly and severally liable to him for the contribution which he had paid up, and all necessary accounts and inquiries; and, secondly, that he was in the position of a surety who was entitled to be indemnified by his co-sureties. No defence was put in by two of the defendants, Mr. Carter or Mr. Duckett, but a defence was put in by the other defendant, Mr. Barker, who claimed in effect that he had given the guarantee to the bank because the bank had required the signature of all the directors. Para. 3 of his defence and counterclaim says this:

> "The defendant executed the guarantees mentioned at the verbal request of the plaintiff and the defendant Carter, who verbally represented to him that the company's bankers required the signatures of all the directors of the company to such guarantees."

Then the defendant Barker says that he had no means, as they knew, except his salary and some moneys which would be paid to him by the company, and that the directors had agreed to indemnify him from any liability which arose against him under this guarantee given to the bank. Upon that he said there was a defence to the plaintiff's claim, and he counterclaimed, in respect of his rights under the agreement made with him by the other directors, and asked for a declaration that the other defendants and the plaintiff were bound to indemnify him against any liability or to exonerate him from any claims to contribution.

The action came before FARWELL, J. The petition was mentioned, the facts I have stated were told to the learned judge, proof was given by the plaintiff of the payment of £934 12s. 7d., and then his case was closed. Counsel, on behalf of the defendant Barker, took a point that the principal debtor, Andrew Duckett, Ltd., ought to have been made a party to this action by being joined as a defendant and that, in the absence of the principal debtor, the action could not be dealt with by the learned judge. That proposition was said to follow from *Lawson* v. *Wright* (2). FARWELL, J., acceded to that view, and said:

> "At the close of the plaintiff's case, and before opening his defence, counsel on behalf of the defendant Barker, submitted that the plaintiff had not proved his case, and was entitled to no relief against his client, on the ground that the plaintiff had neither proved that the company was insolvent nor made the company a party to the action; and in support of this submission he referred to *Lawson* v. *Wright* (2), a case where a surety sued a principal debtor and co-surety, alleging insolvency of the former and claiming a contribution from his co-surety on that ground, and that case is directly in point here."

In other words, FARWELL, J., held that the failure to make the principal debtor a party could not be excused unless there were affirmative proof that the principal debtor was in fact insolvent, that as that proof had not been given the plaintiff's claim had not been established. He thereupon dismissed the action and ordered the plaintiff to pay the costs of all three defendants, and he also dismissed the counterclaim and granted a set-off in respect of the costs of claim and counterclaim of the defendant Barker.

We have looked into *Lawson* v. *Wright* (2) to see whether or not that course adopted by the learned judge was the necessary and right course established by *Lawson* v. *Wright* (2). It certainly seems somewhat startling to find that in these days an action can be, and ought to be, dismissed out of court by reason of the failure to have the proper parties before the court. No amendment was allowed; no adjournment was allowed for the purpose of further joinder of the principal debtor, but the learned judge said that his order in the action was to be without prejudice to either party commencing fresh proceedings. In other words, there was liberty to start over again and bring the matter before the court when the proper parties should be presented to the court.

We have looked at *Lawson* v. *Wright* (2) and some other cases. It would appear that the rule which FARWELL, J., applied was an objection in point of form to the action. It does not appear in any of the cases that it is established that the objection taken was one based on a condition precedent to the plaintiff's right to bring his action, and it would seem also that the proof of the insolvency of the principal debtor would be an excuse from the necessity to join him as a party, and that the proof or information available to the court as to the insolvency of the principal debtor need not necessarily be given by affirmative proof tendered and established by the plaintiff. Turning to *Lawson* v. *Wright* (2), the judgment which was there given by SIR LLOYD KENYON, M.R., contained these words (1 Cox, Eq. Cas. at p. 276):

> "His Honour was very clear on the general equity of the case, and said it had been established ever since the origin of Courts of Equity, that one surety had a right to call on another for contribution in cases of this nature; but his Honour had some doubts whether it was not absolutely necessary to prove the insolvency of the principal, which was not done in the present case. To which objection it was answered by the counsel for the plaintiff, that although such was the rule where the principal was not before the court, yet the principal being here a defendant, it was competent to the court to make such a decree, as it could at the same time direct payment from the principal to the co-surety, and it was also suggested that there might be a difference in the case where the money had been actually paid by one surety."

As a matter of fact, the decree was that it should be referred to take an account, and the head-note says:

> "On a bill filed by a surety against his co-surety and the principal for a contribution from the co-surety in respect of money actually paid by the plaintiff for the principal, it is not necessary to prove the insolvency of the principal; otherwise where the principal is not a party to the suit."

I turn now to look at some of the other cases in which this point has been considered. In *Hitchman* v. *Stewart* (3) it was contended that in similar circumstances the principal debtor was not a necessary party; and three cases were cited to establish that point. The first is *Madox* v. *Jackson* (4), where LORD HARDWICKE says (3 Atk. at p. 406):

> "The general rule of the court, to be sure, is, where a debt is joint and several, the plaintiff must bring each of the debtors before the court, because they are entitled to the assistance of each other in taking the account. Another reason is, that the debtors are entitled to a contribution, where one pays more than his share of the debt. But there are exceptions to this, and the exception out of the first rule is, that if some of the obligors are only sureties, there is no pretence for the principal in the bond to say that the creditor ought to bring the surety before the court, unless he had paid the debt. The exception out of the second rule is that if there are no personal assets at all, and this fact appears plainly in the cause, there is no occasion to bring the representative of that co-obligor before the court."

It is therefore stated by LORD HARDWICKE not that there is a condition precedent, but that the court must be informed as to whether or not it was of importance that the further party should be before the court, and the necessity of the party being before the court was answered if there were no personal assets in his hands at all. I turn to the next case in which that point was considered: *Collins* v. *Griffith* (5). There Lord Chancellor KING refers to the question of the necessity of having all the obligors before the court and overrules the objection that it was necessary to make them all parties to the suit. In the last case to which I need refer, *Angerstein* v. *Clarke* (6), it is said by the LORD CHANCELLOR that

> "if one of the persons living (which is a stronger case than that of a dead person) be admitted to be insolvent, surely it ought to be an answer to an objection for want of parties."

After looking at those cases, I now turn to *Dering* v. *Earl of Winchelsea* (1) (1 Cox, Eq. Cas. at p. 323), where the objection was taken that the principal debtor was not before the court, and the observation which is made is this:

> "The objection in point of form, which I before mentioned, is, that the bill cannot be sustained, inasmuch as it has not charged the insolvency of the principal debtor, and that such a charge is absolutely necessary. As a question of form, it ought to have been brought on by demurrer; but in substance the insolvency of Mr. Dering may be collected from the whole proceedings, which strongly imply it; for the plaintiff appears to have submitted to the judgment, and the defendants have made their defence on other grounds."

It appears, therefore, that this rule is not one which is to be treated as a condition precedent, but one which is to be observed unless there is the excuse, which is excepted to it, of insolvency, and hence that it would serve no useful purpose in insisting on the presence of the principal debtor before the court. In a passage which is to be found in Rowlatt, J.'s book on Principal and Surety (2nd Edn.), pp. 229, 230, he says:

> "It would seem right upon principle that a surety should not have contribution from a co-surety unless he proves that the principal is insolvent, or at any rate that there is some impediment to suing him. The contrary course would certainly lead to a multiplicity of suits, and where he has no contract giving him such a right it seems anomalous that the surety paying should have an equity to contribution so long as the remedy against the principal, which would relieve all the sureties, is available."

The upshot of all that appears to be this, that the rule which is found in *Lawson* v. *Wright* (2) is a rule which must be affirmed and applied, but a rule the observance of which can be overcome if there is evidence that no useful purpose would be served by having this particular party, the principal debtor, before the court by reason of his insolvency. When that excuse is given the want of form is excused; in other words, that the rule is one which does not lay down a condition precedent but want of form which may be overcome. It may be overcome by proof or it may be overcome by it being plain to the court that there is sufficient evidence revealed in the facts before the court that the principal debtor is insolvent; in other words, that there is an implication which the court itself would draw, as in *Dering* v. *Earl of Winchelsea* (1) that there was insolvency on the part of the principal debtor. I would also say, although it is unnecessary to go further into it, that *Lawson* v. *Wright* (2) and its limitations have been considered in two cases to which attention must be drawn when it is necessary to examine it exactly, *Re Snowdon, Ex parte Snowdon* (7), where it is examined by Cotton, L.J., and an important judgment of Lord Warrington (Warrington, J., as he then was) in *Stirling* v. *Burdett* (8).

I turn now, therefore, after considering those authorities and the limitation of the rule, to consider what has happened in the present case. It appears from the pleadings, upon the facts, upon the knowledge before the court, that this £934 was a sum paid up in respect of the overdraft of the account of Andrew Duckett, Ltd., enforced against the guarantors and not claimed against the company itself, that the only proper inference is that the company itself was insolvent and unable to pay. The implication which was found, therefore, in *Dering* v. *Lord Winchelsea* (1) appears in the present case, and the result is that it was unnecessary to insist upon the company being made a defendant, and that the plaintiff's action ought not to fail by reason of a defect of form.

Under those circumstances, the right course will be to allow the appeal and to send the case back to be further tried before the judge of the first instance; but the defendant, Barker, must pay the costs of this appeal, the appeal of the plaintiff, and of the two defendants, Carter and Duckett, who are also respondents to this appeal, and he must also pay the costs of all parties which have been thrown away by his intervention which caused the dismissal of the action.

ROMER, L.J.—I have arrived at the same conclusion as that which has already been

A stated by the MASTER OF THE ROLLS, but as we are differing from FARWELL, J., I should like, out of respect to him, to state my own reasons for so doing.

Where a surety has paid the principal creditor the whole of the principal creditor's debt and is suing his co-sureties for contribution without making the principal debtor a party, it is not in my opinion precedent to the plaintiff's right to sue that the principal debtor should be insolvent. Therefore, in such an action it is not strictly necessary B as a matter of pleading for the plaintiff to allege such insolvency, but in order to avoid multiplicity of actions and to enable the court to adjust all the rights between the sureties and the principal debtor once and for all, the court has laid down a rule of convenience, a very salutary rule and one that I hope will always be observed, but none the less merely a rule of convenience. It is this: that for the purposes I have mentioned the principal debtor should be brought before the court unless the plaintiff C can give to the court some good reason for not doing so. One very obvious reason for not doing so would be the insolvency of the principal debtor, because it would be quite useless to bring him before the court to enable the court to adjust all the rights. There may be, and there no doubt are, other reasons which may be sufficient for not bringing the principal debtor before the court, and in considering whether the plaintiff has shown sufficient reason for not bringing the principal debtor before the court the court D can act on such material as it thinks proper. In the present case, therefore, when counsel for the plaintiff closed his case without having alleged the insolvency of the principal debtor, it was not, in my opinion, right for the learned judge, without more, to dismiss the plaintiff's action as though he had shown no cause of action at all against the defendants. It was, however, right thereupon for the defendants to call the court's attention to the fact that the principal debtor was not there, and if the defendants E had not called the attention of the learned judge to that fact the learned judge himself might have asked, and ought to have asked, the plaintiff why the principal debtor was not a party. If the plaintiff then asked, as he did in the present case, for leave to amend upon proper terms, either by adding the principal debtor as a defendant or being given an opportunity of explaining to the court why the principal debtor was not a party, I think that the learned judge should have acceded to the plaintiff's counsel's F request. The truth of the matter is, as it seems to me, that the objection to the absence of the principal debtor was not an objection going to the root of the plaintiff's cause of action, but was merely an objection to the absence of parties, and, that being so, Order XVI, r. 11, is directly applicable. That rule states that:

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder G of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether H plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

However, instead of adjourning the case in order that the plaintiff might either join the principal debtor as a party or might have an opportunity of giving reasons for not I having joined the principal debtor, the court may in a proper case come to the conclusion, on the materials then before it, that no good purpose would be served by adding the principal debtor. The present case, as it appears to me, would be exactly a case of that description. I will not go through the facts again; they have already been stated by the MASTER OF THE ROLLS, but those facts afford eloquent testimony to the inutility and uselessness of adding the company, the principal debtor in this case, and therefore I think that in the circumstances the learned judge should, notwithstanding the objection that the principal debtor was not before the court, have proceeded with the trial of the action.

For these reasons and those which have been given by the MASTER OF THE ROLLS A
I think that this appeal must be allowed with the consequences that he has indicated.

MAUGHAM, L.J.—I am of the same opinion and, agreeing as I do precisely with the statement of the law given by ROMER, L.J., I do not think it is necessary for me to repeat what he has said on that point. In my opinion, the question whether the principal debtor in such a case as this should be a party to the action is a question of B
convenience; and I will repeat what the Lord Justice has said in this form, that I think the question is whether the presence of the principal debtor before the court is necessary

> "in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter,"

those words being taken from Order XVI, r. 11, which distinguishes between the case C
of a person not present being a necessary party and a person such as the words I have quoted describe.

I would add this, that if the view is right which has been contended for, that, as a matter of law, it was necessary before this action could be maintained either to add the principal debtor, Andrew Duckett, Ltd., as a defendant or to prove strictly that that company was insolvent, that is a point which any one of the defendants, including, of D
course, the defendant Barker, could have raised in his defence according to the terms of Order XXV, r. 2. Not having so raised it, although it stared the defendants in the face, I am of opinion that that was a strong ground for allowing an amendment under Order XVI, r. 11, even if the question, as I say, had been a matter of strict law. By that I do not mean that a question of law of that kind need as a matter of necessity be pleaded by the defendants, but I do think that, when an obvious question of law E
arises in an action and the defendants do not plead it, the judge may well think that, having regard to the intention of the rules of the Supreme Court, merely technical objections should not be allowed to defeat an action or, in other words, that

> "no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties,"

the court in such a case ought to exercise its discretion in favour of allowing the amendment. F
There was, as I have already inferentially stated, no question of surprise here, because the defendants are coming forward knowing perfectly well that the guarantee given was a guarantee of Andrew Duckett, Ltd., and that there was no allegation in the pleadings that that company was insolvent. However, I take the view that the real point was only one of convenience, and I think the question here is whether on the materials before the court it was possible to hold that the presence of the principal G
debtor was necessary in order to enable the court completely to settle the various questions involved.

On that I should like to say a word out of respect to counsel for the defendant Barker's strenuous argument to the contrary. I should observe this, that we do not start with an ordinary case where we know nothing about the principal debtor, we begin in this case with one of those instances, which are exceedingly common to those who are H
conversant with business in the city of London, where a company, desirous of either issuing debentures or obtaining advances from its bank, finds itself bound to obtain the guarantees of its directors. It appears that the guarantee of all the directors was necessary for the overdraft to be allowed by the bank of the company. The defence set up by Mr. Barker was that it was for that very reason that he joined in, it being verbally represented to him that the company's bankers required the guarantees of all I
the directors and he happened to be one. It does not stop there at all, because by the defence it is apparent that the principal debtor, Andrew Duckett, Ltd., had fallen upon bad times, and the defendant Barker, who had been the sales manager of the company's business at a salary of about £312 a year, was so alarmed at the financial responsibility that he was under in connection with the company's affairs that he verbally agreed to resign his salaried post with the company on condition that the plaintiff and the defendant Duckett would exonerate him from any responsibility in connection with the company's affairs. That was, according to the defence, in April, 1930. That

A the company did not improve its position is clear by the fact that on Feb. 25, 1933, the bank served notice in writing on the plaintiff and the defendants demanding payment under the guarantees of the sum of £1,195 16s., and it was after the plaintiff had been compelled to pay to the bank a smaller sum than that, in part satisfaction of his liability, that an action was commenced in the King's Bench Division by the bank against the plaintiff and the defendants, omitting the joining of Andrew Duckett, Ltd., the principal B debtor, as a defendant, and the bank recovered judgment on Oct. 16, 1933, against the plaintiff and the defendants for the sum of £913 12s. 7d. and a sum for costs. The plaintiff had had bankruptcy proceedings taken against him; there apparently was never a more unwilling payment by a guarantor, and after the bankruptcy proceedings were on the point of resulting in a receiving order he paid the whole amount to the bank. In the King's Bench proceedings none of the defendants thought fit to take proceedings C by way of third party process against the principal debtor, and it is apparent that the plaintiff himself did not think it worth while to try to recover anything from the principal debtor, not only because he commenced no proceedings against them and did not attempt to wind them up, but also because he paid the whole sum himself.

The question is not, as it seems to me, whether it has been proved by strict evidence and beyond all doubt that the principal debtor was and is insolvent. The question is D whether there was, in the circumstances I have stated, primâ facie evidence that the presence of that principal debtor, in any proceedings that might take place in chambers in Chancery with a view to enabling the court "effectually and completely to adjudicate upon and settle all the questions involved" was or was not necessary. I have not the smallest hesitation in coming to the conclusion that on those facts there is strong primâ facie ground for thinking that the presence of the principal debtor would have E been perfectly useless and would only have led to an increase in the costs. It was quite open to the defendant Barker, had he chosen, to raise the point by saying: I am going to call evidence to show that the company has some money and ought to be parties to this action, and therefore the proceedings must be stayed at the expense of the plaintiff until the company is added as a party. He did nothing of the sort; on the contrary, what he did was to raise a defence, a plain and intelligible defence absolutely F disconnected with the question as to whether the principal debtor were before the court or not, a defence which could have been made and persisted in and proved in the absence of the principal debtor without the smallest difficulty had it been sound in point of fact. This is therefore one of the rare cases, in my opinion, where a statement made in an ancient case is almost exactly in point. The decision in the case of *Dering* v. *Earl of Winchelsea* (1) was a decision of the LORD CHIEF BARON EYRE on Feb. 8, 1787, and it G really is curious how the passage which has already been read on p. 323 of the report in 1 Cox is apposite to the present case. He says:

> "In substance the insolvency of Mr. Dering [that is, the principal debtor] may be collected from the whole proceedings, which strongly imply it; for the plaintiff appears to have submitted to the judgment"

H —that is what has happened here, he submitted to the judgment without bringing in the principal debtor—"and the defendants"—in this case it is the defendant Barker—"have made their defence on other grounds"—that is precisely what Mr. Barker did here. Without saying I want the principal debtor added, he says: I shall raise a totally different point dependent upon a contract made by the plaintiff with me to hold me free from any liability on this guarantee. Accordingly it seems to me, with the greatest I respect to the learned judge, that in this case the proper course was to have proceeded with the discussion of the defence which had been raised by the defendant Barker, and that the case must therefore go back to have the question raised by his defence adjudicated upon.

On those grounds I agree with the judgments of my learned brethren.

Appeal allowed; case remitted to the judge of first instance for further trial.

Solicitors: *E. C. Randall*; *Gregsons,* for *Barwell & Philcox,* Lewes; *Thomas Griffiths.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

BURNETT *v.* BURNETT

[PROBATE, DIVORCE, AND ADMIRALTY DIVISION (Bucknill J.), July 8, 9, 19, 1935]

[Reported [1936] P. 1; 105 L.J.P. 1; 153 L.T. 318; 51 T.L.R. 574;
79 Sol. Jo. 642]

Variation of Settlement—Settlement made during subsistence of former marriage—Appointment thereunder, after decree absolute, in favour of intended second wife—Second wife's decree of divorce and petition for variation—Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 192.

Under a post-nuptial settlement made by a husband in 1925 provision was made for the husband and any wife and issue of his for the time being in existence. In 1928 the husband exercised a power of appointment under the settlement in favour of two children of the existing marriage. He was divorced in 1929, and later that year, immediately before he married another woman, he made a settlement in her favour. The second wife divorced him in 1934, and petitioned under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, for variation of settlements.

Held: section 192 did not give the court jurisdiction to vary a settlement executed during the subsistence of one marriage, but made in contemplation of a second marriage, on the dissolution of the second marriage; the petitioner was therefore not entitled to succeed as (i) the first settlement was made and the power of appointment exercised during the subsistence of the first marriage; (ii) the court had no jurisdiction to vary the 1929 settlement as any such variation must constitute a variation of the first settlement.

Hargreaves v. *Hargreaves* (1) applied.
Prinsep v. *Prinsep* (2) and *Janion* v. *Janion* (3) distinguished.

Notes. Section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, is now s. 25 of the Matrimonial Causes Act, 1950.

Quære whether, in view of the principle in *Fender* v. *Mildmay*, [1937] 3 All E.R. 402, the court would have jurisdiction under s. 25 to vary a settlement, made between decrees nisi and absolute of dissolution of one marriage and in contemplation of a second marriage, upon the dissolution of the second marriage.

As to settlements which cannot be varied under s. 25, see 12 HALSBURY'S LAWS (3rd Edn.) 452, para. 1017, and for cases on the subject, see 27 DIGEST (Repl.) 645–649, *6087–6112*. For the Matrimonial Causes Act, 1950, s. 25, see 29 HALSBURY'S STATUTES (2nd Edn.) 412.

Cases referred to:

(1) *Hargreaves* v. *Hargreaves*, [1926] P. 42; 95 L.J.P. 31; 134 L.T. 543; 42 T.L.R. 252; 27 Digest (Repl.) 646, *6094*.

(2) *Prinsep* v. *Prinsep*, [1929] P. 225; 98 L.J.P. 105; 141 L.T. 220; 45 T.L.R. 376; 73 Sol. Jo. 429; subsequent proceedings [1929] P. 265; varied 46 T.L.R. 29, C.A.; 27 Digest (Repl.) 646, *6098*.

(3) *Janion* v. *Janion*, [1929] P. 237, n.; 98 L.J.P. 111, n.; 141 L.T. 226, n.; 45 T.L.R. 381, n.; 27 Digest (Repl.) 646, *6097*.

(4) *Melvill* v. *Melvill and Woodward*, [1930] P. 159; 99 L.J.P. 65; 143 L.T. 206; 46 T.L.R. 327; 74 Sol. Jo. 233, C.A.; 27 Digest (Repl.) 646, *6095*.

(5) *Loraine* v. *Loraine and Murphy*, [1912] P. 222; 82 L.J.P. 29; 107 L.T. 363; 28 T.L.R. 534; 56 Sol. Jo. 687, C.A.; 27 Digest (Repl.) 638, *6003*.

Divorce Motion

This was a motion by the respondent husband in a divorce suit, to confirm the registrar's report submitting that the petition of the wife for variation of settlements be dismissed. By cross-motion the petitioner prayed that the registrar's report be discharged and that her petition for variation of settlements be remitted for further report. The facts are set out in the judgment. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 102, provides: "The Court may after pronouncing a decree for divorce . . . inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage as the Court think fit, and the Court may exercise the powers conferred by this sub-section notwithstanding that there are no children of the marriage."

Alexander Grant, K.C., and *Victor Russell* for the wife petitioner.

A. Richard Ellis for the husband respondent.

L. W. Byrne for the trustees of the principal settlement.

F. L. C. Hodson for the children of the respondent by a previous marriage.

Cur. adv. vult.

July 19. **BUCKNILL, J.**, read the following judgment:

The petitioner was married to the respondent on June 27, 1929, and there is no issue of the marriage. On April 13, 1934, the petitioner obtained a decree nisi for the dissolution of her marriage, and the decree was made absolute on Oct. 22, 1934. On Nov. 21, 1934, the petitioner petitioned for a variation of settlements under the power conferred on the court by s. 192 of the Judicature (Consolidation) Act, 1925. The settlements in respect of which the petitioner claims an order for variation are three in number, and are dated (i) June 18, 1925, (ii) Oct. 6, 1927, (iii) June 24, 1929. No. 2 is a subsidiary settlement to No. 1. No. 3 is a deed of appointment exercised under powers conferred by No. 1. When the respondent executed settlement No. 1 he was then in fact married to another women by whom he had two daughters, born in January, 1925, and March, 1927. Under the terms of settlement No. 1 the respondent effected a settlement of his share of the residuary estate of a deceased uncle. The declared trusts of the settlement so far as is material to this motion were as follows:

> "3. (*a*) Upon trust during the lifetime of the settlor to apply the annual income of the trust fund for the maintenance support or otherwise for the benefit of all or any one or more exclusively of the other or others of the settlor and any wife and issue of his for the time being in existence and any person or persons who would if he were actually dead intestate be entitled to the trust fund or the income thereof, as the trustees in their absolute discretion . . . think fit.
>
> "(*b*) And after the death of the settlor and subject to any life or less interest appointed to his wife under the power for that purpose hereinafter contained the capital and income of the trust fund shall be held in trust for all or any one or more exclusively of the other or others of the child children or more remote of the issue by his present or any future marriage. . . .
>
> "(*c*) If there shall not be any child of the settlor who attains a vested interest under the trust hereinbefore declared in default of appointment . . . the capital and income of the trust fund shall be held in trust for such person . . . as the settlor shall by deed . . . or by will or codicil appoint.
>
> "(4) The settlor may from time to time . . . appoint to or in favour of a wife who may survive him during the residue of her life while she remains his widow."

By the terms of settlement No. 2, dated Oct. 6, 1927, which was stated to be supplemental to No. 1, it was recited that the settlor had granted a mortgage on June 17, 1925, for £2,000 on his reversionary interest in his uncle's will, to secure a loan of £2,000 for the purpose of paying his debts, which loan was made on the express condition that the settlor would execute settlement No. 1. The settlor has since the settlement No. 1 incurred further debts which also were paid off on condition that he should bring certain further investments into the settlement. The settlor accordingly brought the said investments into the principal settlement to be held on the same trusts. On Aug. 21, 1928, and Sept. 26, 1928, the respondent executed two appointments in favour of the two children of his first marriage.

On June 24, 1929, the respondent, who was by this time divorced from his first wife, and was about to marry the present petitioner, executed a deed of appointment in pursuance of the powers conferred on him under settlements No. 1 and No. 2. The operating words of the appointment so far as is material to this case are as follows:

> "Whereas a marriage is shortly intended to be solemnised between the appointer and S. N. . . . the trustees shall after the death of the appointor stand possessed of the sum of six thousand pounds of the part of the residue of the trust funds settled by the settlement . . . upon trust to pay the income thereof to the said S. N. (if she shall survive him) during her life for her separate use . . . and from and after the death of the survivor of the appointor and the said S. N. . . . upon trust for the children (if any) of the appointor's marriage with the said S. N. . . ."

The registrar reported on the petition to vary settlements that he was of the opinion that none of the three settlements were settlements which could be varied under the powers given to the court. In his opinion, the first two settlements might properly be regarded as post-nuptial settlements as regards the first marriage, inasmuch as they were made by the respondent while he was married to his first wife, but neither of the first two settlements was made in contemplation or on account of the second marriage in respect of which it is sought to vary the settlements. The registrar considered that the case was almost identical with *Hargreaves* v. *Hargreaves* (1). As regards the third settlement, the registrar reported that this was clearly an ante-nuptial settlement in contemplation of the second marriage, but that the appointment was on the trusts mentioned in the first two settlements, and must therefore stand or fall with them. The appointment also purported to confer an interest without limitation to widowhood, which was greater than the respondent was given power to appoint.

On objection to the registrar's report it was argued on behalf of the petitioner (the second wife) that the widest possible interpretation should be given to the word "settlement" in s. 192 of the Judicature (Consolidation) Act, 1925, and that the motive which induced the settlor to make the settlement was of no importance. In support of this proposition *Prinsep* v. *Prinsep* (2) was cited where ([1929] P. at p. 235) Hill, J., said:

> "Whether a settlement is within s. 192 must depend on what it effects. If, in fact, it is a settlement on either husband or wife, or both in the character of husband or wife, it is wholly immaterial that it is prompted and stated to be prompted by affection only for one of them. On the question whether a settlement is a settlement within s. 192, the motive seems to me immaterial, except so far as it is given effect to by the terms of the deed."

It was argued that the settlement of 1925 was clearly a post-nuptial settlement as regards the woman who was then the wife of the respondent, and was an ante-nuptial settlement as regards the woman who subsequently became his wife after his marriage with the first wife had been dissolved. In support of this argument, *Janion* v. *Janion* (3) and *Prinsep* v. *Prinsep* (2) were relied on, and it was argued that the settlements in those cases were of the same ante-nuptial character as in the present case.

In *Janion* v. *Janion* (3) the marriage was celebrated in 1914, and in 1915 the husband, who had married while he was a minor, came of age and executed the settlement which was the subject of the decision. He was therefore one of "the parties whose marriage is the subject of the decree," to quote the words of s. 192 of the Act of 1925. The settlement recited that the settlor was desirous of making a provision for his wife and issue in consideration of his natural love and affection for his wife. The trusts of the settlement included a provision that "after the death of the settlor" and subject to the life or other interest of any wife of his the capital and income were in certain circumstances to be held in trust for all or any of his children by any marriage. Provision was made under the settlement for appointment by the settlor in favour of any wife who might survive him. There was one child of the marriage. In due course the wife obtained a decree dissolving her marriage on the ground of the husband settlor's adultery. She filed a petition to vary the settlement. She asked, inter alia, that the settlor's power to appoint to a future wife or children should be extinguished in the case of any future wife whom he might marry in her (the petitioner's) lifetime.

The registrar in his report on that petition reported that there was no jurisdiction to vary the settlement because it did not come within s. 192. It was argued on behalf of the husband that the settlement was not a post-nuptial settlement but a spendthrift settlement. LORD MERRIVALE, in the course of his judgment varying the report and holding that the settlement did come within s. 192, said ([1929] P. at p. 239):

> "With an assignment of property to a trustee in which the cestuis que trustent are the wife then in being, a future wife, if there be one, and any child of the marriage, as well as the husband and father of any wife and children, there being these uses, it extends not only to but beyond the lifetime of the husband. I find it impossible to say that this is not a settlement which is within the provisions in the successive statutes and placed by those provisions under the control of the court. It is the effect which must be regarded. It is the interest of the wife and child or any wife or any child or children, and as to those the legislature, as I understand, intended to protect them from being impoverished by reason that a decree of divorce had become necessary."

In the present case it was argued that the use of this language by LORD MERRIVALE indicated that he considered that a settlement of this nature made by a husband was not only a post-nuptial settlement as regards the wife in being but an ante-nuptial settlement as regards any wife in the future, so as to entitle any wife of the settlor to apply for a variation of the settlement. If this reading of s. 192 is right, the legal position of the various beneficiaries, wives and children, arising from a possible series of variations of the settlement, which would be limited only by the possible number of wives of the settlor, would tend to become extremely complicated. It is to be noted that in *Janion* v. *Janion* (3) there was a wife in being at the time when the settlement was made, that the settlement was expressly made for the purpose of making provision for her, and that it was the dissolution of her marriage which prompted the application to the court to vary the settlement. No second wife in fact appeared on the scene, and to this extent the case differs entirely from the case which is now before me.

In *Prinsep* v. *Prinsep* (2) the question as to variation of settlements arose on the dissolution of marriage of a husband and wife on the ground of the husband's adultery. There was one child of the marriage. The decree absolute was made in 1928. The parties were married in 1912, and by an ante-nuptial settlement made in 1912 certain trust funds were brought into settlement by the mother of the husband on trust to pay the income to the husband for life until he should become bankrupt and thereafter on certain protective trusts, and after his death to pay the income to the wife so long as she remained a widow. There were provisions for resettlement of trust funds on an after taken wife of the husband. In August, 1920, the mother of the husband by deed brought into settlement certain further funds in trust to apply the income at the discretion of the trustees for the benefit of the husband and his issue by any marriage and any wife of his. Power was reserved to the husband to appoint income for her life to any wife he might marry.

The question for the decision of the court was whether the deed of the mother of the husband made in August, 1920, was a post-nuptial settlement within s. 192 of the Judicature (Consolidation) Act, 1925. It was argued on behalf of the trustees of the settlement that the settlement of August, 1920, was a settlement by the mother on her son and had nothing to do with his marriage, and was not a settlement in consequence of the marriage, and was therefore not a "post-nuptial" settlement. HILL, J., decided that the settlement of August, 1920, was a "post-nuptial" settlement. He said ([1929] P. at p. 232):

> "What does matter is that the settlement should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state. Is the settlement of that character? . . . In terms, it has in contemplation Mr. Prinsep, whom it designates 'principal beneficiary,' but it also has in contemplation his then wife, Mrs. Prinsep, and any future wife and his child and any future children."

It was argued that these words used by the judge indicated that, in his view, the settlement in question in that case was not only a post-nuptial settlement as regards his then existing marriage, but was also an ante-nuptial settlement as regards any future marriage. It was a settlement which

> "provided for the financial benefit of one or other of the spouses and with reference to their married state."

Here, again, it must be pointed out that in *Prinsep* v. *Prinsep* (2) the motion to vary the settlement was in respect of the injured wife who was married to the husband at the time when the settlement was made. It is true that "any wife" is mentioned in the settlement, and that the expression "married state" is quite general. If in *Prinsep* v. *Prinsep* (2) the husband had married again and had again been divorced, and the second wife had then sought to vary the settlement of August, 1920, in her favour, the same point would have arisen which has arisen in the present case. But as it is, the case of *Prinsep* v. *Prinsep* (2) is no direct authority on the question which I have to decide.

In *Melvill* v. *Melvill and Woodward* (4) the husband obtained a decree for the dissolution of his marriage on the ground of his wife's adultery. There were two children of the marriage. The decree nisi was pronounced in March, 1928, and was made absolute in October, 1928. On Dec. 12, 1928, the wife married the co-respondent in the suit. On Dec. 30, 1927, after the divorce petition had been filed and the case had been set down for trial, the wife executed a settlement on herself for life with the remainder to any children of hers. The settlor was described as the wife of the petitioner in the divorce suit, as she in fact was, and the consideration was expressed to be the natural love and affection of the settlor for the two children of her marriage. The settlor also had a power to appoint the income and not exceeding a moiety of the capital of the trust fund to any surviving husband. On a petition by the husband to vary the settlement, MR. JUSTICE BATESON held that it was not a "post-nuptial" settlement within the meaning of the section, and said that he was satisfied that the settlement was made by the wife to protect, if she could, any money to which she might be entitled from being touched in any way by her then husband. BATESON, J., said ([1930] P. at p. 109):

> "In my judgment it is not a settlement on the wife in her character as a wife, nor is it in reference to the married state of the spouses. It is a settlement upon the wife for herself and for any children she may have in future and with power to appoint to any husband she may take, made at a time when she knew perfectly well that the only possible person that she at that time could think of benefiting would not be the husband who had not yet got his decree absolute, but the new husband whom she intended to take as soon as she possibly could."

The judgment of BATESON, J., was reversed on appeal, and the settlement was held to be a post-nuptial settlement so far as the then existing marriage was concerned. I have referred to the case because it seems to me that, if the argument put before me is right in the present case, the co-respondent who became the second husband in *Melvill* v. *Melvill and Woodward* (4) might also have claimed a variation of the settlement as an ante-nuptial settlement, if he, too, subsequently divorced the wife, and therefore the settlement would be post-nuptial as regards the first marriage and at the same time ante-nuptial as regards the second marriage. I cannot think that the legislature ever intended s. 192 of the Judicature (Consolidation) Act, 1925, to have such a result as that.

It was argued on behalf of the wife in the present case that the word "parties" in s. 192 has been decided to include one of the two parties, and that if the settlement refers in terms to any marriage of one of the parties it is an ante-nuptial settlement as regards any such marriage, either in being or in the future. In other words, a settlement may be made on a woman in contemplation of a possible series of marriages by her with the aid of death or divorce, and in such a case the settlement is an ante-nuptial settlement within the meaning of s. 192 in the case of each marriage of the series.

On the other side, on behalf of the husband, in support of the registrar's report, it was argued that the reasoning of HILL, J., in *Hargreaves* v. *Hargreaves* (1) applied to this case. In that case, on April 28, 1914, a man made a settlement of certain property on trust, subject to the life interests of his mother, to pay the income to the settlor for life, and after his death in favour of his children. The settlement contained a power for the settlor to appoint for the benefit of any wife, but contained no other reference to the marriage of the settlor. A month later the settlor entered into a deed of appointment in which, after reciting that a marriage had been arranged between himself and his future wife, he appointed to her after marriage a certain sum during the continuance of the coverture. The marriage took place on June 9, 1914, and there was one child, born in January, 1920. On May 6, 1924, a decree nisi was granted on the petition of the wife, who subsequently applied to vary the settlement. Hill, J., confirmed the report of the registrar that the appointment should be varied by directing the trustees to pay £500 a year to the petitioner for life instead of during coverture, but he refused to vary in the wife's favour the original settlement of April, 1914. Hill, J., in the course of his judgment, said ([1926] P. at p. 45):

> "This section is dealing with ante-nuptial and post-nuptial settlements, and it refers to marriage. It refers to it because what it is dealing with is what we commonly know as a marriage settlement—that is, a settlement made in contemplation of, or because of, marriage, and with reference to the interests of married people, or their children. Nobody has referred me to any case in which it is said it has any wider meaning. The judgment of the Court of Appeal in *Loraine* v. *Loraine and Murphy* (5) shows that it has not a wider meaning than that."

This passage was quoted by Romer, J., in *Melvill* v. *Melvill and Woodward* (4) ([1930] P. at p. 178).

Applying this explanation of the meaning of "ante-nuptial settlement" to the case now before me, the principal settlement, in order to be "ante-nuptial" within the meaning of s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, must be made in contemplation of, or because of, a second marriage, although the settlor at the time when the settlement was made was already married. I do not think that s. 192 was intended to cover such a case as this. To bring the section into operation there must be a "marriage" which is the subject of the decree of divorce, and it is in contemplation of this marriage and because of this marriage that the settlement must be made. I do not think that the legislature intended a spouse of an existing marriage to contemplate a second marriage, so as to be able to execute a settlement which is "ante-nuptial" as regards such contemplated marriage when at the time being she or he is married and, therefore, incapable of then entering into a second marriage.

In my view, the settlements of June 18, 1925, and Oct. 6, 1927, were not made because of the marriage which is the subject of the decree in this case. If there were a settlement made "in contemplation of or because of marriage," to quote the words of Hill, J., in *Hargreaves* v. *Hargreaves* (1), it was made in contemplation of or because of the marriage between the settlor and his first wife, which was subsisting at the time of the settlement in question.

A second point taken on behalf of the wife on this petition to vary was that the appointment under settlement No. 3 by the settlor on his second wife under the powers conferred by the original settlement No. 1 was clearly an ante-nuptial settlement within s. 192. I think that this is so, but, in my view, the court has no jurisdiction under s. 192 of the Judicature (Consolidation) Act, 1925, to vary an appointment in such a way that in the result the principal settlement is also varied although that settlement is not within s. 192. Thus, in this case, the settlor under the principal settlement only had power to appoint to a wife who may survive him while she remains his widow. In other words, it only covers a period of time which begins with the death of the settlor. But if the appointment is varied by varying the period of appointment to her life while single and thereby starts during the settlor's life, then the principal settlement is thereby itself varied, because the appointment covers a different period of time to that which the principal settlement allowed.

For these reasons, I confirm the report of the registrar.

Solicitors: *Radcliffes & Hood*; *St. Barbe Sladen & Wing*; *Francis Miller & Steele*, for *Dickinson, Miller & Turnbull*, Newcastle-upon-Tyne; *Gamlen, Bowerman & Forward*, for *Cottrell & Son*, Birmingham.

[*Reported by* William Latey, Esq., *Barrister-at-Law.*]

HOLMES *v.* WATT

[Court of Appeal (Lord Hanworth, M.R., Roche, L.J., and Swift, J.), April 10, 11, 1935]

[Reported [1935] 2 K.B. 300; 104 L.J.K.B. 654; 153 L.T. 58]

Bankruptcy—Proof lodged for rent due—No dividend paid in bankruptcy—Legality of subsequent distress for same rent—Bankrupt a joint tenant—Levy of distress on goods of other joint tenant—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 35, *sub-s.* (1).

Distress—For rent—One of joint tenants bankrupt—Proof lodged in bankruptcy for rent due—No dividend paid—Legality of subsequent distress for same rent—Levy of distress on goods of other joint tenant—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 35 (1).

A landlord who has lodged a proof in his tenant's bankruptcy for rent due before the date of the receiving order may subsequently distrain for the same rent if he has not received a dividend in the bankruptcy in respect of it. Where the bankrupt holds a joint tenancy the distress may be made on the other joint tenant's goods.

Ex parte Grove (1) (1747), 1 Atk. 104, explained. *Re Howell, Ex parte Mandleberg & Co.* (2), [1895] 1 Q.B. 844, *Re Jeffery, Ex parte Honey* (3) (1871), 7 Ch. App. 178, *King* v. *Hoare* (4) (1844), 13 M. & W. 494, *Briggs* v. *Sowry* (5) (1841), 8 M. & W. 729, and *Newton* v. *Scott* (6) (1842), 10 M. & W. 471, considered.

Notes. As to restrictions on the landlord's right of distress, see 2 Halsbury's Laws (3rd Edn.) 567, para. 1129, and for cases on the subject, see 5 Digest 960, *7866–7873.* For the Bankruptcy Act, 1914, s. 35 (1), see 2 Halsbury's Statutes (2nd Edn.) 370.

Cases referred to:

(1) *Ex parte Grove* (1747), 1 Atk. 104; 26 E.R. 69, L.C.; 4 Digest 348, *3261.*

(2) *Re Howell, Ex parte Mandleberg & Co.*, [1895] 1 Q.B. 844; 64 L.J.Q.B. 454; 72 L.T. 472; 43 W.R. 447; 39 Sol. Jo. 452; 2 Mans. 192; 15 R. 372, D.C.; 5 Digest 961, *7873.*

(3) *Re Jeffery, Ex parte Honey* (1871), 7 Ch. App. 178; 41 L.J. Bcy. 9; 25 L.T. 728; 20 W.R. 223, L.JJ.; 4 Digest 446, *4030.*

(4) *King* v. *Hoare* (1844), 13 M. & W. 494; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 14 L.J.Ex. 29; 4 L.T.O.S. 174; 8 Jur. 1127; 153 E.R. 206; 21 Digest 218, *538.*

(5) *Briggs* v. *Sowry* (1841), 8 M. & W. 729; 11 L.J.Ex. 193; 151 E.R. 1234; 5 Digest 940, *7683.*

(6) *Newton* v. *Scott* (1842), 10 M. & W. 471; 12 L.J.Ex. 488; 152 E.R. 556, Ex.Ch.; 5 Digest 957, *7848.*

(7) *Fell* v. *Whittaker* (1871), L.R. 7 Q.B. 120; 41 L.J.Q.B. 78; 25 L.T. 880; 20 W.R. 317; 12 Digest (Repl.) 619, *4787.*

(8) *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; 48 L.J.Q.B. 705; 41 L.T. 418; 28 W.R. 97, H.L.; 12 Digest (Repl.) 29, *55.*

(9) *Re Collie, Ex parte Adamson* (1878), 8 Ch. D. 807; 47 L.J.Bcy. 103; 38 L.T. 917; 26 W.R. 890, C.A.; 4 Digest 444, *4019.*

Appeal by landlords from the decision of Talbot, J., and a common jury awarding the tenant £20 damages for excessive distress.

The facts are stated in the judgment of Lord Hanworth, M.R.

E. W. Cave, K.C., and *R. J. White* for the landlords.

Lord Erleigh, K.C., and *W. D. Roberts* for the tenant.

The arguments and the cases cited sufficiently appear in the judgments.

LORD HANWORTH, M.R.—This appeal is one which involves a good many points of law which were not fully developed before the learned judge in the court below. Indeed, the learned judge, as I understand, felt himself bound to follow the case of

Ex parte Grove (1), but invited a further examination of the authorities, and thought it was a case in which there ought to be a review in the Court of Appeal. We have had the advantage, with the assistance of counsel, of going into a large number of authorities which were not before the learned judge, and, therefore, I feel less reluctance in differing from the learned judge because I feel that the case now has developed completely different aspects from those which it wore when it was before the learned judge and the learned judge himself was anxious that the case should be reviewed.

It is very important that the facts of this case should be stated and fully understood because it is in relation to the facts of the case that our judgment applies. There was an agreement made on May 17, 1926, whereby the landlord, James Watt, let these premises to Charles Robert Holmes and Mary Davison Holmes, who were together described as the tenant. It was a joint tenancy, and under that agreement they covenanted to pay a rent of £4 10s. a week. The tenants got into arrear with their rent. Difficulties occurred and there had been certainly one distress, which was levied in October, 1931. The agreement was one for a definite period of three years, but it was continued by holding over between the parties, and the result was that there was a tenancy, at any rate, from week to week at £4 10s., but it might be possible to apply to this continued tenancy the provision of the original agreement for a longer period of notice to quit. The situation remained that they were joint tenants liable to pay the landlord £4 10s. a week. By Jan. 1, 1932, there was a sum due from them in respect of rent of £74 9s. 7d., and a distress warrant for that was issued. On May 4, 1932, the landlord, James Watt, died. Probate was taken out to his estate, and the appellant landlords are his personal representatives. The rent was not paid, but the occupation continued. On May 23, 1932, a receiving order was made against the tenant, Charles Robert Holmes. On July 4 a notice was given to disclaim this lease or tenancy, and on July 19, in fact, it was disclaimed. However, the bankruptcy was one in which the assets were very small indeed. The statement of affairs which I hold in my hand was one which showed an apparent deficiency of as much as £3,182. Therefore it was a case in which it was possible to apply the summary procedure under s. 129 of the Bankruptcy Act, which applies to cases of small estates where the estate is less than £300. Although there was that disclaimer, there was no release of the occupation by the two tenants. On July 18 a proof was carried in in bankruptcy for a sum of £67, being the rent which was claimed to have accrued due and to remain unpaid at the date of the receiving order, May 23. On Aug. 11 there was a distress warrant taken out for the sum of £78 3s. 11d., but it was contended that at that time, inasmuch as the proof had been carried in for £67 instead of £78 3s. 11d., that figure ought to stand at £11 3s. 11d., and no more. The distress was levied, and on Aug. 15 the tenant paid the bailiff £30 on account with a request to withdraw from possession and with liberty "lawfully to make a second distress for the said rent and for the expenses incident to such distress." On Aug. 14 the tenant unhappily lost his wife, and he remained in possession of the premises. The furniture which was on the premises was said to belong to his wife. So far as the evidence goes there is no proof that administration was granted to the tenant or that the value of the goods was so small that the administration by probate would not be required. All that we do know is that the tenant remained in possession of the premises and was a bailee and had a possessory title to the goods which had belonged to his wife. On Dec. 3 the tenant paid a sum of £43 2s. 3d. That made a total in these two payments of the £30 I have mentioned and the £43 2s. 3d. of £73 2s. 3d. paid by the tenant. However, whichever way you take it there was rent accruing and still remaining due. It is plain that by virtue of the payments that had been made the only amount which remained due on Dec. 3 was £18, as the rent accrued due from Aug. 11 to Dec. 3 was £72, and of the total rent in arrear, namely, £150 3s. 11d., the £73 2s. 3d. had been paid, leaving £77 1s. 8d., the amount distrained for, from which £59 1s. 8d. out of the sum of £67 proved for must be deducted, but the true amount would appear to be £77 1s. 8d. Also it is to be remembered that during the time of the tenant's occupation of the premises rent had been accruing due at £4 10s. a week.

The distress was levied on Dec. 3, and the present claim in the action was brought in respect of that levy; it is said that the landlords had elected to prove for the said A sum in the tenant's bankruptcy, and submitted a proof of their claim to the trustee in bankruptcy, and that, that proof being admitted, there was no liability at all in respect of that £67 which could be enforced by distress, and that by reason of that the landlords wrongly made a claim for £77 1s. 8d. on Dec. 3, and that the distress which was levied was excessive. It is not suggested that it was illegal or irregular: the claim is that it was an excessive distress. The landlords justify their action on the ground that they B were entitled to levy the distress, that the £67 proof carried into the estate in respect of which there was no dividend at all did not prevent their right to levy the distress. The case was tried before the learned judge, who awarded a sum of £20 in respect of this excessive distress to the tenant. From that decision the defendants appeal, and we have heard the matter at length before this court.

The learned judge acted upon *Ex parte Grove* (1). That appears to be taken in some C of the cases as establishing the proposition that a landlord cannot distrain and prove for the same rent, that if there is an election by him to carry in a proof he has lost his right of distress. *Ex parte Grove* (1) has been a good deal criticised, and in particular by LORD BATHURST in *Ex parte Devine* (COOKE'S BANKRUPTCY LAWS (8th Edn.), 199, 201). LORD BATHURST pointed out that *Ex parte Grove* (1) was a case which depended upon whether or not the assignees in the bankruptcy could make a good title to a D purchaser. That was the real purport and point of the case, and it was held that they could. Turning to the report of the case I find this (1 Atk. at p. 104):

> "The issuing a commission against a tenant, and the messenger's possession of the goods of the tenant, does not hinder the landlord from distraining for rent; for this is not such a custodia legis as an execution is, and there, too, the law allows the landlord a year's rent," E

that is, even in bankruptcy.

HARDWICKE, L.C., also says (1 Atk. at p. 105):

> "A landlord is considered in a higher degree than a common creditor, and it would be hard to preclude him from distraining where there are goods on the premises, and, therefore, he must be put to his election to waive his proof, or his distress." F

How far does that case go? How far is it an authority binding at any rate upon this court?

One has to examine the Bankruptcy Acts to see whether or not the right of the landlord is taken away and, if so, how far. The Bankruptcy Act, 1914, s. 7, provides that

> "On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, G no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose."

The same provision in the Act of 1883, s. 9, as it then was, came up for consideration by H VAUGHAN WILLIAMS, J., in *Re Howell, Ex parte Mandleberg* (2). He said this ([1895] 1 Q.B. at p. 847):

> "It was contended on behalf of the trustee that the landlord's right of distress in respect of the first two months of the quarter was taken away by the joint effect of s. 9 of the Act of 1883, r. 19 of Sched. II, and the limitation in s. 42 . . . and that by s. 9 no creditor in respect of any debt provable is to have any remedy against the I property of the bankrupt except as is directed by the Act. . . . But I think that contention fails,"

and he thereupon affirmed the right of the landlord to levy a distress. He affirmed the right and held that s. 9, as it was under that Act, had not removed the landlord's right of distress. It is quite true that by s. 42, as it was in that Act, and by s. 35 of the present Act, there is a limitation imposed upon the right of the landlord to levy. Section 35 (1) says:

> "The landlord or other person to whom any rent is due from the bankrupt may at

> any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation that, if such distress for rent be levied after the commencement of the bankruptcy, it shall be available only for six months' rent accrued due prior to the date of the order of adjudication and shall not be available for rent payable in respect of any period subsequent to the date when the distress was levied."

That section affirms the right of a landlord to levy a distress. That common law right is not removed. It limits the amount for which the landlord can hold the distress to a period of six months' rent accrued prior to the date of the order of adjudication, and it is not to be available for rent payable for any period subsequent to the date when the distress was levied: in other words, you cannot levy in respect of the rent which is by agreement to be payable in advance, but it does not prevent the right to levy in respect of the rent which accrued after the date of the commencement of the bankruptcy if what is levied for is rent which has up to that time accrued, and is not rent which is payable in advance. The case of *Re Howell* (2) definitely decided that in respect of rent which accrued by virtue of the Apportionment Act prior to the date of the order of adjudication, that is, after the receiving order but before the adjudication, the landlord was entitled to distrain and to hold that rent.

There are other cases which must be considered. In *Re Jeffery, Ex parte Honey* (3), MELLISH, L.J., says (7 Ch.App. at p. 182):

> "Before the passing of the Act of 1861, although a proof could be made against both the joint and separate estates where the bankrupts had executed a joint and several guarantee or bond, or entered into a joint and several contract, yet the creditor could not receive a dividend from both estates, and he had to elect from which he would receive the dividend."

That seems to indicate that by the mere proof or carrying in of a proof the creditor has not lost his other rights. It is contended that by carrying in that proof there was no further right of distress. I have dealt with the point under the Bankruptcy Act. But on what is the doctrine of his losing the one remedy in favour of the other founded? During the argument we looked at *King* v. *Hoare* (4), which provides that where you have a judgment that then exists your judgment is not merely a right against a debtor but something of a higher nature. Very often, if it is unsatisfied, it is a bar to an action because you have now got a judgment, and it has become something different from the debt which gave you a right to sue. That principle does not apply where you are merely carrying in a proof. There are two more cases on the same lines that I must refer to. In *Briggs* v. *Sowry* (5) the head-note reads:

> "Where the assignees of a bankrupt, under the 6 Geo. 5, c. 16, s. 75, have declined a lease to which the bankrupt was entitled, but the bankrupt has not delivered up the lease to the lessor, the property in the demised premises, in the meantime, continues vested in the bankrupt, and the lessor retains, until such delivery up to him, his right of distress for the rent."

That appears applicable at the present time because the debtor with his wife remained in possession of these premises from May 23 to Aug. 15, and after Aug. 15, when the wife died, the tenant remained in possession of the premises from Aug. 15 right down to Dec. 3. During that time there was rent accruing due, rent which had not been carried in to the proof and which had accrued due subsequent to the date of the receiving order. In *Newton* v. *Scott* (6), where a landlord distrained on the goods of A. and the tenant afterwards became bankrupt and obtained a certificate, it was held by the court of Queen's Bench

> "that the certificate did not operate as a release of the rent, and that the landlord had a right, in replevin at the suit of A., to avow for a return of the goods."

LORD DENMAN definitely applies the case of *Briggs* v. *Sowry* (5). Under those circumstances I find a difficulty in seeing that there has been some change or alteration which prevented the right of a landlord to levy the distress. The claim has not passed into any higher right and no dividend has been received in the bankruptcy. The Bankruptcy

Act recognises the power of the landlord to sue and to retain a certain amount, and although I agree that there is sufficient interest in the goods remaining in the plaintiff, within the case of *Fell* v. *Whittaker* (7), which would enable him to bring an action for interference with his possession, yet unless he can do more than establish the right that the landlord had no right to levy a distress, there ought to be no damages awarded to him.

For the reasons which I have given it appears to me that there was at the time the distress was levied a sum in respect of which the landlord was not precluded from levying a distress and, under those circumstances, no right to damages arises and the appeal must be allowed here with costs and judgment entered in the action for the landlords with costs.

ROCHE, L.J.—I agree that this appeal should be allowed and that judgment should be entered for the landlords on the claim and counterclaim. My Lord has stated the relevant facts so fully that it is unnecessary to repeat them but, having regard to the respect I feel for the learned judge from whose decision we are differing, I should like to state very shortly in my own way my reasons for arriving at the conclusion which I have stated.

This tenancy which was in question was at the material times a tenancy of the plaintiff tenant and his wife. At the time the distresses complained of were made the wife was dead. The tenant brought and maintained his action in respect of property which had been his wife's, of which he was at all material times bailee, but in respect of which he had no right of property whatever. That fact, I think, was not brought to the attention of the learned judge and was sufficient of itself to account for the difference between the conclusion at which the learned judge arrived and at which this court is arriving. Having regard to that circumstance, the case of *Ex parte Grove* (1), on which the learned judge founded his judgment, however understood, in my judgment is no authority entitling the plaintiff to succeed in his action. I have no inclination, even had I the temerity, to criticise the decision of Hardwicke, L.C., in the case of *Ex parte Grove* (1). Understood as I understand it, and I understand it in the same sense that Lord Bathurst understood it as stated in Cooke on Bankruptcy at p. 199, that case seems to me to be one which no criticism can be directed at. I am far, however, from saying that it is sufficient warrant for the broader proposition which in other textbooks it is supposed to be an authority for, namely, that once a proof is lodged in respect of a tenant who becomes bankrupt there can never be a distraint upon that tenant's goods thereafter. I should require authority, which has not been produced to us here, before I was satisfied that that broad conclusion resulted from that case. As at present advised I am inclined to think that at most the mere lodging of a proof would give rise of necessity for an election on the part of the landlord as to which remedy he desired to pursue. It will be noticed that I have laid emphasis on the fact that the lodging of the proof was the matter here relied upon. In this case, as my Lord has stated, not only was there no question that the landlord never received a dividend, but there never was a dividend in the present case paid by the bankrupt's estate. I am therefore dealing with this case on the basis that it is the mere lodging or filing of a proof that is the matter which is supposed to have debarred the landlord from his right of distress. Taking that view, however, of the case of *Ex parte Grove* (1), as I have stated, it seems to me to have no relevance to the facts of this case. What the landlord did was that he proved against the estate of one joint tenant, who was the plaintiff, and he afterwards distrained on the goods of the person who had formerly been a tenant, namely, the deceased wife, upon property which was then the property of her next of kin or her legal representatives whoever they might be. If it is asserted in this action that the landlord may prove for rent in the bankruptcy of one tenant, and distrain upon the goods which belonged to another person, also a tenant, why then the authority for that must be found elsewhere than in the case of *Ex parte Grove* (1).

This is not a case where there has been a res judicata as in *King* v. *Hoare* (4) or *Kendall* v. *Hamilton* (8) to which my Lord has referred, nor is it a case on which there has been a proof and receipt of a dividend. As I understand the law of election in

A bankruptcy it is plain. My Lord has referred to *Re Jeffery, Ex parte Honey* (3), and the law as there laid down by MELLISH, L.J., that

> "although a proof could be made against both the joint and separate estates where the bankrupts had executed a joint and several guarantee or bond, or entered into a joint and several contract, yet the creditor could not receive a dividend from B both estates, and he had to elect from which he would receive the dividend."

The same statement of the law, namely, that time for action is open until receipt of a dividend, was laid down by JAMES, L.J., in *Re Collie, Ex parte Adamson* (9). The Lord Justice, delivering the judgment of himself and BAGGALLAY, L.J., says (8 Ch.D. at p. 817) (it had been objected that proof against one estate was an election not to proceed against another estate):

> C "By a rule which was established by the courts (it is difficult to see on what principle or by what authority) [the Lord Justice had no great conviction that the rule, though established, was a sensible rule apparently] a creditor having a joint legal or equitable demand against a partnership, and a several one against the members, or some of the members, of the same partnership, was not entitled to go against the joint estate and the separate estates, but was entitled to choose between D them; and it was laid down in the books that the election must be made before the receipt of a dividend."

Here no dividend was received in respect of this estate of the bankrupt and until the landlord had a chance of receiving a dividend or had to elect whether he would take a dividend or not, it seems to me impossible to contend, having regard to the facts of the case and the doctrine to which I have referred, that he had no right to distrain in E respect of the sum which was due from the wife as well as the husband. For those reasons I think that the decision that the distress was excessive, which means that the rent was not due because there had been already a proof in respect of it, cannot be supported, and that the judgment on the claim and counterclaim should be as stated by the MASTER OF THE ROLLS.

F **SWIFT, J.**—I agree.

Appeal allowed.

Solicitors: *E. Sabine Read, James & Charles Dodd*; *W. R. Perkins.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re ORLEBAR. ORLEBAR *v.* ORLEBAR

[CHANCERY DIVISION (Clauson, J.), June 25, 26, July 2, 1935]

[Reported [1936] Ch. 147; 105 L.J.Ch. 92; 154 L.T. 293]

Settlement—Condition—Tending to induce tenant for life to abstain from exercising powers under Settled Land Act—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 106 (1) (*b*).

A testatrix, who died in 1919, by her will devised the C. estate, to which she was entitled in remainder after the death of O. O., who was tenant in tail in possession of the C. estate and also heir-at-law and next of kin of the testatrix, to E. O. for life, with remainder over. By cl. 10 she gave the income of her residuary estate to O. O. for life, and after his death she directed that in case the C. estate "as existing at my death," or the greater part thereof, should devolve under the limitations of her will, then her residuary estate was to be held upon the same trusts as would be applicable if it were capital money or investments therefrom arising from a sale of the C. estate under the Settled Land Acts, 1882 to 1890, and in case the C. estate should not thus devolve, then the residuary estate should be held upon trust after raising therefrom the sum of £10,000 for certain charitable purposes for the legatees therein named.

Held: upon the proper construction of the will, upon the exercise by O. O., as tenant in tail in possession of the C. estate, of his power of sale under the Settled Land Act, 1925, the C. estate, as existing at the death of the testatrix, could not devolve under the limitations of her will, and the words of the condition which governed the disposition of her residuary estate in that event would be fulfilled; but if that disposition operated, it would prevent the residue passing to O. O. as on an intestacy and must tend to induce him to abstain from exercising his powers under the Settled Land Act, 1925, within the meaning of s. 106 (1) (*b*) of the Act; and, therefore, in the event of a sale by O. O. under the powers granted him by the Act the disposition of the residuary estate of the testatrix would be inoperative and the residuary estate would, subject to the life interest of O. O., devolve as on an intestacy.

Notes. As to avoidance of provisions against exercise of powers, see 29 HALSBURY'S LAWS (2nd Edn.) 697, 698, and for cases, see 40 DIGEST 743, 744. For Settled Land Act, 1925, see 23 HALSBURY'S STATUTES (2nd Edn.) 12.

Case referred to:

Shelley's Case (1581), 1 Co. Rep. 93 b; Moore, K.B. 136; 76 E.R. 206; 17 Digest (Repl.) 272; *761.*

Adjourned Summons

The following statement of facts is taken from the judgment of CLAUSON, J.:—

On Oct. 30, 1919, died a Mrs. Valentina Augusta Wynter. At that moment certain family estates, which it is convenient to refer to as the Crawley estates, stood settled to the use of the plaintiff, Orlando Orlebar, who was the son of a sister of Mrs. Wynter, for life with remainder to the heirs of his body, with remainder to Mrs. Wynter absolutely. It was, apparently, supposed at the time that the plaintiff was tenant for life with remainder to the heirs of his body, if any, but it is recognised now that, in view of the rule in *Shelley's Case* (1), the true position was that he was tenant in tail with remainder to Mrs. Wynter. He had not then, and he has not now, barred his estate tail, and I was told that he has made up his mind not to do so. The testatrix, Mrs. Wynter, left residuary estate of the value of some £15,000. The plaintiff was the only nephew of Mrs. Wynter and he was her heir-at-law and sole next of kin.

Mrs. Wynter's will contained cl. 6, which I will read:

> "I bequeath all furniture glass plate . . . belonging to me at the time of my death and situate in or about Crawley House in the county of Bedford (which furniture

> glass plate and plated articles pewter linen books china and pictures miniatures and prints bequeathed by this clause are hereinafter referred to as 'the settled chattels') unto my trustees upon the trusts hereinafter directed, namely: I direct that my trustees shall permit my nephew [the plaintiff] to have the use and enjoyment of the settled chattels during his life upon condition that he allows the same to remain at Crawley House in the same manner substantially as at the time of my death and I give this direction in the hope that my said nephew will make Crawley House his principal place of residence during his life. Subject as aforesaid I direct that the settled chattels shall be held by my trustees upon the trusts following namely: In case Crawley House shall after the death of my said nephew devolve under the limitations of this my will then upon trust to permit the settled chattels to be used and enjoyed as heirlooms by the person or persons for the time being entitled to Crawley House under the limitations of this my will and as nearly as the rules of law and equity will permit but so that the same shall not vest absolutely in any person. . . ."

Then:

> "But in case Crawley House shall not after the death of my said nephew devolve under the limitations of this my will then upon trust for such relative of mine of the name of Orlebar who upon the death of my said nephew shall become entitled to Crawley House whether for an estate for life in fee or in tail and if there shall be no such person then I direct that the settled chattels shall fall into and form part of my residuary personal estate hereinafter bequeathed."

There follow directions about an inventory.

It is clear that, if Crawley House is sold by the plaintiff under the powers vested in him under the Settled Land Act, it will not devolve under Mrs. Wynter's will, and, accordingly, in that event, the gift of chattels in cl. 6, in so far as it directs the chattels to be used and enjoyed as heirlooms, will be inoperative. The question whether in such case these chattels might, in certain events, devolve on a relative of the testatrix of the name of Orlebar should he have acquired, presumably through some purchase, an estate in Crawley House, seems to me to be open. Before reading the next clause, let me say that the plaintiff, the tenant in tail, appears to me to be a tenant for life within the meaning of that term as used in s. 51 of the Settled Land Act, 1882, and s. 106 of the Settled Land Act, 1925, in view of the provisions of s. 58 of the former Act, and s. 20 (1) (i), and s. 117 (1) (xxviii), of the latter. I go on to cl. 8 of the will. The question which arises under cl. 8 is as to a certain condition requiring residence at Crawley House. That clause contains recitals that the hereditaments in the county of Bedford usually known as the Crawley estate (which hereditaments included Crawley House) were settled by the will of the testatrix's late father, Robert Shipton Orlebar, to the use (after the death of her mother and subject to an annuity in favour of the testatrix) of her late brother-in-law, Orlando Robert Hammond Orlebar, during his life with remainder to the use of her said nephew Orlando Robert Aplin Orlebar, during his life, with remainder to the heirs of the body of the said Orlando Robert Aplin Orlebar with an ultimate remainder to the use of the testatrix her heirs and assigns for ever; then that the testatrix was desirous of providing for the event of the said hereditaments devolving under the said ultimate limitation, but so, nevertheless, that no person should be put to any election owing to the disposition thereinafter contained that she was also desirous of disposing of her freehold cottage at Walton in the county of Bucks in manner thereinafter mentioned. The latter part of cl. 8 contains a devise of the Crawley estate and all the other hereditaments to which under the said will or any conveyance the testatrix was or might be entitled for any estate or interest in remainder and also her said freehold cottage at Walton in the county of Bucks (all of which hereditaments were thereinafter referred to as "the Crawley and Walton estates") to the use of her cousin Evelyn Orlebar during his life without impeachment of waste with remainder to the use of his son Robert Evelyn Orlebar during his life without impeachment of waste with remainder to the use of the first and every other son of the said Robert Evelyn Orlebar successively in remainder one after the other according to their respective seniorities in tail male, with remainder to the use of Augustus Orlebar, A during his life with remainder to uses in favour of his sons successively and their sons in tail male (all which uses were revoked by codicils to the testatrix's will) with remainder to the use of Edward Yarde Orlebar during his life with remainder to his sons successively and after various other remainders to the use of the testatrix's own right heirs

> "Provided always that every person who shall become entitled under my will to the B said Crawley estate hereinbefore devised as tenant for life or tenant in tail male or in tail by purchase in possession shall reside at Crawley House aforesaid for at least six calendar months (either continuous or discontinuous) in every year (meaning thereby every complete period of twelve calendar months) and if the person so becoming entitled as aforesaid shall fail to comply with the direction last hereinbefore contained (not being prevented from so doing by illness or accident) then and C in such case the estate of such person shall cease and determine."

It was argued by counsel, and I agree, that in the event of a sale of Crawley House by the plaintiff under his Settled Land Act powers, the condition of residence imposed by this clause in the will will be inoperative.

By cl. 10 the testatrix devises and bequeathes her real estate and her personal estate D to trustees upon trust for sale and conversion and out of the proceeds of conversion to pay legacies and so forth and to invest the residue and to stand possessed of the rest of the investments (thereinafter called "her residuary estate") upon trust to pay the income to the plaintiff

> "during his life and after his death in case the Crawley estate as existing at my death or the greater part in value thereof shall on his death devolve under the E limitations of this my will then upon the trusts which would be applicable to my residuary estate if the same were capital money or investments of capital money arising from the sale under the Settled Land Acts, 1882 to 1890, of the Crawley estate or the part thereof which shall so devolve and so as to be primarily liable to be invested in the purchase of land in fee simple to be conveyed to the uses affecting the said Crawley estate or the part thereof which shall so devolve but in case the F Crawley estate or the greater part thereof shall not on the death of my said nephew devolve under the limitations of this my will then upon trust to raise out of my residuary estate the sum of £10,000 sterling and hold the same upon the trusts hereinafter declared concerning the same and to stand possessed of such part of my residuary estate as shall remain after raising the said sum of £10,000 as to £5,000 part thereof upon trust for Knightly Vere Orlebar, son of the late Captain Vere G Bernard Orlebar, R.N., and as to the balance thereof upon trust for the said Robert Evelyn Orlebar and Henry Augustus Godfrey Thornton Orlebar in equal shares."

There is a question which I do not think it will be necessary for me to deal with, as to exactly who is intended by the legatees last named.

This summons was taken out by Orlando R. A. Orlebar, tenant in tail in possession H of the Crawley estate, and also heir-at-law and sole next of kin of the testatrix to have it determined in the event of his exercising his power of sale under the Settled Land Act, 1925, (*a*) what would be the effect of the condition as to residence upon the provisions of the will; and (*b*) upon what trusts after the death of the plaintiff would (i) the settled chattels, (ii) the residuary estate, be held.

F. McMullan for the plaintiff. I

Humphrey H. King for the defendant, Edward Yarde Orlebar.

Maurice Berkeley for the trustees of Mrs. Wynter's will.

F. E. Skone James for the legatees of the ultimate residue.

A. Andrewes-Uthwatt for the Attorney-General.

CLAUSON, J., stated the facts and continued: The question which I have to determine is whether the provisions in cl. 10 of Mrs. Wynter's will have any, and what, operation in the event of her nephew, the plaintiff, who, it is to be remembered, is her heir-at-law and next of kin, selling the Crawley estate or the greater part of the value of it under his settled land powers. Before 1926 this would have turned on the question whether the provisions in question, within the meaning of s. 51 of the Settled Land Act, 1882, tended by a disposition of property, or in any other manner whatever, to induce the plaintiff to abstain from exercising any Settled Land Act power. If they did so tend, they were, so far as they did so tend, to be deemed void. Section 51 of the Act of 1882 is now replaced by s. 106 of the Settled Land Act, 1925, which, for all material purposes, is in precisely the same terms.

In the first place I am of opinion that the expression "Crawley estate as existing at my death," means land which, on Oct. 30, 1919, was subject to the Crawley family settlement. If that land, or the greater part of it, is sold by the plaintiff under the Settled Land Act powers, the trusts in effect settling the testatrix's residue as capital moneys of the Crawley estate will not arise because the condition, namely, that the lands, or the greater part of them in value, shall pass under the limitations of the testatrix's will, will not have been fulfilled, while, on the other hand, the words of the condition which govern the disposition of her residuary estate in that event will be fulfilled. But, if that disposition operates, it will prevent the residue passing as upon an intestacy to the plaintiff, and it seems quite clear that the provision in question must necessarily tend to induce him to abstain from exercising his Settled Land Act powers of sale. It results that the provision must, in the event of a sale by the plaintiff under the Settled Land Act powers, be inoperative.

I will declare that, in the event of the settled estate being sold or disposed of by the plaintiff in exercise of the powers conferred upon him by the Settled Land Act, 1925, the condition of residence imposed by the will of the testatrix upon the defendants Edward Yarde Orlebar and Godfrey Thornton Orlebar respectively as tenants for life will cease to have effect; that the trust in cl. 6 to permit the settled chattels to be enjoyed as heirlooms will be inoperative; and lastly, that the testatrix's residuary estate will, subject to the life interest therein of the plaintiff, devolve as on an intestacy by reason of the invalidity of the provisions contained in cl. 10 of the will for raising the £10,000 thereout and holding the balance in trust as therein mentioned.

Solicitors: *Balderston, Warren, & Co.*; *Treasury Solicitor.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

LOW *v.* FRY

[King's Bench Division (du Parcq, J.), March 15, 1935]

[Reported 152 L.T. 585; 51 T.L.R. 322]

Sale of Land—Repudiation of agreement by purchaser—No memorandum or note in writing—Part payment of purchase price by cheque—Right of vendor to recover on cheque.

The defendant orally agreed to buy back for the sum of £800 a cottage which he had sold to the plaintiff. There was no memorandum or note in writing of the agreement for sale sufficient to satisfy the terms of s. 40 of the Law of Property Act, 1925. He handed to the plaintiff a cheque for £450 made payable to him as part of the purchase price. The defendant subsequently repudiated the agreement and stopped the cheque, which was dishonoured. The plaintiff, who had always remained able and willing to convey the property, sued the defendant on the cheque. The defendant relied on s. 40 (1) of the Law of Property Act, 1925.

Held: the plaintiff was entitled to recover on the cheque.

Jones v. *Jones* (1) (1840), 6 M. & W. 84, followed.

Casson v. *Roberts* (2) (1862), 31 Beav. 13, discussed.

Notes. As to remedies on an uncompleted contract for the sale of land, see 29 Halsbury's Laws (2nd Edn.) 374 et seq., and for cases, see 40 Digest 221 et seq.

Cases referred to:

(1) *Jones* v. *Jones* (1840), 6 M. & W. 84; 9 L.J.Ex. 178; 151 E.R. 331; 6 Digest 161, *1033*.

(2) *Casson* v. *Roberts* (1862), 31 Beav. 613; 1 New Rep. 9; 32 L.J.Ch. 105; 7 L.T. 588; 27 J.P. 73; 8 Jur. N.S. 1199; 11 W.R. 102; 54 E.R. 1277; 40 Digest 232, *2013*.

(3) *Thomas* v. *Brown* (1876), 1 Q.B.D. 714; 45 L.J.Q.B. 811; 35 L.T. 237; 24 W.R. 821; 40 Digest 29, *133*.

(4) *Monnickendam* v. *Leanse* (1923), 39 T.L.R. 445; 67 Sol. Jo. 706; 40 Digest 231, *2009*.

(5) *Mayson* v. *Clouet*, [1924] A.C. 980; 93 L.J.P.C. 237; 131 L.T. 645; 40 T.L.R. 678, P.C.; 40 Digest 242, *2123*.

(6) *Harrison* v. *Holland and Hannen and Cubitts, Ltd.*, [1922] 1 K.B. 211; 91 L.J.K.B, 337; 126 L.T. 390; 38 T.L.R. 157; 66 Sol. Jo. 217, C.A.; 40 Digest 134, *1054*.

Action tried by du Parcq, J.

The plaintiff, Charles Leonard Low, sued the defendant, John Fry, as the holder of a cheque for £450, dated Dec. 31, 1934, drawn by the defendant in favour of the plaintiff. The defendant had orally agreed to buy back a cottage at Worcester Park, Surrey. where the plaintiff and his wife lived, the defendant having sold it to the plaintiff some time previously. There was no memorandum or note in writing of the agreement for re-purchase sufficient to satisfy the terms of s. 40 of the Law of Property Act, 1925. The defendant handed to the plaintiff the cheque as part of the purchase price, but subsequently repudiated the agreement and stopped the cheque, which was dishonoured. Notice of dishonour was duly given to the defendant, and the plaintiff, who had always remained willing and able to convey the property, sued the defendant on the cheque. The defendant relied on s. 40 (1) of the Law of Property Act, 1925, which provides:

> "No action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised."

Section 30 of the Bills of Exchange Act, 1882, provides that every party whose signature appears on a bill is, primâ facie, deemed to have become a party thereto for value.

E. P. Done for the plaintiff.

C. E. Rochford for the defendant.

DU PARCQ, J.—This is an interesting case. The plaintiff claims £450, with interest, on a cheque drawn by the defendant, made payable to the plaintiff, and presented by the plaintiff as holder, and dishonoured. The defence is that the consideration had wholly failed or that there was no consideration for the cheque.

There is no dispute about the facts so far as they are material. It is sufficient to say that some time ago the defendant sold to the plaintiff Riverside Cottage, Old Malden-lane, Worcester Park, Surrey, in which premises the plaintiff and his wife lived. On Dec. 30, 1934, the defendant and his wife visited the plaintiff and his wife at Riverside Cottage, when a discussion took place as to the defendant buying back the cottage. Later that day the defendant orally agreed to buy the cottage for £800. He drew a cheque for £450, as part of the purchase price, made it payable to the plaintiff, and handed it to the plaintiff, who said that, if he received the money at once, he would save about £23. I doubt whether the defendant exactly understood this, but he knew that the cheque was wanted in connection with a mortgage—in fact, the plaintiff wished to use the cheque to make a payment to a building society early in the week. The plaintiff gave the defendant a receipt for "the sum of four hundred and fifty pounds on account of purchase of Riverside Cottage. Purchase price of Riverside agreed at eight hundred pounds." Both the cheque and the receipt were dated Dec. 31, 1934. The contract between the parties was an oral one. There was no contract in writing and there was no memorandum or note of the contract in writing sufficient to satisfy the terms of s. 40 (1) of the Law of Property Act, 1925.

That Sunday evening—Dec. 30—the defendant's wife changed her mind about wanting the house and the same evening, as the agent of her husband, wrote the following letter to the plaintiff: "I don't know what you will think of us, but have changed our minds about buying Riverside, so please do not put the cheque through. I have again got that feeling that I could not live there, so Mr. Fry wants me to let you know at once. I know you can make more money of it. Please forgive us for putting you about. Yours sincerely, E. Fry (for John Fry)." This letter reached Riverside Cottage on the Monday morning, but after the plaintiff had left to go to business. The cheque was duly presented, but, having been stopped, was dishonoured. The plaintiff now brings this action on the cheque. Counsel for the plaintiff, relying on s. 30 of the Bills of Exchange Act, 1882, which provides that every party whose signature appears on a bill is, primâ facie, deemed to have become a party thereto for value, has put in the cheque, proved the signature of the defendant, and left it to the defendant to endeavour to prove that there was no consideration for it.

Counsel for the defendant points out that the cheque was given for part of the purchase price of the cottage and was not by way of deposit. He says that, as there was no memorandum or note in writing of the agreement between the parties sufficient to satisfy s. 40 (1) of the Law of Property Act, 1925, there was no enforceable contract and that no action could have been brought for specific performance or for damages for the failure to complete the contract. Accordingly, he contends that his client would have been entitled to the return of the £450 had the cheque been met and that he has a good defence to the action.

That argument seems at first sight to have some support from authority, but I do not think that it can prevail. In my opinion, counsel for the plaintiff is right when he says that the decision in *Jones* v. *Jones* (1), if correctly decided, is conclusive of this case. It is a decision of the Court of Exchequer on a question of pleading. The action was one of debt by the payees against the makers of a promissory note payable on demand with a count on an account stated. The plea to the first count was that the promissory note was made and given by the defendants to the plaintiffs as the purchase money to be paid to the plaintiffs for the sale to the defendant, Owen Jones, of a cottage and land by virtue of an agreement made between the defendant, Owen Jones, and the plaintiffs for the sale of the cottage and land; "and that the said contract for the sale of the said tenement was not, nor was any memorandum or note thereof, in writing signed by the said Owen Jones, being the party to be charged therewith, or any person or persons thereunto lawfully authorised by him: and the defendants further say that there was not at any time any consideration or value for the defendants' making the said promissory note, or payment of the amount thereof except as aforesaid; and the plaintiffs have held, and now hold, the same without value or consideration." A

That case is very like the one now before me. The question was whether the facts stated in the plea, assuming them to be correct, afforded a defence to the action of debt on the promissory note. It was held that they did not. It is, no doubt, true that in the replication it was stated that the defendant, Owen Jones, had been put into possession of the cottage and land and was still in possession and enjoyment thereof B under the contract. But it is clear that the judgment of the court did not proceed on that fact or take it into consideration. PARKE, B., said in the course of the argument (6 M. & W. at p. 86):

> "We must assume, on these pleadings, that the note was given for the purchase money, and that the plaintiffs are perfectly ready to execute a conveyance. The plea does not aver that they are not ready and willing to convey. Although, therefore, they may not be bound to perform the agreement, yet, if they are ready to do so, what right have the defendants to refuse to pay their note? They have all they bargained for." C

LORD ABINGER, C.B., said (6 M. & W. at p. 88):

> "It is clear that this is a case where the parties have paid their money down—or, what is equivalent, given a promissory note payable on demand—for a future conveyance. Can anybody say they are not bound to pay it, unless they show that the plaintiffs have refused to execute that conveyance? I think the plea is clearly insufficient." D

The rest of the court concurred.

There being no evidence in the case now before the court that the plaintiff has not E always been ready and willing to execute a conveyance of Riverside Cottage, it might be enough to say that I was bound by the decision of the Court of Exchequer in *Jones* v. *Jones* (1). Counsel for the defendant, however, has called my attention to *Casson* v. *Roberts* (2), decided in the Court of Chancery by SIR JOHN ROMILLY, M.R. The question now before me is not one in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter. F If it were so, then in accordance with s. 25 (11) of the Judicature Act, 1873, now s. 44 of the Supreme Court of Judicature (Consolidation) Act, 1925, I should be bound to give effect to the rule of equity. But I do not think that this is such a question. In my view, SIR JOHN ROMILLY purported to be giving a decision which was in accordance with the common law. His decision was that where there was no contract, or no contract which could be enforced, the purchaser was entitled to a return of his deposit. G He said (31 Beav. at p. 616) that it was only where there was a valid contract that the court, either in equity or at law, entered into the question by whose default it happened that the contract was not or could not be executed, and where there was no contract the purchaser was entitled to get back his deposit and nothing more. He also said:

> "I have always understood the law to be that when money is paid as a deposit on a purchase it is, primâ facie, money to be applied for the purchaser's benefit in the performance of the contract and in part liquidation of the purchase money." H

Casson v. *Roberts* (2) has, as counsel for the plaintiff observed, been twice commented on. No reference to it is made in LEAKE ON CONTRACTS (8th Edn., 1931, at p. 208), where the decision in *Jones* v. *Jones* (1) is set out and treated as correctly stating the law. Counsel referred to *Thomas* v. *Brown* (3), where QUAIN, J., said (1 Q.B.D. at p. 724):

> "With regard to the case of *Casson* v. *Roberts* (2) I do not think that it has much bearing upon the present question, but I must say that I do not think the reasons upon which it proceeded are satisfactory." I

I was also referred to the decision of HORRIDGE, J., in *Monnickendam* v. *Leanse* (4), where he declined to follow the decision of SIR JOHN ROMILLY in *Casson* v. *Roberts* (2). I need not refer further to *Monnickendam* v. *Leanse* (4), because a distinction may well be drawn between the facts of that case and those of the one before the court. In that case, in which the memorandum drawn up did not satisfy the requirements of s. 4 of the Statute of Frauds, and a deposit had been paid by the purchaser, it was held that if the purchaser repudiated the agreement he was entitled to recover the amount of the deposit.

In this state of the authorities I am satisfied that I ought to follow the decision of the Court of Exchequer in *Jones* v. *Jones* (1). I should, however, refer also to *Mayson* v. *Clouet* (5), on which counsel for the defendant relied. That is a decision of the Privy Council and not binding on me, and if it were in conflict with a decision of the Court of Exchequer I should follow the decision of the Court of Exchequer, but I do not think that *Mayson* v. *Clouet* (5) assists the defendant in this case. There a contract for the sale of land provided that a deposit should be paid forthwith, then two instalments of cash—each ten per cent. of the rest of the agreed price—at certain dates, the balance of the price to be paid within ten days of the production of a certificate of the completion of buildings. There was a provision that, if the purchaser failed to comply with the conditions of the contract, his deposit might be forfeited and the property re-sold. The purchaser paid the deposit and the two instalments, but failed to pay the balance of the price at the stipulated time. The vendors rescinded the contract, and a claim for the return of the instalments succeeded as the contract distinguished between the deposit and the instalments and provided for a forfeiture only of the deposit. The question there was whether the vendors could elect to rescind the contract and yet retain the instalments of the purchase price.

There is no doubt that the Privy Council disapproved of a dictum of Bankes, L.J., in *Harrison* v. *Holland and Hannen and Cubitts, Ltd.* (6). In that case there was provision for a deposit of £50,000 and a further £100,000 as part payment of the price to be paid within a fortnight. Ex abundanti cautela, the contract provided that in the event of non-completion the £50,000 should be forfeited and the £100,000 should not. Bankes, L.J., speaking of the £100,000 as a part payment, said ([1922] 1 K.B. at p. 213):

> "If nothing more had been said about it, as the contract came to an end in consequence of the purchasers' own default, neither they nor their assignee would have been able to get the money back."

The Privy Council pointed out that this was in conflict with what had been said by Lush, J., who tried the case:

> "The £100,000 is not called a deposit; it is expressly stated to be in part payment of the purchase money, and so it is not money paid as a guarantee for the due performance of the contract. It is, therefore, not forfeitable."

Their Lordships stated that they considered the dictum of Bankes, L.J., was unsound. In the case before me there is no provision in the contract as to forfeiture of the money paid by the purchaser, and if the plaintiff had elected to treat the contract as rescinded, and accepted the defendant's repudiation, he would not be entitled to recover. But he has not done so, and has done nothing to repudiate his promise to convey the premises to the defendant. In answer to a question which I asked just before giving judgment, the plaintiff, by his counsel, stated to me that he would give an undertaking to convey this property to the defendant. The plaintiff is entitled to judgment in this action on the cheque for £450, with interest thereon, and costs. The undertaking by the plaintiff that he will execute a conveyance of the property to the defendant will be set out in the judgment.

Judgment for plaintiff.

Solicitors: *Parfitt, Creswell, & Williams*; *Lidiard & Sons.*

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

Re MANCHESTER (RINGWAY AIRPORT) COMPULSORY PURCHASE ORDER, 1934

[KING'S BENCH DIVISION (Branson, J.), May 23, 24, 27, 1935]

[Reported 153 L.T. 219; 99 J.P. 319; 79 Sol. Jo. 503; 33 L.G.R. 314]

Compulsory Purchase—Application to quash order—Need to show substantial prejudice of applicant—Bias—Appointment of official of Ministry to sit as assessor with inspector at inquiry—Form of appointment—Waiver of objection—Public Works Facilities Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 50), *s.* 2 (1), *Sched. I, Part III* (2).

The M. Corporation desired to establish an aerodrome on a certain site. In June, 1934, they approached the Director of Civil Aviation for guidance whether the consent of the Air Council, under s. 8 (1) of the Air Navigation Act, 1920, would be forthcoming. The Air Ministry sent Wing-Commander A. to inspect the site and report. After this inspection, by letter dated July 10, 1934, the Air Council told the Corporation that, while the report had enabled them "to arrive at certain general and provisional conclusions," the Council were "not in a position at the present stage to give their final decision in the matter, particularly as it may be necessary to hold a public inquiry, the results of which will possibly influence the Ministry's final views. Subject to these reservations, the letter added, the Council considered the site suitable. Subsequently, the Corporation made a compulsory purchase order to which objections were made, and the Air Minister and the Minister of Health jointly ordered a public inquiry by an inspector. Wing Commander A. sat beside the inspector and acted as his assessor, giving his views on technical matters and putting questions to witnesses. At the inquiry, the inspector said he intended to see the site from the air and also to walk over the ground. The inspector made two flights, the first during the inquiry. On each occasion he was piloted by N., a prospective witness for the Corporation. N. indicated landmarks referred to at the inquiry to the inspector but did not discuss the matter with him. Wing Commander A. accompanied the inspector on the second flight but no representatives of the objectors did so, despite an invitation by the inspector. No objection to Wing Commander A. or to N. or to the flights was taken at the inquiry. Between the close of the inquiry and the giving of the Minister's decision a Ministry official wrote to the Corporation asking for their views as to the exclusion of certain lands from the order and the siting of the airport entrance. The Corporation replied giving their views. Subsequently, the Minister confirmed the compulsory purchase order. The objectors applied to the High Court to quash the order, pursuant to s. 2 (1) and Sched. I, Part III (2) of the Public Works Facilities Act, 1930, which empowered such quashing by the court "if satisfied that the order is not within the powers of the Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with." The objectors contended that by reason of the matters set out above the Minister was biased and so had no jurisdiction to adjudicate on or confirm the compulsory purchase order.

Held: the order should not be quashed because (i) the power to quash under the statute was discretionary and should not be exercised on either of the grounds set out above unless the interests of the applicant had been substantially prejudiced by the irregularity of which complaint was made: *Errington* v. *Minister of Health* (1), [1935] 1 K.B. 249, considered and explained.

(ii) neither the expression of the Ministry's view in the letter of July 10, nor the consideration of Wing Commander A.'s report, nor the correspondence with the Corporation before and after the inquiry, made it impossible, or even unlikely, that the Minister could act judicially.

(iii) the Minister was entitled to appoint an assessor to assist the inspector at the inquiry, and no formality was required for such appointment; any objection to the appointment of the assessor, and in particular to the appointment of Wing-Commander A., was waived by not being taken at the inquiry.

(iv) as the inspector had not received information from N. on controversial matters without giving the objectors a fair opportunity of correcting or contradicting such information, no objection could be taken to the inspector's flights with N.

Per Branson, J. It is most important that the rules of fair play should be insisted on, but it is important also that decisions, the giving of which has been entrusted to administrative bodies instead of to the courts of law, should not be rendered abortive by insistence upon irregularities which have not really prejudiced the applicant.

Notes. The Act of 1930 has been repealed, but provisions similar to those on which this case turns are now contained in Sched. I, Part IV, para. 15 (1) (*b*) of the Acquisition of Land (Authorisation Procedure) Act, 1946. The authority of Branson, J.'s dictum that ultra vires acts will not be quashed under such a provision unless substantial prejudice to the applicant is shown is doubtful; no question as to such prejudice was raised in the Court of Appeal in *Palmer* v. *Minister of Housing and Local Government* (1952), 3 P. & C.R. 165, when an order was attacked as being ultra vires.

Referred to: *Horn* v. *Minister of Health*, [1936] 2 All E.R. 1299.

As to the power of the court to quash an ultra vires compulsory purchase order, see 10 Halsbury's Laws (3rd Edn.) 51, para. 83, text and notes (*a*), (*b*) and (*c*).

For the Acquisition of Land (Authorisation Procedure) Act, 1946, Sched. I, Part IV, para. 15 (1) (*b*), see 3 Halsbury's Statutes (2nd Edn.) 1079.

Cases referred to:

(1) *Errington* v. *Minister of Health*, [1935] 1 K.B. 249; 104 L.J.K.B. 49; 152 L.T. 154; 99 J.P. 15; 51 T.L.R. 44; 78 Sol. Jo. 754; sub. nom. *Re Jarrow North Ward* (*No.* 1) *Clearance Order*, 1933, *Ex parte Errington*, 32 L.G.R. 481, C.A.; Digest Supp.

(2) *Board of Education* v. *Rice*, [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 27 T.L.R. 378; 55 Sol. Jo. 440; 9 L.G.R. 652, H.L.; 19 Digest 602, *290*.

(3) *Local Government Board* v. *Arlidge*, [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 30 T.L.R. 672; 12 L.G.R. 1109, H.L.; 38 Digest 97, *708*.

Application. Objectors applied for the quashing of a compulsory purchase order, pursuant to s. 2 (1) and Sched. I, Part III, of the Public Works Facilities Act, 1930.

The applicants were a number of local authorities and the owners of certain lands affected by the City of Manchester (Ringway Airport) Compulsory Purchase Order, 1934, which had been made by the Manchester Corporation, and confirmed by the Secretary of State for Air on Feb. 8, 1935. The grounds of the application to the High Court were that the order as confirmed was not within the powers of the Act, and that certain requirements of the Act had not been complied with. The facts appear in the judgment.

The Public Works Facilities Act, 1930, s. 2, provides:

> "(1) Any local authority . . . may be authorised to purchase land compulsorily for any of the purposes specified in Part I of the First Schedule to this Act by means of an order (in this Act referred to as a 'compulsory purchase order') made and submitted to the appropriate Minister and confirmed by him in accordance with the provisions of Part II of that schedule, and the provisions of Part III of that schedule shall have effect with respect to the validity and date of operation of any such order. . . ."

By Sched. I, Part III, para. 2: "If any person aggrieved by an order desires to question its validity on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within twenty-one days after the publication of the notice of confirmation, make an application for the purpose to the High Court, and if any such application is duly made the court, if satisfied that the order is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order either generally or in so far as it affects any property of the applicant."

Sir Stafford Cripps, K.C., S. G. Turner, K.C., and *A. Macfarlane* for the applicants (the objectors).

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *Wilfrid Lewis* for the Secretary of State for Air (the confirming authority).

Tyldesley Jones, K.C., and *Redmond Barry* for the Manchester Corporation (the purchasing authority).

BRANSON, J.—This is an application, pursuant to s. 2 (1) and Part III of Sched. I, to the Public Works Facilities Act, 1930, for the quashing of the City of Manchester (Ringway Airport) Compulsory Purchase Order, 1934. The applicants are a number of local authorities and the owners of certain of the lands to which the order applies. The grounds of the application are that the order as confirmed is not within the powers of the Act and that certain requirements of the Act were not complied with. The reasons upon which those submissions are based can be better appreciated when the facts have been stated.

The facts are as follows: In 1930 the City of Manchester established an airport at Barton to which, as time went on, there were thought to be certain objections which made it unsuitable for continental air service. The City Corporation thereupon appointed a committee to consider the question whether to spend money on improving it or whether to establish a new aerodrome elsewhere. An alternative site at Ringway was suggested and, in view of the fact that the consent of the Air Council was necessary under s. 8 (1) of the Air Navigation Act, 1920, to enable them to acquire a new site, the committee approached the Director of Civil Aviation in June, 1934, for the purpose of seeking the guidance of the Ministry in the matter. In consequence an official of the Ministry, Wing-Commander Allen, was sent to inspect the Barton Aerodrome and the Ringway site. He inspected both places and made a report to the Director of Civil Aviation. The committee also obtained a report from their own advisers, and upon July 2, 1934, the town clerk wrote to the director asking what view the Ministry would take if the Corporation decided to seek another site. To this letter the Air Council replied on July 10 to the effect that on present information it was thought that the wiser policy for the city to adopt would be to purchase the Ringway site. I shall refer to these letters in greater detail later. As soon as the Corporation decided to proceed with the acquisition of the Ringway site, copies of the report of the Corporation's airport special committee, which contained the two letters above referred to, were sent to the Cheshire County Council and the Bucklow Rural District Council, who were regarded as interested. A compulsory order was thereupon made by the Corporation in pursuance of s. 2 (1) of the Public Works Facilities Act, 1930, and submitted to the Secretary of State for Air and the Ministry of Health, to the latter for the purpose of getting authority to raise the necessary money. Notices of objection having been given, the two Ministers jointly ordered a public local inquiry to be held and gave notice that "G. Ewart Rhodes, the inspector appointed to hold the said inquiry," would commence it upon Oct. 9, 1934. At the opening of the proceedings on that day, the inspector was accompanied by Wing-Commander Allen, who sat beside him, and with regard to whom he said as follows:

> "I have the great advantage of having with me Wing-Commander Allen, who, after a distinguished career in the Royal Air Force, is with me as an assessor to assist me on technical questions regarding aviation. I am sure his help will be most valuable."

Wing-Commander Allen took part in the proceedings, giving his views on technical matters and putting questions to witnesses. No objection was taken by anyone at any time to his so acting. His presence at the inquiry was by reason of instructions received by him from the Directorate of Civil Aviation to give the inspector assistance on technical questions relating to aviation. This, he says, was in accordance with the usual practice. On the first day Mr. Turner, who appeared for all the local authorities who are parties to this application, asked the inspector to inspect the site. What happened was this. Counsel said:

A

> "And, if I may respectfully say so, sir, this site looks very different if you look at it from the road from what it does if you go over it field by field."

The inspector:

> "My intention is to see it from the air and walk over the ground."

He did so on Oct. 10, being taken up in an aeroplane piloted by one Norman. Norman B had been mentioned on the first day as a prospective witness for the Corporation. The fact that the inspector had inspected from the air was mentioned by him on the second day, when he said that he had asked the pilot to keep higher above the chimneys than he was doing. The circumstances of this flight and of another flight on Oct. 16 are detailed by the inspector in his affidavit. Having stated that he had arranged to be piloted by Mr. Norman, the inspector continued:

C

> "During these flights and on our way to and from the Barton Aerodrome, we did not discuss the subject-matter of the said inquiry, though when flying over the Ringway site he did manage to indicate to me the situation of some of the landmarks, which had been referred to on the previous day at the inquiry. The noise of the engines while in the aeroplane prevented anything more than a word or two being said to indicate any particular place and the indication was principally done D by gestures. . . . On Tuesday, Oct. 16, . . . I found in accordance with the directions I had given on Friday, Oct. 12, that a large aeroplane had been made available for me. The said aeroplane was one of the aeroplanes from the Barton Aerodrome and was piloted by a person who was entirely unknown to me. There was room in the said aeroplane for six passengers. Wing-Commander Allen (the assessor) and I only went up, but before going up I gave a special and urgent invitation that any E of the vacant seats should be occupied by representatives of the objectors and the Corporation."

I accept the inspector's account of those incidents which, with one exception, namely, his invitation to Major Allsop, are uncontradicted. It appears, therefore, that the inspector was invited by the objectors to inspect, that they were aware on the second F day of the inquiry that he had done so, that they were aware of his second inspection on Oct. 16 in company with the assessor, and made no objection at all. My attention was directed to certain complimentary remarks made by the counsel for the objectors to the inspector and the assessor at the close of the inquiry, with regard to which I need only say that I do not regard them as more than the usual interchange of courtesies at the close of a long inquiry.

G After the inquiry had closed and before the decision of the Ministry was given, certain communications passed between the town clerk of Manchester and the Air Ministry, to which exception is taken in the notice of motion. First there were certain interviews, which turn out to have been nothing more than inquiries as to when a decision might be expected. No question is now raised as to the propriety of these. Then there are some letters. On Jan. 19, 1935, an official of the Air Ministry wrote to the town clerk H of Manchester, asking for a precise definition of certain lands which the town clerk at the inquiry had suggested might be excluded from the order. No complaint is now made as to this, but the letter went on:

> "The solicitor representing Messrs. Greg, the parish of Styal and other interests, suggested that if the order was confirmed two conditions should be laid down, namely: (*a*) no entrance to airport on the Styal side, the roads being narrow and I airport traffic not being wanted; (*b*) there should be a definite condition that any land which might become subsequently surplus to airport requirements should be an open space only with no possibility of its use for such things as an omnibus station, buildings, cemetery, playing fields, or anything else. There seems no need to consider (*b*) at the moment, as any such questions can be dealt with better when any proposal arises to appropriate such lands for particular purposes, but (*a*) might conceivably affect the lay-out plans of the aerodrome if there is any likelihood of requiring an entrance on the Styal side. I should like therefore to have your general views on this."

The town clerk replied on Jan. 28, 1935, dealing with the suggested exclusion of the lands and continuing:

> "With regard to the two points raised in the fifth paragraph of your letter, I desire to make the following observations: (*a*) In view of the fact that there is a considerable length of frontage to the airport on the Styal side, the Corporation do not consider that they should be precluded from providing an entrance on that side at some future date, should the necessity arise. (*b*) I agree with you that there is no need to consider at the moment any question as to the possibility of the user of any land forming part of the compulsory purchase order, which may not ultimately be required for airport purposes."

On Feb. 8, 1935, the Secretary of State for Air confirmed the order.

In these circumstances it is contended by the objectors that the Secretary of State had no jurisdiction to adjudicate upon the order or to confirm it because he was biased. The bias alleged is that the Air Council had expressed an opinion upon the question of the relative merits of the Barton and Ringway sites in the letter of July 10, 1934. It now becomes necessary to turn to that letter and the letter to which it was a reply. The town clerk's letter contains the following passages:

> "It must be appreciated that if it is decided to proceed with the construction of an aerodrome upon the alternative site, a compulsory purchase order will probably be necessary, and I appreciate that the Minister must not be asked, and cannot express any view which might limit his unprejudiced consideration of any question which might arise at a public inquiry with regard to the acquisition of the land. On the general question, however, as to whether it is desirable to proceed at Barton or to seek another site, it appears to the chairman of the committee and myself that the committee can fairly ask the Ministry for some guidance, and the chairman would be very much obliged if, after you have had an opportunity of considering the report and discussing the matter with Wing-Commander Allen, you could indicate to me what view the Ministry would take if the Corporation decided that it was wise to seek another site."

The answer to that I think it right to read in full because of the importance attached to it by the applicants. It is dated July 10, and runs as follows:

> "I am commanded by the Air Council to acquaint you that they have had under consideration the report of the aeronautical consultants, which was forwarded with your letter, and also the report of the inspection of the sites at Barton and at Ringway, which was carried out by a representative of this department [Wing-Commander Allen] on June 25 last. . . . I am to say that while the Air Council have been able, as a result, to arrive at certain general and provisional conclusions on which they are prepared to afford advice to your Corporation regarding the relative merits of the proposals under consideration, it will be appreciated that they are not in a position at the present stage to give their final decision in the matter, particularly as it may be necessary to hold a public inquiry, the results of which will possibly influence to a marked degree the views finally adopted by the Air Ministry. Subject to this consideration, however, I am to acquaint you that the Air Council's present opinion based on the information above referred to, is that the Corporation would not be well advised to undertake further expenditure on a large scale at Barton Aerodrome. Your Corporation are fully aware of the objections which have been raised to this site. As regards the alternative site at Ringway, the Air Council's view is that this site appears to be capable of development into an airport suitable for the requirements of a large and important district such as Manchester. They would, accordingly, advise that the purchase and development of this site will be the wiser policy to adopt and will prove more profitable, so far as can be foreseen at present, than further expenditure on a large scale at Barton."

The last paragraph is immaterial. It appears to me that the greatest care was taken both by the town clerk and by those who dealt with the Air Council's reply not to prejudge any issue which might arise at a public inquiry if, as was probable, a public inquiry should become necessary. The Air Council say that their conclusions are general and provisional, that they are not in a position to give a final decision, and point out that the results of a public inquiry might influence the views finally adopted by the Air Ministry. In arriving at this general and provisional conclusion the Air Council considered the report made by Wing-Commander Allen and the report of the aeronautical consultants sent to them on July 2 in the town clerk's letter. The latter report was put in evidence at the public inquiry, the report of Wing-Commander Allen, being a Government document, was not. It is contended that, having seen the report of Wing-Commander Allen made in the absence and without communication with the opponents of the site, the Secretary of State had rendered himself unfit to adjudicate upon the question of the comparative merits of the two sites.

The proposition that a person or body upon whom the duty is cast of deciding anything in the nature of a dispute between two parties must act judicially is not disputed. No good purpose would be served by my reading again the well-known passages from *Board of Education* v. *Rice* (2) ([1911] A.C. at p. 182), and *Local Government Board* v. *Arlidge* (3) ([1915] A.C. at pp. 133, 134, 141), which were cited in the judgments of the Court of Appeal in *Errington* v. *Minister of Health* (1). They may be summed up by saying that, though the forms and procedure of a court of law need not be followed, the ordinary principles of fair play must in substance be observed.

A further question is raised in the present case, which has not so far been expressly dealt with by the courts. Part III, para. 2, of the First Schedule to the Public Works Facilities Act, 1930, provides for the quashing of an order

> "if [the court is] satisfied that the order is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with."

It is contended that, if it appears that the Minister has failed in any particular to act judicially in making the order, then the order is not within the powers of the Act and must be quashed whether the interests of the applicant have been substantially prejudiced or not. In my opinion that contention is unsound. It is true that it appears to be supported by some expressions at the end of the judgment of GREER, L.J., in *Errington's Case* (1), where the point was not raised. The passage I have in mind is the following ([1935] 1 K.B. at p. 268):

> "In my judgment it is true to say that an order made by a quasijudicial officer based on materials which are not the materials referred to in para. 4 of the First Schedule is an order which is not within the powers of the Act, having regard to the proposition which has been established in common law that a quasijudicial officer in exercising his powers must do it in accordance with the rules of natural justice, that is to say, he must hear both sides and must not hear one side in the absence of the other."

Both MAUGHAM, L.J. ([1935] 1 K.B. at p. 279) and ROCHE, L.J. ([1935] 1 K.B. at p. 282) proceed to consider the question whether the applicant's interests had been substantially affected. The paragraph is perhaps not very happily expressed. The power to quash is made discretionary in both cases referred to, even, that is to say, if it appears that the order is not within the law. In my opinion, the manifest intention of the statute is that the order shall not be quashed on either ground unless it appears that the interests of the applicant have been substantially prejudiced by the irregularity of which complaint is made. This seems to be in accordance with what one would expect. It is, of course, most important that the rules of fair play should be insisted on, but it is important also that decisions, the giving of which has been entrusted to administrative bodies instead of to the courts of law, should not be rendered abortive by insistence upon irregularities which have not really prejudiced the applicant. The substance must not be allowed to be obscured by undue attention being paid to form.

I now proceed to consider in detail the objections raised by the objectors. The first is that, the Air Council having expressed a tentative view in its letter of July 10, 1934, and having considered Wing-Commander Allen's report and having been in communication with the town clerk by the letters above referred to, the Air Minister, who is a member of that council, had incapacitated himself from acting judicially and, therefore, that the Public Works Facilities Act, 1930, cannot be operated in this case at all, so that if the Manchester Corporation wish to acquire the Ringway site it must proceed by private Act of Parliament. The question is really one of fact, namely, did what was done make it impossible or even unlikely that the Minister could bring a judicial mind to bear upon the matters in issue between the parties? In my opinion, it did not. With regard to the letter of July 10, the greatest care was taken to emphasise the fact that the view expressed therein was tentative only and might be altered. There was every reason of common sense and prudence impelling the Corporation, on the one hand, to inquire of the Air Council what its view of the suitability of the Ringway site might be, and the Air Council, on the other hand, to express a view, because under s. 8 (1) of the Air Navigation Act, 1920, and para. 7 (1) of the Air Navigation (Consolidation) Order, 1923 (S.R. & O. 1923, No. 1508), made thereunder, the Corporation could only use the site, however acquired, for an aerodrome with the consent of the Air Council and if licensed by the Secretary of State. The Ministry was bound, in order to express even a tentative opinion, to get a report. It is true that the report was not disclosed to the objectors, but its author was present at the inquiry and made his views known thereat. With regard to the letters, the passages complained of did no more than inquire whether certain matters raised at the inquiry were still in issue for decision. The answer being merely that some were and some were not, no real objection can be taken to them. The result is that the contention that the order is not within the powers of the Act fails.

Next the objectors contend that certain requirements of the Act were not complied with. Under this head it is said that the inquiry was not a public local inquiry within para. 4 of the Second Part of the First Schedule to the Act. Three grounds are assigned for this contention. The first of them was the attendance thereat of Wing-Commander Allen. It was said that there is no power to appoint an assessor, as Wing-Commander Allen was said to be, and that, if there was such a power, he was not duly appointed. There are two answers to this. The first is that there is nothing in the Act or in any of the Acts referred to therein which deal with the holding of public local inquiries which would prevent the appointment of two inspectors or of one inspector and an assessor, as the Minister might determine; nor is there any requirement as to any formality to be observed in appointing him or them. The second is that the inspector announced that Wing-Commander Allen was there to assist him, and no objection was taken to him or to the part he took at any time. Thus, even if there was any irregularity in his being there, it was clearly waived. Then it is said that it was wrong to appoint Wing-Commander Allen because he had already reported in favour of the Ringway site. Two answers are made to this objection, the first being that Wing-Commander Allen was not a member of the tribunal at the local inquiry and took no part in the making of the report. The second answer is again waived. The letter of July 10, which had been disclosed to the applicants, made them aware of the fact that Wing-Commander Allen had made a report to the Ministry. The applicants could have raised objection if they thought that any objection could properly be made, but they did not. The third matter complained of is that the inspector was taken on a flight of inspection to the rival sites by a witness for the Corporation and in the absence of any representative of the objectors. Here again the matter is one of fact. If the inspector had received information from the pilot on controversial matters without giving the objectors a fair opportunity of correcting or contradicting what he said, there would be ground for complaint. But accepting, as I do, the affidavit of the inspector upon this point I hold that there is no substance in this objection.

For these reasons I conclude that the order appealed from is valid and this application should be dismissed.

Application dismissed.

Solicitors: *Gregory, Rowcliffe, & Co.*, for the Clerk to the Cheshire County Council; *Treasury Solicitor*; *Sharpe, Pritchard, & Co.*, for the Town Clerk, Manchester.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

Re L.H.B. (in Camera)

[Court of Appeal (Lord Hanworth, M.R., Romer and Maugham, L.JJ.), July 16, 1935]

[Reported [1935] Ch. 643; 104 L.J.Ch. 328; 153 L.T. 356]

Lunatic—Guardian of infant—Sole guardian—Receiver authorised to exercise powers—Lunacy Act, 1890 (53 *Vict., c.* 5), *s.* 128.

The patient, a lunatic, of whose estate a receiver had been appointed under s. 116 (1) (*c*) of the Lunacy Act, 1890, was the sole guardian of her infant son.

Held: under s. 128 of the Lunacy Act, 1890, the court had jurisdiction to authorise the receiver, in the name and on behalf of the patient, to exercise in such manner as he thought advisable the powers relating to the custody, control, maintenance, and education of the infant which were vested in the patient as guardian.

Notes. As to where a person of unsound mind is a trustee or guardian, see 21 Halsbury's Laws (2nd Edn.) 355–357, and for cases, see 33 Digest 222 et seq. For Lunacy Act, 1890, see 17 Halsbury's Statutes (2nd Edn.) 1052.

Application under r. 10 of the Management of Patient's Estates Rules, 1934.

The patient was a lunatic of whose estate the Official Solicitor had been appointed receiver by order dated Nov. 4, 1931, made under s. 116 (1) (*c*) of the Lunacy Act, 1890. At the date of the order the patient was in a mental hospital. The patient was discharged from the hospital on Nov. 18, 1932, and resided outside a mental hospital until the end of April, 1935, but the receivership order was not discharged. On April 23, 1935 (while the present application was pending), she was again admitted to hospital and was certified on April 26, 1935. At the time of the hearing before the Court of Appeal she was resident in a mental hospital.

The patient was a widow, her husband having died in the year 1929. She had an infant son, who was born on July 18, 1919, and was receiving his education at a public school. At the time of the hearing the patient's property was insufficient for the maintenance of the infant, who was being maintained and educated out of funds provided from outside sources. The only known relations of the infant, apart from the patient, were a sister of the patient residing abroad and a brother of the patient's late husband residing in Scotland. The patient was the sole guardian of the infant, no testamentary guardian having been appointed by the patient's husband and no guardian having been appointed by the court.

The application was made by the Official Solicitor, as receiver of the estate of the patient, for authority to exercise the power of custody, control, maintenance, and education vested in the patient as guardian of her infant son. Romer, L.J., heard the application on April 15, 1935, and it was adjourned by him into court. The adjourned application was now heard in camera.

J. W. Brunyate for the Official Solicitor.—The order is necessary in order that arrangements may be made for the future holidays of the infant and for launching him in the world. The mother is the sole guardian of the infant by virtue of s. 4 of the Guardianship of Infants Act, 1925, and there is jurisdiction under s. 128 of the Lunacy Act, 1890 (as extended to the case of a receiver by s. 1 of the Lunacy Act, 1908), to authorise the receiver to exercise the powers vested in her as guardian, although no previous case can be found in which the jurisdiction given by that section has been exercised as regards powers vested in the patient as guardian.

LORD HANWORTH, M.R.—We have considered the facts and the sections of the Acts quoted and are of opinion that there is jurisdiction to make the order asked. The order will authorise the receiver in the name and on behalf of the patient to exercise, in such manner as he in his discretion thinks advisable, such powers vested in the patient

in her character of guardian as relate to the custody, control, maintenance, and education A
of her infant son. The costs may be allowed out of the estate of the patient.

ROMER and **MAUGHAM, L.JJ.**, concurred.

Order accordingly.

Solicitor for applicant, *The Official Solicitor.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*] B

C

A.-G. *v.* LLOYDS BANK, LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Tomlin, Lord Russell, Lord Macmillan, and Lord Wright), February 28, March 1, 15, 1935] D

[Reported [1935] A.C. 382; 104 L.J.K.B. 523; 152 L.T. 577]

Estate Duty—Passing—Accumulation of income during life of settlor—Application of rule in Lassence v. *Tierney—Beneficial interests not changing hands—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1.

Estate Duty—Passing—Property deemed to pass—Quantum taxable—Interest purchased or provided by deceased—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2 (1) (*d*). E

By a settlement dated Nov. 20, 1925, a settlor directed the trustee to hold the trust fund in trust for all or such one or more exclusively of the others or other of the children or remoter issue of the settlor or the husbands or wives of such children or remoter issue at such age or time, or ages or times, and in such manner in all respects as the settlor should by deed or will appoint. In default of and F subject to any such appointment, the settlor directed the division of the trust fund into three equal shares and the appropriation of one such share to each of the settlor's three children, V., P. and F., but so that the trustee should retain the shares so appropriated and should hold the share of each such child on the trusts therein mentioned. By a revocable deed of appointment dated Sept. 26, 1928, the settlor directed the trustee to stand possessed of the trust fund on trust during the G life of the settlor to accumulate the yearly income as an addition to the capital and after her death to hold the trust fund (and the accumulations of the income thereof) in trust for her said three children, V., P. and F., in equal shares, but so that the trustee should retain the same and should hold the share of each child on trust to pay the income to such child during his or her life and after the death of such child in trust for the children or remoter issue of such child as such child H should appoint and, in default of appointment, in trust for the children of such child who being sons should attain the age of twenty-one years or being daughters should attain that age or marry, in equal shares if more than one. The appointment also contained a provision for the accruer of any share in respect of which the said trusts should fail. On Oct. 15, 1930, the settlor died, and was survived by her three said children, who were unmarried. Estate duty was claimed in respect I of the principal value of the trust fund (including the accumulations) under the Finance Act, 1894, s. 1. It was accepted that if estate duty were not exigible under s. 1 of the Act of 1894, duty would be chargeable under s. 2 (1) (*d*) of that Act, but the method of assessment under the latter provision was disputed.

Held: (i) the trust fund did not pass on the death of the settlor within s. 1 of the Act of 1894, and accordingly estate duty was not exigible under that section, because, applying the rule in *Lassence* v. *Tierney* (1) (1849), 1 Mac. & G. 551, V., P. and F. were both before and after the death of the settlor between them absolutely entitled to the trust fund subject to the same defeasance, and, therefore, in connection with that event there was no shifting of the beneficial interest in the trust fund;

(ii) estate duty was exigible under s. 2 (1) (*d*) of the Act of 1894, only on the amount (if any) by which the value of the life interests accruing to V., P. and F. by reason of the death of the settlor exceeded the value of those interests, if any, before the death.

Adamson v. *A.-G.* (2), [1933] A.C. 257, explained.

Notes. The quantum taxable under the Finance Act, 1894, s. 2 (1) (*d*), was altered by the Finance Act, 1934, s. 28, under which provision the extent of any beneficial interest arising on the death of the deceased must be ascertained without regard to any interest in expectancy which the beneficiary may have had therein before the death. The proviso to s. 28 of the Act of 1934 safeguarded the rights of the parties in the present case.

Considered: *Re Hodson's Settlement, Brookes* v. *A.-G.*, [1939] 1 All E.R. 196. Applied: *Re Hatch, Public Trustee* v. *Hatch*, [1948] 2 All E.R. 288. Distinguished: *Re Brassey's Deed Trusts, Coutts* v. *Inland Revenue Commissioners*, [1951] 2 All E. R. 353; Referred to: *A.-G.* v. *Dickinson and Baron*, [1937] 2 All E.R. 485; *Scott* v. *Inland Revenue Commissioners*, [1936] 3 All E. R. 752; *Haldane* v. *Eckford*, [1948] 1 All E.R. 760.

As to property which passes on the death, see 15 HALSBURY'S LAWS (3rd Edn.) 10, 11, paras. 14–18; and for cases on the subject, see 21 DIGEST 7, 8, *21–27*.

Cases referred to:

(1) *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L.T.O.S. 557; 41 E.R. 1379; 14 Jur. 182, L.C.; 44 Digest 555, *3715*.

(2) *Adamson* v. *A.-G.*, [1933] A.C. 257; 102 L.J.K.B. 129; 148 L.T. 365; 49 T.L.R. 169; Digest Supp.

(3) *Cowley* v. *Commissioners of Inland Revenue*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 47 W.R. 525; 15 T.L.R. 270; 43 Sol. Jo. 348, H.L.; 21 Digest 8, *27*.

(4) *Hancock* v. *Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 50 W.R. 321, H.L.; 37 Digest 106, *397*.

Appeal from the decision of the Court of Appeal (LORD HANWORTH, M.R., SLESSER and ROMER, L.JJ.) (reported 151 L.T. 268) upon the information herein set out, which stated as follows:

1. The object of this information is to recover estate duty and succession duty on the death of Josephine Lawrence Butler (hereinafter called "the deceased") in respect of the property below mentioned.

2. By an indenture of settlement dated Nov. 20, 1925, and made between the deceased of the one part and the above-named defendant of the other part (which said indenture is hereinafter called "the settlement"), after reciting that the deceased had caused to be issued to or transferred into the name of the nominee of the defendant twenty-thousand fully paid deferred shares of £10 each in a company called Butler Estates Co., Ltd., with a view to such shares being held upon the trusts and with and subject to the powers and provisions thereinafter declared and contained concerning the same for the benefit of the children and remoter issue of the deceased, and in order to make provision for such children and remoter issue, it was witnessed and it was thereby declared and agreed that the defendant should stand possessed of the said shares and the investments from time to time representing the same (hereinafter called "the trust fund") on the trusts and with and subject to the powers and provisions following, that is to say, in trust for all or such one or more exclusively of the others or other of the children or remoter issue of the deceased or the husbands or wives of such children or remoter issue at such age or time or respective ages or times and in such shares and with such trusts for their respective advancement and maintenance and education at the discretion of the defendant or any other person or persons and in such manner in all respects as the deceased should from time to time by deed revocable or irrevocable or by will or codicil

appoint; and until and in default of and subject to any such appointment in trust to divide the trust fund into three equal shares and to appropriate one such share to each of the deceased's three children, namely, Vera Lawrence Butler, Patience Mourilyan Butler and Francis Charles Joseph Butler, but so that the defendant should retain the shares so appropriated and should hold the share of each such child upon trust until such child should attain the age of twenty-one years or, being a daughter, marry, to apply the income at the defendant's discretion for his or her maintenance, education or benefit and to accumulate the surplus, and after such child should have attained the age of twenty-one years or being a daughter have married, to pay the income to such child during his or her life (with a discretionary trust in the event of alienation) and at the death of such child in trust for the children or remoter issue of such child as such child should appoint with a provision in default of appointment and a provision for the accruer of any share in respect of which the above mentioned trusts should fail.

3. No dividend was declared in respect of the said shares between the date of the settlement and the date of the deed of appointment next below mentioned and consequently no income was during such period paid or applied in accordance with the above-mentioned provisions in default of appointment contained in the settlement.

4. By a deed of appointment dated Sept. 26, 1928, and made between the deceased of the one part and the defendant of the other part (which said deed is hereinafter called "the appointment") the deceased in exercise of the power for that purpose given to her by the settlement appointed that the defendant should stand possessed of the trust fund on the following trusts, that is to say, on trust during the life of the deceased to accumulate the yearly income thereof at compound interest as an addition to capital and after her death in trust for her three said children, namely, Vera Lawrence Butler, Patience Mourilyan Butler and Francis Charles Joseph Butler in equal shares, but so that the defendant should retain the said shares and should hold the share of each child on trust to pay the income to such child during his or her life and after the death of such child in trust for the children or remoter issue of such child as such child should appoint with a provision in default of appointment and a provision for the accruer of any share in respect of which the above-mentioned trusts should fail. The appointment contained a provision reserving power to the deceased at any time or times during her life by any deed or deeds or by will or codicil wholly or partially to revoke the appointment thereunder and to declare new trusts concerning the trust fund.

5. Pursuant to the direction contained in the appointment the defendant accumulated all dividends declared in respect of the said shares during the period between the date of the appointment and the death of the deceased and such accumulations form an addition to the capital of the trust fund.

6. The deceased died on Oct. 15, 1930, without having exercised the power reserved to her by the appointment to revoke the appointment thereunder and to declare new trusts concerning the trust fund.

7. The three above-named children of the deceased are all living.

8. In the circumstances aforesaid estate duty at the appropriate rate became payable under s. 1 of the Finance Act, 1894, in respect of the principal value of the trust fund (including the said accumulations) as property passing on the death of the deceased. Alternatively, estate duty at the appropriate rate became payable under s. 2 (1) (*d*) of the Finance Act, 1894, in respect of the life interests of the deceased's three children in the trust fund (including the said accumulations) as interests provided by the deceased and arising on the death of the deceased.

9. The aggregate value of the property which passed on the death of the deceased within the meaning of the Finance Act, 1894 (exclusive of the trust fund and the said accumulations, the value of which is not known to the informant), was upwards of £270,000.

10. In addition, succession duty became payable in the circumstances aforesaid under s. 2 of the Succession Duty Act, 1853, and s. 58 (2) of the Finance (1909–10) Act, 1910, in respect of the life interests of the deceased's three children in the trust fund (including the said accumulations) as on a succession derived by the said children from the deceased as predecessor. The rate of duty is 1 per cent.

A 11. The defendant, as trustee of the settlement, is the person accountable for the said estate duty and the said succession duty. The Commissioners of Inland Revenue have caused application to be made to the defendant for accounts and payment of the said duties respectively, but the defendant refuses to deliver any such accounts or to pay any such duty and contends that neither such duty is payable.

12. The defendant has in its possession or power divers deeds, accounts, writings, and B other documents relating to the matters in question in this suit and it ought to produce the same. The informant on behalf of His Majesty prays as follows:

(1) That it may be declared that on the death of the deceased estate duty at the appropriate rate became payable under s. 1 of the Finance Act, 1894, in respect of the principal value of the trust fund (including the said accumulations) or, alternatively, under s. 2 (1) (*d*) of the Finance Act, 1894, in respect of the life interests therein of the C three above-named children of the deceased.

(2) That it may be declared that upon the death of the deceased succession duty at the rate of 1 per cent. became payable under s. 2 of the Succession Duty Act, 1853, and s. 58 (2) of the Finance (1909–10) Act, 1910, in respect of the life interests of the three said children of the deceased in the trust fund (including the said accumulations).

(3) That the defendant may be ordered to deliver accounts of the said property and D to pay the amount of the said estate duty and succession duty, with interest thereon respectively from the death of the deceased, to the Commissioners of Inland Revenue, the informant hereby waiving such penalties as the defendant may have incurred by reason of the said duties not having been paid up to the present time.

(4) That all necessary and proper inquiries may be made, directions given, and accounts taken for the purposes aforesaid.

E (5) That the informant, on behalf of His Majesty, may have such further or other relief in the premises as the case may require.

The Court of Appeal held, reversing FINLAY, J., and applying *Adamson* v. *A.-G.* (2), that it could not be said that the vested right given before B.'s death to the children was of no possible value, and, therefore, the question of estate duty payable on the interest deemed to pass on the death must be measured, as in *Adamson's Case* (2), by F the excess of the actual value after the death beyond the actual value of the expectant right or the right to an expectant beneficial interest which each child held before the death.

The Crown appealed.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *J. H. Stamp* for the appellant.
R. W. Needham, K.C., and *P. M. Walters* for the respondent.

G The House took time for consideration.

March 15. **LORD ATKIN.**—I have had the opportunity of reading the opinion which my noble and learned friend LORD TOMLIN has prepared, and which will be read by my noble and learned friend LORD RUSSELL. I entirely agree with it and have nothing to add.

H **LORD TOMLIN** (read by LORD RUSSELL OF KILLOWEN).—The questions raised by this appeal are concerned with the estate duty which became payable on the death of Mrs. Josephine Lawrence Butler, whom I will call the settlor, in respect of a fund settled by her in her lifetime.

The settlement in question was dated Nov. 20, 1925. The respondent was made the trustee of it, and the property settled consisted of 20,000 fully paid deferred shares of I £10 each in a company called Butler Estates Co., Ltd.

The trusts declared of the shares and of the investments for the time being representing the same were (subject to a special power of appointment by the settlor) to divide the trust fund into three equal shares and to appropriate one such share to each of the settlor's three children, namely, Vera Lawrence Butler, Patience Mourilyan Butler, and Francis Charles Joseph Butler, but so that the respondent should retain the shares so appropriated and should hold the share of each such child on trust until such child should attain the age of twenty-one years or, being a daughter, marry, to apply the income at the respondent's discretion for his or her maintenance, education or benefit, and to accumulate the surplus, and after such child should have attained the age of twenty-one years or being a daughter have married, to pay the income to such child during his or her life (with a discretionary trust in the event of alienation), and at the death of such child in trust for the children or remoter issue of such child as such child should appoint with a provision in default of appointment and a provision for the accruer of any share in respect of which the above-mentioned trusts should fail. A

No dividend was declared in respect of the shares between the date of the settlement and the date of the deed of appointment which I shall next mention, and consequently no income was during such period paid or applied in accordance with the above-mentioned provisions in default of appointment contained in the settlement. B

By a deed of appointment dated Sept. 26, 1928, the settlor in exercise of the power for that purpose given to her by the settlement appointed that the respondent should stand possessed of the trust fund on the trusts declared in the first five clauses of the appointment. C

The nature of the arguments developed before your Lordships' House renders it desirable to set out these clauses at length. They are as follows:

> "1. The [trustee] shall stand possessed of the trust fund upon trust during the life of the said Josephine Lawrence Butler to accumulate the yearly income thereof at compound interest by investing the same and the resulting income thereof in any of the investments authorised by the said settlement and from and after the death of the said Josephine Lawrence Butler the [trustee] shall stand possessed of the trust fund (which expression shall hereinafter include the accumulations of income thereof) in trust for the three children of the said Josephine Lawrence Butler namely Vera Lawrence Butler Patience Mourilyan Butler and Francis Charles Joseph Butler in equal shares but so that the share which after the death of the said Josephine Butler shall be so held in trust for each of the said three children shall not vest absolutely in such child but shall be retained by the [trustee] upon the trusts hereinafter declared concerning the same. D E
>
> "2. During the life of such child the [trustee] shall pay the income of such share of the trust fund to him or her and so that in the case of a daughter the same shall during coverture be without power of anticipation. F
>
> "3. After the death of such child the [trustee] shall hold such share and the future income thereof in trust for all or such one or more exclusively of the others or other of the children or remoter issue of such child at such age or time or respective ages or times if more than one in such shares and with such future or other trusts for their respective advancement maintenance and education at the discretion of the [trustee] or any other persons or person and in such manner in all respects as such child shall from time to time by deed revocable or irrevocable or by will or codicil (without transgressing the law as to remoteness) appoint and in default of and subject to any such appointment in trust for all or any of the children of such child who being sons or a son shall attain the age of twenty-one years or being daughters or a daughter shall attain that age or marry if more than one in equal shares. G
>
> "4. Provided always that no child of such child of the said Josephine Lawrence Butler who or whose issue shall take any part of the said share of the trust fund under any appointment by virtue of the power of appointment lastly hereinbefore contained shall in default of appointment to the contrary be entitled to any share of the unappointed part thereof without bringing the share or shares interest or interests so appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly. H I
>
> "5. If the trusts hereinbefore declared concerning the share of such child of the said Josephine Lawrence Butler as aforesaid in the Trust Fund shall fail then subject to the trusts powers and provisions herein declared and contained or by law vested in the [trustee] concerning the same share of the trust fund and to every or any exercise of such respective powers the said share and any additional share or shares which may accrue or be added thereto by virtue of any provision for accruer herein contained and the income thereof respectively shall go and accrue by way of addition to the shares in the trust fund of the others of the said three children of the said

Josephine Lawrence Butler in equal shares and so that the share which shall so accrue and be added to each of such other shares of the trust fund shall be held upon the trusts and with and subject to the powers and provisions (including provisions as to accruer to other shares) herein declared concerning the same or as near thereto as circumstances will admit."

The appointment contained a power of revocation exercisable by the settlor by deed or will. This power was never in fact exercised and the settlor died on Oct. 15, 1930, leaving the appointment in operation, and survived by her three children named in the settlement and appointment. The three children are all living and none of them has ever been married.

The Crown by information claimed that on the death of the settlor, estate duty at the appropriate rate became payable under s. 1 of the Finance Act, 1894, in respect of the principal value of the trust fund including the accumulations or alternatively under s. 2 (1) (*d*) of the same Act in respect of the life interests therein of the three children of the settlor.

On the hearing of the information, Finlay, J., held that the property did not pass under s. 1 of the Act, but that the Crown was entitled to duty under s. 2 (1) (*d*) of the Finance Act, 1894, and that by reason of s. 4 of the same Act the accumulations ought not to be aggregated with the other interests. The formal order contained a declaration that upon the death of the settlor estate duty did not become payable under s. 1 of the Finance Act, 1894, in respect of the principal value of the trust fund, and also a declaration that on the death of the settlor estate duty at the appropriate rate became payable under s. 2 (1) (*d*) of the Finance Act, 1894, in respect of the life interests in the settled fund of the three children of the settlor, but that the accumulations were not to be aggregated with the value of such life interests or with any other estate passing on the death of the settlor.

On appeal by the Crown to the Court of Appeal Finlay, J.'s judgment was affirmed. Romer, L.J., however, pointed out that Finlay, J.'s order was in form too favourable to the Crown as it did not limit the payment of duty to duty on the increase of value that accrued to the interests of the children by reason of the settlor's death. There was, however, no cross-appeal before the Court of Appeal, and accordingly the formal order of the court merely dismissed the appeal and affirmed the declaration of Finlay, J., that no duty was payable under s. 1. Subsequently the respondent obtained an extension of time for appealing against Finlay, J.'s order and took the matter again to the Court of Appeal with a view to amending the second declaration in Finlay, J.'s order in the sense indicated by Romer, L.J. This appeal succeeded, and an order was made allowing the appeal and substituting for the second declaration of Finlay, J., a declaration that the beneficial life interest of each of the three children of the settlor in the trust funds (including the accumulations) to the extent to which the principal value of such beneficial life interest on the death of the settlor exceeded the actual value (if any) of the expectant beneficial life interest of each child prior to such death was an interest accruing or arising on such death and was therefore to be deemed property passing on the death of the settlor under s. 2 (1) (*d*) of the Finance Act, 1894, and that estate duty at the appropriate rate on the principal value of such excess was leviable and payable accordingly, but that for the purpose of determining the rate of estate duty to be paid on the property passing or deemed to pass on the death of the settlor the accumulations were not to be aggregated with such property.

The Crown now appeals to your Lordships' House against both orders of the Court of Appeal, contending that estate duty at the appropriate rate became payable under s. 1 of the Finance Act, 1894, in respect of the principal value of the trust funds (including the accumulations), or alternatively, if this was not so, that duty became payable under s. 2 (1) (*d*), and that the second declaration of Finlay, J.'s order was in the right form.

The provisions of the Finance Act, 1894, to which I have referred so far as relevant are as follows:

s. 1: "In the case of every person dying after the commencement of this Part

> of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty,' at the graduated rates hereinafter mentioned, . . . A
>
> s. 2: "(1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say: . . . (*d*) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased." B

As was made clear by LORD MACNAGHTEN in *Earl Cowley* v. *Commissioners of Inland Revenue* (3) ([1899] A.C. at p. 211), s. 1 of the Finance Act, 1894, gives effect to the principle C

> "that whenever property changes hands on death the State is entitled to step in and take toll of the property as it passes without regard to its destination or to the degree of relationship, if any, that may have subsisted between the deceased and the person or persons succeeding,"

while s. 2 is subsidiary, declaring that the expression "property passing on the death of the deceased" shall be "deemed to include" certain things classified under four different heads to no one of which rightly understood is that expression literally applicable. The property which is envisaged as passing is the beneficial interest in property. The first question to consider, therefore, is: Did any property in fact pass by reason of the settlor's death? D

Now on this part of the case the question seems to me to depend on the proper construction to be put on the appointment. On behalf of the Crown it is urged that the effect of the appointment is, first, during the life of the settlor to create a trust for the accumulation of the income of the fund by adding the same to the corpus for the benefit of those who take under the settlement which springs into existence at the settlor's death according to their respective interests under the settlement, and, secondly, to create as from the settlor's death a settlement of the original trust fund and the accumulations under which there then arise for the first time life interests in favour of the three children in the original trust funds and the accumulations followed by trusts for their issue with accruer clauses between the several stocks. On that view of the appointment it is contended that by reason of the death of the settlor property actually passed, because the trust for accumulation ceased and the life interests of the children sprang into being for the first time. E F

On the other hand, the respondent contends, first, that the rule commonly known as the rule in *Lassence* v. *Tierney* (1), approved and applied by your Lordships' House in *Hancock* v. *Watson* (4), operates in the present case, with the result that on the true construction of the appointment there is an absolute initial gift to the three children of the settlor in equal shares, and that the absolute initial gift of each share is only cut down if and when and while there is in existence some person qualified to take under the trusts of such share declared in derogation of the absolute gift and to the extent necessary to give effect to the rights of such person, and, secondly, that on this view of the construction nothing passed by reason of the settlor's death. G H

I am satisfied that the frame of the appointment is such as to attract the application of the rule in *Lassence* v. *Tierney* (1) which admittedly is to be regarded in construing non-testamentary instruments as well as in construing testamentary documents; the nature and effect of the rule is stated by LORD DAVEY in *Hancock* v. *Watson* (4) ([1902] A.C. at p. 22) in these terms: I

> "it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be."

In the present case it is to be observed that the gift is in the first instance absolute in form "in trust for the three children . . . in equal shares" and that in the engrafted trusts introduced by the words "but so that" there is a direction for dealing with the thing described as "the share which after the death of the settlor, Josephine Butler, shall be so held in trust for each of the settlor's three children," and throughout the clauses containing the engrafted trusts there are phrases indicating ownership such as "the share of each child" or "the shares in the trust fund of the others of the settlor's three children." Further, I cannot find in the language of the engrafted trusts anything appropriate to have effect if there be a failure of the stocks of all three children. Having regard to the language and circumstances to which I have called attention I am of opinion that the case is one to which the rule in *Lassence* v. *Tierney* (1) falls to be applied.

Further the result of applying the rule is, I think, that the absolute gift stands, or to employ Lord Davey's language "takes effect" except to the extent to which it is cut down by the events which actually happen. At the death of the settlor nothing had happened to cut down the absolute gifts beyond the fact that all three children were living.

No doubt in respect of each share the absolute gift was defeasible because it might be defeated to a limited extent by the other children surviving so as to enjoy a life interest in it or by the birth of issue becoming entitled under the trust, but the defeasibility was not ended by reason of the death of the settlor and even if it had been that would not have constituted a passing under s. 1 of the Act (see *Adamson* v. *A.-G.* (2)). But for the possibility of the birth of issue the three children together could in a settlor's lifetime have stopped the trust for accumulation and demanded a transfer to themselves of the whole fund and the accumulations. To-day, after the settlor's death, the position is the same. But for the possibility of the birth of issue the three children together could require that the whole fund and the accumulations should be transferred to them on their joint receipt. Their interests to-day are the same as they were before the settlor's death, i.e., they together own the whole fund and the accumulations subject to the same defeasance. Their position in this regard has not been altered by the settlor's death.

If there has been a passing of property on the death there must have been a passing or shifting of the beneficial interest in the fund from one to another. But if the only persons beneficially interested in the fund immediately before the death are also the only persons beneficially interested in the fund immediately after the death (subject though their title is to the same possibility of defeasance) where is any passing or shifting to be found? In my opinion, there is none.

It is admitted by the respondent that if there is no passing under s. 1 of the Act, s. 2 (1) (*d*) will come into operation. The question is how duty under that provision is to be assessed. It is, I think, clear that it is exigible only on the amount of the excess (if any) by which the value of the interest accruing by reason of the death exceeds the value of the interest, if any, before the death, and the order of Finlay, J., in this regard was wrong in form. The respondent though he has not appealed against the order of the Court of Appeal which dealt with this has criticised its form as possibly precluding him from saying that the excess in the present case is nil.

I do not think that in the circumstances your Lordships would desire to modify the form of that order, but as it has evidently been based on the declaration proposed by Lord Warrington of Clyffe in *Adamson* v. *A.-G.* (2) ([1933] A.C. at p. 278), I may perhaps be permitted to say that in my opinion Lord Warrington of Clyffe did not intend to hold that in every case within the ambit of s. 2 (1) (*d*), the value of the interest after the death must necessarily exceed the value of the interest before the death.

Further, having regard to some of the observations in the courts below, I may, perhaps, also venture to observe that the ratio decidendi in *Adamson* v. *A.-G.* (2) is not that on the execution of the settlement the beneficial interest in the whole fund passed out of the settlor but that it passed out of the settlor to the children whose interest was the same both before and after the death of the settlor subject only to this that a possibility of defeasance came to an end with the death and that the cesser of that possibility of defeasance did not constitute a passing.

A In the result, therefore, I am of opinion that this appeal fails on both points, and should be dismissed with costs.

LORD RUSSELL OF KILLOWEN.—For myself I find myself in such complete agreement with the opinion which I have just read, both in its reasoning and in its conclusions, that I have not thought it necessary to trouble your Lordships with any observations of my own. B

LORD MACMILLAN.—I also am entirely in accord with the opinion of my noble and learned friend LORD TOMLIN and I have nothing to add.

LORD WRIGHT.—I also agree and I have nothing to add.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue*; *R. C. Bartlett & Co.* C

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

D

RIDLEY *v.* LEE

[CHANCERY DIVISION (Luxmoore, J.), December 18, 19, 1934; January 14, April 1, 1935] E

[Reported [1935] Ch. 591; 104 L.J.Ch. 304; 153 L.T. 437; 51 T.L.R. 364; 79 Sol. Jo. 382]

Sale of Land—Restrictive covenant—Building scheme—Covenant void—Covenant by purchaser with himself and other persons—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 82. F

By conveyances dated Feb. 20, 1907, B., H., & S., tenants in common, conveyed to B. (one of their number) land subject to restrictive covenants. By a conveyance dated July 6, 1907, B., H., & S. conveyed to the plaintiff land adjacent to that the subject of the conveyances of Feb. 20, the plaintiff covenanting with the vendors, their heirs, executors, administrators, and assigns, "owners for the time being of the lands now or formerly a part of the vendors' estate of which G the hereditaments hereby conveyed form part and so that every person for the time being entitled to any estate in any such lands shall have a right to the observance and fulfilment of" certain stipulations thereinafter mentioned "so far as they relate to their property," that he, his heirs and assigns would perform and observe those stipulations. The relevant stipulations were the same as those specified in the conveyances of Feb. 20. In 1933, B. conveyed to the defendant part of the H land comprised in the conveyances of Feb. 20, and shortly afterwards the defendant began to erect on that land houses which were in breach of the stipulations in the conveyances of Feb. 20 and July 6, 1907. In an action by the plaintiff for a declaration that the defendant was bound by a building scheme and for an injunction restraining him from building on the land houses which did not comply with the stipulations, I

Held: (i) although the covenants entered into by B. in the conveyances of Feb. 20, 1907, were in form with B., H., & S. jointly, and although each of the covenantors had at that time a separate interest in the land retained, the covenants could not be treated as joint and several, for a covenant with H. & S. alone would not create the necessary mutual obligation binding on the whole interest in the land conveyed and that retained; a man could not contract with himself: *Ellis* v. *Kerr* (2), [1910] 1 Ch. 529; and so the covenants in the conveyances of Feb. 20, 1907, were void and unenforceable when they were entered into; and, therefore, there were

A no restrictive covenants in existence relating to the land purchased by the plaintiff in 1907, and, as no subsequent covenants were entered into, no building scheme ever came into existence, and the action failed.

(ii) s. 82 of the Law of Property Act, 1925, did not operate to render sufficient to constitute a building scheme that which was insufficient to create such a scheme in 1907.

B

Notes. As to building schemes, see 29 HALSBURY'S LAWS (2nd Edn.) 445 et seq., and as to cases, see 40 DIGEST 307, 308. As to Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

Cases referred to:

(1) *Withers* v. *Bircham* (1824), 3 B. & C. 254; 5 Dow. & Ry. K.B. 106; 3 L.J.O.S. K.B. 30; 107 E.R. 728; 12 Digest (Repl.) 33, *100*. C

(2) *Ellis* v. *Kerr*, [1910] 1 Ch. 529; 79 L.J.Ch. 291; 102 L.T. 417; 54 Sol. Jo. 307; 12 Digest (Repl.) 25, *24*.

(3) *Elliston* v. *Reacher*, [1908] 2 Ch. 665; 78 L.J.Ch. 87; 99 L.T. 701, C.A.; 40 Digest 309, *2646*.

D **Action** for declaration and injunction.

The plaintiff, the owner of lot 26 and part of lot 27 on a building estate, which, by virtue of conditions of sale, were subject to restrictive covenants, claimed a declaration that the defendant, as owner and occupier of lot 25 adjoining the plaintiff's plots, was bound by the building scheme and by certain covenants by which the defendant's vendor was himself bound under a sale by the vendor and two others as tenants in E common to himself. These covenants were similar to those into which the plaintiff had entered with regard to his plots. The defendant pleaded that his property was conveyed to him free of any covenants or restrictions, that he purchased without notice of a building scheme, and that any restrictions affecting the land had ceased to apply.

Section 82 of the Law of Property Act, 1925, provides:

"(1) Any covenant, whether express or implied, or agreement entered into by a F person with himself and one or more other persons, shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone. (2) This section applies to covenants or agreements entered into before or after the commencement of this Act, and to covenants implied by statute in the case of a person who conveys or is expressed to convey to himself and one or more other persons, but without pre- G judice to any order of the court made before such commencement."

G. D. Johnston for plaintiff.

Harman for defendant.

Cur. adv. vult.

April 1.—**LUXMOORE, J.,** read the following judgment. This action has been brought for a declaration that the defendant, as owner and occupier of certain land at Purley in H the county of Surrey, is bound by a building scheme, and for ancillary relief, including an injunction to restrain him from building upon the land more than two dwelling-houses with the appropriate stables, outbuildings and offices. The defendant denies the existence of a building scheme and says that if, contrary to his submission, there is such a scheme, the plaintiff has by his conduct deprived himself of the right to enforce it. He also says that the plaintiff has not suffered, and will not suffer, anything beyond I nominal damages if more than two dwelling-houses should be built on the land.

There is no dispute of fact except on the question of damage. The material facts are as follows. By a deed dated May 4, 1903, John Porteous Maley conveyed to Edward Hall, Edward James Sole and Harry Tom Freeman in fee simple as tenants in common, 19 acres 3 roods and 9 perches of land situate in the parish of Coulsdon, bounded on or towards the north-east by a road called the Higher Drive, on or about the south-west by a road called Old Lodge-lane, on or towards the north-west by land in the occupation of the Reedham Orphanage, and on or towards the south-east by land then or lately belonging to one Alfred Densham. The conveyance carried into effect an agreement for sale and purchase. Messrs. Hall, Sole, and Freeman subsequently sold the property comprised in the conveyance of May 4, 1903, to Mr. Frederick Betts, the said Mr. Edward Hall and the said Mr. Edward James Sole, and it was conveyed to them in fee simple as tenants in common by a conveyance dated Feb. 10, 1904. Between the date of this conveyance and Oct. 4, 1906, Messrs. Betts, Hall, and Sole sold and conveyed certain parts of the land comprised in the conveyance of Feb. 10, 1904, to various purchasers. The purchaser in each case was one or other of the vendors, Messrs. Betts, Hall, and Sole. No restrictions were imposed on any of these sales. On Oct. 4, 1906, the rest of the land comprised in the conveyance of Feb. 10, 1904, then remaining unsold was offered for sale by auction, subject to certain conditions which were attached to the particulars of sale. The property was described in the particulars as being "a valuable freehold building estate, comprising three freehold detached residences, and fifty-one freehold building plots, situated on the Reedham Park Estate, Purley, Surrey." The plan attached to the particulars comprised the unsold land, included in the conveyance of Feb. 10, 1904, lying between Higher-drive and Reedham-road. The last-named road is on the site of the Old Lodge-lane shown on the plan on the conveyance of May 4, 1903. The sale plan also shows the property as intersected by two roads running more or less at right angles to Higher-drive and Reedham-road. The fifty-one lots offered for sale are coloured pink on the sale plan and are numbered consecutively from 1 to 51 inclusive, while the three freehold residences are shown on the plan and are also coloured pink and are numbered 52, 53 and 54 respectively.

The conditions of sale, so far as material to this action, provided as follows: Condition 14:

> "The property, or every lot of property, is sold and shall be conveyed subject to the following stipulations and every purchaser shall covenant with the vendors their and each of their heirs, executors, administrators, and assigns, owners for the time being of any of the lands now or formerly part of the vendors' estate of which the same form part, for the observance thereof, and so that every person for the time being entitled to any estate in any such lands shall have a right to the observance and fulfilment of such stipulations so far as they relate to such covenantors' property or lot or lots, namely: No lands shall be used or have any buildings erected thereon save for the purposes of private residences and stables, outbuildings, offices, and gardens, suitable and adapted for use therewith. In the event of a sale in lots . . . not more than two dwelling-houses with such stables, outbuildings, and offices shall be erected on any one plot. No such dwelling-house henceforth erected shall (exclusive of such offices, outbuildings, and stables, as aforesaid) be of less value, in prime cost of labour and materials at lowest current prices, than as follows, namely: In the case of houses fronting Higher Drive for each detached house £700 and for a pair of semi-detached houses £1,200; and in case of houses fronting any other road for each detached house £500 and for a pair of semi-detached houses £800. Nothing shall be done or permitted which shall be a nuisance, or damage, or annoyance to the neighbourhood, or any person resident, or owning property therein. Every purchaser shall forthwith erect and afterwards maintain a good and sufficient boundary fence or wall upon the frontage, and also on the side of the property (or of his lot) as marked 'T' within the boundary. Nothing other than bow windows or other architectural dressings, or a front boundary wall or fence, shall be erected between the building lines shown on the sale plan and the road. Provided always: (*a*) The vendors reserve the right as between themselves and any purchaser, and the owner or owners for the time being of any part of the estate at any time hereafter to alter, modify, release, or dispense with any of the stipulations aforesaid, and to lay out or deal with the estate or any lot or lots not sold in such manner as they, or any, or either of them shall think fit. (*b*) No purchaser shall be personally liable in respect of any breach or non-performance of any of these covenants occurring after he shall have parted with all ownership of his plot or plots. (*c*) The said covenant on the part of every purchaser shall be framed so as to give effect to clauses (*a*) and (*b*)."

None of the property offered for sale at the 1906 auction was sold on that occasion, but on Feb. 20, 1907, Frederick Betts, Edward Hall and Edward James Sole sold to Frederick Betts certain parts of the property which comprised lots 23, 24 and 25, and lots 45 to 51 inclusive at that auction. These lots were conveyed by two separate conveyances, each dated Feb. 20, 1907, and made between the said Frederick Betts, Edward Hall and Edward James Sole, of the one part, and the said Frederick Betts, of the other part. Each of these conveyances is in the same form. The habendum in each case is expressed to be "subject nevertheless to the obligations or liability aforesaid and to the covenants by the purchaser"—that is Mr. Frederick Betts—"hereinafter contained." The obligations or liability mentioned were or was in respect of the repair of Higher Drive and the maintenance of certain fences in that road. The covenants by the purchaser are in each case in these words:

> "The purchaser (but as to the stipulations set out in Part II of the second schedule hereto not so as to bind himself personally after he shall have parted with all ownership of the said hereditaments) doth hereby for himself his heirs and assigns covenant with the vendors their and each of their heirs executors administrators and assigns (owners for the time being of any of the lands now or formerly part of the vendors' estate of which the said hereditaments form part and so that every person for the time being entitled to any estate in any such lands shall have a right to the observance and fulfilment of the stipulations in Part II of the said second schedule so far as they relate to the said hereditaments hereinbefore expressed to be hereby granted) that the stipulations last aforesaid shall be observed so far as they relate to the hereditaments last aforesaid. . . . Provided nevertheless that as between the vendors and the purchaser and the owner or owners for the time being of any part of the said estate the vendors shall be at liberty at any time hereafter to alter, modify, release or dispense with any of the stipulations set out in Part II of the said second schedule hereto and to lay out or deal with the remainder (or any part thereof) of the said estate in such manner as they or any or either of them shall think fit."

The second part of the schedule contains stipulations similar to those set out in condition 14 of the conditions of sale. It is to be observed that the covenants contained in these conveyances were entered into by Mr. Frederick Betts, on the one hand, and Mr. Frederick Betts and the other two vendors on the other. A question, therefore, arises as to their validity. I propose to deal with this later.

On July 6, 1907, Edward Hall, Edward James Sole and Frederick Betts conveyed to the plaintiff, Eustace Ridley, a further part of the property offered for sale at the 1906 auction. The part so conveyed is described in the conveyance as

> "All that piece or parcel of land situate on the north-west side of the Burcott-road leading out of Higher Drive at Purley in the county of Surrey which said piece or parcel of land has a frontage on the south-east side thereof to the said Burcott-road of 60 feet and contains on the north-east and south-west sides thereof a depth of 170 feet, and measuring in width at the rear thereof 60 feet, and which is distant from the Higher Drive aforesaid about 210 feet computed from the south-east corner thereof which said hereditaments are more particularly described in the plan drawn on the second page of these presents and are thereon coloured pink and numbered lot 26 and part of 27."

The property in fact comprised lot 26 and also a part of lot 27 shown on the sale plan to which I have already referred. The plaintiff entered into a covenant in this form:

> "The purchaser hereby covenants with the vendors their and each of their heirs executors administrators and assigns owners for the time being of the lands now or formerly a part of the vendors' estate of which the hereditaments hereby conveyed form part and so that every person for the time being entitled to any estate in any such lands shall have a right to the observance and fulfilment of the stipulations hereinafter mentioned so far as they relate to his property or lot or lots that the

> purchaser his heirs and assigns will henceforth perform and observe the stipulations mentioned in the first schedule hereto to the intent and so that the said stipulations shall be binding on the said lands and premises hereby assured into whosesoever hands the same may come but not so as to render the purchaser personally liable in damages for any breach thereof after he shall have parted with his interest in the premises." A

B

The first schedule contained stipulations similar to those set out in condition 14 of the conditions of sale, including the proviso reserving the right to the vendors to alter, modify, release or dispense with any of the said stipulations, and to lay out or deal with the estate or any lot or lots not sold in such manner as they or any or either of them should think fit.

Before this conveyance was executed, the plaintiff and his solicitors were informed C that Mr. Frederick Betts had purchased a part of the same estate, subject to the same restrictions as were to be imposed in respect of the land which the plaintiff was then purchasing. If the plaintiff and his advisers had inquired into the position, they would have ascertained, or ought to have ascertained, that a question arose as to the validity of this covenant.

After the conveyance to Mr. Frederick Betts, but before the execution of the con- D veyance in favour of the plaintiff, Messrs. Hall, Sole, and Betts executed a memorandum of deposit of title deeds in favour of the London and County Banking Company to secure the repayment of all moneys for the time being owing to the bank from the partnership of Messrs. Sole, Hall, and Betts. The documents deposited included the conveyances of May 27, 1902; May 4, 1903; and Feb. 10, 1904.

No further part of the property was sold until Dec. 24, 1908. On that date the E London and County Banking Co., with the concurrence of Messrs. Sole, Hall, and Betts, sold and conveyed to Messrs. Charles William Payne and Arthur Ingram a further part of the property offered for sale at the 1906 auction. The part of the property so conveyed comprised lots 9 to 22 inclusive, the remainder of lot 27 (being the part of that lot not sold to the plaintiff on July 6, 1907), and lots 28 to 40 inclusive at that auction. The conveyance to Messrs. Payne and Ingram was not made subject to any F stipulations or restrictions of any kind. It appears that before this conveyance was executed the property comprised in it, together with other property forming the rest of the property offered at the 1906 auction, was offered for sale by auction on Nov. 19, 1908, in three lots, and that the property conveyed by the conveyance of Dec. 24, 1908, formed lot 2 at that sale. No mention was made in the particulars or conditions of sale of any restrictions or stipulations affecting the property or any part of it, and the G conveyance of Dec. 24, 1908, is not expressed to be subject to any restrictions or stipulations, nor did Messrs. Payne and Ingram purport to enter into any covenants or stipulations restrictive of such user.

On May 6, 1909, the rest of the property offered for sale at the 1906 and 1908 auctions, then remaining unsold, was offered for sale by auction under an order of the Chancery Division of the High Court of Justice, made in an action between Messrs. Sole and Hall H as plaintiffs against Frederick Betts as defendant. The property was offered in two lots without any restrictions or stipulations. It appears from a memorandum endorsed on the conveyance of Feb. 10, 1904, to which I have already referred, that that part of the property which formed lot 2 at the 1909 auction and lots 41 to 44 inclusive at the 1906 auction were sold and duly conveyed to Sir David Burnett in fee simple. I am informed that this conveyance was free from any restrictions or stipulations. On I Dec. 7, 1915, a small part of the land comprised in lot 23 at the 1906 auction was conveyed to the plaintiff by Mr. Betts and his then mortgagee. No mention is made in this conveyance of the restrictions sought to be imposed in respect of lots 23, 24, and 25 by the conveyance of Feb. 20, 1907. On Jan. 7, 1921, the remaining part of lot 23 was conveyed by Mr. Betts to Thomas Charles Mansfield. The habendum in this conveyance is expressed to be

> "subject nevertheless to the stipulations and exceptions contained in the schedules

> to the indenture of conveyance dated Feb. 20, 1907, . . . , so far as the same are still subsisting and capable of affecting the premises"

thereby assured. On Sept. 15, 1924, Mr. Betts conveyed to Percy Edward Ridley, the brother of the plaintiff, the land comprised in lot 24 at the 1906 auction, with a narrow strip facing part of and situate at the rear of the land comprised in lot 25 at the same auction. No reference is made in this conveyance to the restrictions and stipulations contained in the conveyance of Feb. 29, 1907, but, in answer to a requisition made on behalf of Mr. P. E. Ridley, before the conveyance, whether the stipulations and exceptions contained in the last-mentioned indenture had been observed, Mr. Betts' solicitors replied that they knew of no breach.

On Dec. 8, 1933, Mr. Betts agreed to sell the rest of the property comprised in lot 25 at the 1906 auction to the defendant, Henry William Lee. The agreement contained a statement that the property was or may have been formerly subject to certain stipulations as to building or otherwise, and provided:

> "The purchaser has notice thereof and shall not make any objection or requisition with regard thereto but the vendor guarantees that these stipulations have ceased to apply to the property sold and in the conveyance to the purchaser the land shall not be conveyed as subject to them."

In compliance with this provision the property was conveyed on Dec. 22, 1933, by Mr. Betts to the defendant without any reference to the stipulations or restrictions sought to be imposed by the conveyance of Feb. 20, 1907. Shortly after Dec. 22, 1933, the defendant lodged with the Coulsdon and Purley Urban District Council plans of four houses proposed to be erected on the land comprised in the conveyance of Dec. 22, 1933. Three of these houses were in course of erection at the date when the writ was issued, and the foundations of the fourth house were excavated or being excavated. The plaintiff issued the writ in this action on Jan. 20, 1934.

The first question to be determined is whether any building scheme was in existence when the plaintiff purchased the land comprised in and conveyed by the conveyance of July 6, 1907, and, if so, to what land does it relate. There can, I think, be no doubt but that at the time of the 1906 auction the then owners of the whole property laid it out with the intention of developing it as a building estate, subject to restrictions intended to be imposed on all the lots into which they proposed to divide it. The restrictions were consistent only with a general scheme of development, and I do not think that the fact that the vendors reserved a wide power to alter, modify, release or dispense with the restrictions is by itself sufficient to negative this view. Nothing, however, was sold at the 1906 auction.

Both the conveyances of Feb. 20, 1907, contain what purports to be covenants by Mr. Betts in accordance with the scheme enunciated in the 1906 particulars and conditions of sale. In form these conveyances were made upon the footing that the restrictions were entered into for the benefit of the other lots intended to be included in that scheme. The conveyance to the plaintiff on July 6, 1907, was made on the same footing, and, assuming that the covenants by Mr. Betts in the two conveyances were valid, it seems to me that Mr. Betts and those claiming under him as well as the plaintiff could in equity have enforced the restrictions in respect of the lands included in the conveyances, namely, lots 23, 24, 25, 26, and part of 27, and lots 45 to 51 inclusive, although the scheme was, under the general power reserved to the vendors, abandoned so far as the rest of the land was concerned.

A serious question, however, arises by reason of the fact that the covenants in the two conveyances of Feb. 20, 1907, were entered into by Mr. Betts with himself and two other persons. The covenants are in form with Messrs. Betts, Hall, and Sole jointly, and, although each of the covenantors had at that time a separate interest in the land retained, it is impossible to treat the covenants as joint and several, as it was suggested by counsel for the plaintiff could be done, on the authority of the decision in *Withers* v. *Bircham* (1), for a covenant with Messrs. Hall and Sole alone would not create the necessary mutual obligation binding upon the whole interest in the land conveyed and that retained.

A In my judgment, the covenants in the conveyances of Feb. 20, 1907, were void and unenforceable at the time they were entered into: (see *Ellis* v. *Kerr* (2)). It follows from this that there were no restrictive covenants in existence relating to any part of the land offered at the 1906 auction at the date when the plaintiff purchased lot 26 and part of lot 27, and, as no subsequent covenants were entered into, no building scheme ever came into existence.

B It is said, however, that any defect in the covenants entered into by Mr. Betts in 1907 has been cured by the provisions of s. 82 of the Law of Property Act, 1925. This section is as follows:

> "(1) Any covenant, whether express or implied, or agreement entered into by a person with himself and one or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone. (2) This section applies to covenants, or agreements entered into before or after the commencement of this Act, . . . but without prejudice to any order of the court made before such commencement." C

It was argued that the effect of this section is to constitute as from Jan. 1, 1926, a valid and enforceable building scheme in respect of lots 23, 24, 25, 26, and part of lot 27, and lots 45 to 51 inclusive, although such building scheme had in law no existence in July, 1907, or at any time between that date and Jan. 1, 1926. I am unable to accept this view. It may well be that, if Messrs. Hall and Sole were now seeking to enforce the covenants in the conveyances of Feb. 20, 1907, against Mr. Betts, they would be entitled to do so by reason of the express provisions of the section in question, and that to enable them to do so the covenant would be construed as having been entered into with them alone and not with them and Mr. Betts. But this is not such an action. As already pointed out, if the covenant had in the first instance been entered into between Mr. Betts, on the one hand, and Messrs. Hall and Sole, on the other, it would not have enured for the benefit of the whole of the interests in the land retained, because Messrs. Hall and Sole were only two out of three tenants in common, and covenants in such form would not have created that mutuality of obligation which is the essential ingredient for the enforcement of a building scheme by one purchaser from the common vendors against another purchaser from them: see *Elliston* v. *Reacher* (3). D E F

I am satisfied that there was no building scheme on July 6, 1907, affecting the property now vested in the defendant jointly with that belonging to the plaintiff, and that there is nothing in s. 82 of the Law of Property Act, 1925, which compels me to hold that what was insufficient to create such a scheme in 1907 must by reason of that section be deemed from Jan. 1, 1926, to have constituted a building scheme as from the earlier date or from any intermediate date. G

In these circumstances I do not think it necessary to consider the conflicting evidence whether any and what damage might have been suffered by the plaintiff if I had held that there was in fact a building scheme binding the land of the plaintiff or defendant, or whether the plaintiff had by acquiescence or otherwise debarred himself from enforcing such scheme. H

In the result I dismiss the action and order the plaintiff to pay the defendant's costs.

Action dismissed.

Solicitors: *Joynson-Hicks & Co.*; *Ward & Melliar Smith.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*] I

BIRMINGHAM CORPN. *v.* BARNES

[House of Lords (Lord Atkin, Lord Tomlin, Lord Russell, Lord Macmillan and Lord Wright), February 22, 25, March 8, 1935]

[Reported [1935] A.C. 292; 104 L.J.K.B. 281; 152 L.T. 558; 51 T.L.R. 293; 79 Sol. Jo. 213; 33 L.G.R. 189; 19 Tax Cas. 195; 99 J.P. 173]

Income Tax—Deduction in computing profits—Wear and tear—"Actual cost to the person by whom the trade is carried on"—Person receiving contribution to cost—Amount of deduction for wear and tear—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. D, Rules applicable to Cases I and II, r.* 6 (6).

On April 19, 1920, an agreement was entered into by the B. Corporation with the D. Co. to lay a tramway to the works of the D. Co. on the terms that the D. Co. would pay the B. Corporation £10,000, and also £50 for each day prior to a stated date that the tramway service was in operation. The tramway was laid by the B. Corporation by direct labour at a cost of £54,752, and the D. Co. paid £10,806 to the B. Corporation. In 1922 the B. Corporation spent £271,399 on renewals of its tramway tracks, and received £46,238 from the Government Unemployment Grants Committee towards the cost.

In computing the profits of the B. Corporation in respect of their tramway undertakings, the question arose as to the allowance to be made for wear and tear in respect of the tramway tracks under the Income Tax Act, 1918, Sched. D, Rules applicable to Cases I and II, r. 6, i.e., whether the allowance should be based on the net cost to the B. Corporation after deducting the contributions from the D. Co. and the Government Unemployment Grants Committee, or whether such contributions should be ignored. It was common ground that the B. Corporation were entitled to an allowance on the footing that the tracks were new.

Held: the "actual cost" of the track to "the person by whom the trade is carried on" within r. 6 (6) was in each case the full amount without deduction of the contributions by the D. Co. and the Government Unemployment Grants Committee respectively, and, therefore, the aggregate amounts of the deductions allowable for wear and tear were £54,752 and £271,399.

Notes. The Income Tax Act, 1918, Sched. D, Rules applicable to Cases I and II, r. 6 (6), was replaced (as amended) by the Income Tax Act, 1952, s. 288. See also s. 332 of the Act of 1952.

Considered: *Union Cold Storage Co.* v. *Simpson*, [1939] 2 All E.R. 94.

For the Income Tax Act, 1952, s. 288, s. 332, see 31 Halsbury's Statutes (2nd Edn.) 280, 319.

Case referred to:

(1) *John Hall Junior & Co.* v. *Rickman*, [1906] 1 K.B. 311; 75 L.J.K.B. 178; 94 L.T. 224; 54 W.R. 380; 22 T.L.R. 131; 28 Digest 53, *267*.

Appeal from the decision of the Court of Appeal (Slesser and Romer, L.JJ., Lord Hanworth, M.R., dissenting), reported [1934] 1 K.B. 484, on a Case stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts, for the opinion of the King's Bench Division of the High Court of Justice. The Case stated as follows:

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on Dec. 13, 1932, for the purpose of hearing appeals, the Corporation of Birmingham (hereinafter called "the corporation") appealed against assessments to income tax for the years ending April 5, 1931, and April 5, 1932, respectively, made upon it in respect of the profits of its tramway undertaking by the Additional Commissioners of Income Tax for the Division of Hemlingford under the provisions of the Income Tax Acts.

2. The sole question at issue on the appeal was the amount of the deductions to be

allowed under r. 6 of the rules applicable to Cases I and II of Sched. D in respect of the A diminished value by reason of wear and tear during the respective years of the corporation's tramways tracks.

3. On April 19, 1920, the corporation entered into an agreement with the Dunlop Rubber Co., Ltd. to lay a tramway track and establish a tramway service between Salford Bridge, Erdington, and the company's works upon the terms that in view of the facilities which the tramway would give for the employees of the company to travel to B and from its works the company would pay the corporation the sum of £10,000 if the track was laid and a regular service established by June 1, 1920, and a further sum of £50 for each day the service was run prior to that date. The corporation fulfilled these requirements, and a sum of £10,806 was paid by the Dunlop Rubber Co., Ltd. The corporation laid the track by direct labour at a total cost of £54,752.

4. In the year ending March 31, 1922, the corporation spent £271,399 on renewals of C its tramway tracks, and received £46,238 from the Government Unemployment Grants Committee.

5. On Dec. 22, 1920, the Unemployment Grants Committee had issued a circular letter to county councils and other local authorities, drawing attention to an announcement made in Parliament that the Government had decided to provide a grant of £3,000,000 for the purpose of assisting local authorities to carry out at once works on D which a substantial number of the unemployed could be engaged. This letter described the conditions imposed upon or adopted by the committee to govern the distribution of the grant. These conditions were that works would be approved only in areas where the existence of serious unemployment which was not otherwise provided for was certified by the Ministry of Labour; that preference in employment must be given to unemployed ex-service men; that the grant must not in any case exceed 30 per cent. E of the wages bill of additional men taken on for work; that the works must be such as were approved by the appropriate department of the Government as suitable works of public utility; that the unemployed workmen taken on must remain on the registers of the employment exchanges and would be required to take other work at any time if the exchanges were in a position to offer them such work and that the actual working of the schemes and the accounts relating thereto should be open at any time to any inspection F required by the committee. Applications for a grant were invited, which were to be accompanied by a general description of the works to be undertaken; a statement of the estimated expenditure on the whole scheme, showing the cost of labour as a separate item; an estimate of the expenditure which would be incurred on labour during the next three months; an estimate of the average number of men likely to be continuously employed on the work during the next three months, or of the number of additional men G who would be taken on if a grant were made; information as to the manner in which the balance of the cost of the scheme would be defrayed, and the date when the scheme could be commenced or additional men taken on.

6. The corporation made applications to the Unemployment Grants Committee for assistance under the specified conditions and furnished the particulars required in regard to the works to be undertaken, and the committee assented to the grants. The schemes H in respect of which applications for assistance were made included, inter alia, works described as the reconstruction of tramway tracks in certain named roads, and in applying for the actual payment of the grants the proper officers of the corporation set out in the prescribed form the numbers of and payments made to workmen in respect of whose wages a claim was made, and certified that all workmen in respect of whose wages a claim was made had been taken through the agency of an employment exchange; that I the accounts and vouchers of the corporation relating to the work in question were available to be submitted to audit when required by the district auditor on behalf of the Unemployment Grants Committee; and that the payment of wages to workmen engaged for the work through the employment exchange had been duly made and accounted for as shown in the statement submitted.

7. As a matter of administrative convenience, the Board of Inland Revenue have from time to time agreed with representatives of local authorities and other persons working tramways schemes for the computation of the deductions to be allowed in

A respect of the wear and tear of the machinery and plant used for the purposes of such concerns. By para. 2 of a scheme adopted in 1922 it was provided that

> "From the date when the track, or any portion thereof, is or has been renewed, such renewal shall be recorded and dealt with as if it were a new track, and annual allowances shall be granted in respect thereof on the basis of the sum actually B expended and of the agreed life as provided in para. 3, provided that such allowances shall continue until the full cost has been allowed, notwithstanding that the said track or portion thereof may be again renewed before such aggregate cost has been allowed. This proviso shall apply also to expenditure on new track since 1908."

Paragraph 3 of the scheme dealt with the methods to be adopted in computing the life of the permanent way of a tramway undertaking. In the case of the corporation's C tramways the agreed life of the tracks has been taken as twelve years.

8. Between 1921 and 1926 several questions were under debate between the Board of Inland Revenue and various local authorities in regard to the manner in which grants from the Unemployment Grants Committee ought to be dealt with for the purposes of computing the liability to income tax of the authorities which had received them, and the determination of the amount of the deductions to be allowed to the corporation in D respect of the wear and tear of its plant was left in suspense. In October, 1926, the Special Commissioners heard an appeal by another local authority in which one of the questions at issue was whether the deduction to be allowed in respect of the diminished value of the permanent way of the authority's tramways by reason of wear and tear during the year under review ought to be based on the full value of the track or on the net cost to the authority of the relaying of the track after the deduction of the amount E of a grant received from the Unemployment Grants Committee towards the cost of the work. The commissioners who heard that appeal decided that they must fix the allowance under r. 6 on the value of the plant in question, irrespective of the fact that the cost of the plant was in part defrayed by some other person than the owner. In giving this decision they observed that the question of the actual cost to the appellant authority would become material in course of time when sub-r. (6) of the rule was F applied.

9. The principle of this decision was followed in settling the deductions allowed for wear and tear of the corporation's tramways tracks. A deduction at the rate of £4,563, or one-twelfth of the total cost of £54,752, was allowed for each of the years from 1921–22 to 1929–30 inclusive, in respect of the new track laid in 1920, and a deduction at the rate of £22,617, or one-twelfth of the total cost of £271,399 for each of the years from 1922–23 G to 1930–31 inclusive, in respect of the tracks renewed in 1921–22. These deductions amounted in the aggregate to £41,067 up to April 5, 1930, in respect of the new track laid in 1920, and to £203,553 up to April 5, 1931, in respect of the tracks renewed in 1921–22. The corporation, in making its returns for the purposes of assessment, claimed that similar deductions of £4,563, and £22,617 respectively should be allowed for each of the years 1930–31 and 1931–32. H.M. inspector of taxes, while admitting the claim H for a deduction of £22,617 for the year 1930–31 in respect of the tracks renewed in 1921–22 took the view that, in arriving at the actual cost of the tracks to the corporation, the amounts contributed by the Dunlop Rubber Co., Ltd., and the Unemployment Grants Committee respectively should be deducted from the total sums expended on the tracks; that the actual cost to the corporation of the new track laid in 1920 was £43,946 only, and the actual cost to the corporation of the tracks renewed in 1921–22 was I £225,161 only, and that consequently under sub-r. (6) of r. 6 of the deduction for wear and tear of the new track laid in 1920, should be restricted to the difference between £43,946 and £41,067, or £2,879 for the year 1930–31, and no allowance for wear and tear of that track should be made for the year 1931–32, and the deduction for wear and tear of the tracks renewed in 1921–22 should be restricted, for the year 1931–32, to the difference between £225,161 and £203,553 or £21,608. The Additional Commissioners of Income Tax, in making the assessments under appeal, restricted the deductions in accordance with the view taken by H.M. inspector of taxes, and disallowed the corporation's claims to the extent of £1,684 for 1930–31 and £5,572 for the year 1931–32.

10. In the corporation's accounts of its tramways department for the year ending March 31, 1921, the expenditure on permanent way during the year was entered in the capital account as £43,945 11s. 4d., and no mention was made of the sum of £10,806 received from the Dunlop Rubber Co., Ltd. In the accounts for the year ending March 31, 1922, the contributions from the Unemployment Grants Committee were credited to a separate renewals fund account, and the total expenditure of £271,399 on renewals of tracks was included in a sum debited to this account under the head permanent way reconstruction works. The renewals fund account showed a debit balance of £211,952 which was carried to the balance sheet.

11. Neither party sought to draw any distinction in principle between the payment received from the Dunlop Rubber Co., Ltd., and the grants received from the Unemployment Grants Committee.

12. It was contended on behalf of the corporation:

(a) That the actual cost to the corporation of the new track laid in 1920 was the total amount of £54,752 expended thereon.

(b) That the actual cost to the corporation of the tracks renewed in the year 1921–22 was the total amount of £271,399 expended thereon.

(c) That the whole of the amounts expended by the corporation in laying and renewing the tracks were moneys belonging to the corporation, and it was immaterial whether they were ultimately obtained by the corporation from contributions by other bodies, from loans, from rates, or from any other source.

(d) That the deductions allowed for wear and tear of the tracks in question did not amount in the aggregate to the actual cost thereof to the corporation.

(e) That the corporation was entitled to a deduction of £4,563 for each of the years of assessment in respect of the new track laid in 1920, and to a deduction of £22,617 for the year ending April 5, 1932, in respect of the tracks renewed in 1921–22 as claimed in its return.

13. It was contended on behalf of the Crown:

(a) That the sums received from the Dunlop Rubber Co., Ltd. and the Unemployment Grants Committee though passing through the hands of the corporation, were not at its free disposal, but were contributions by other bodies earmarked to the construction of the tracks on which they were required to be expended.

(b) That for the purpose of fixing the limitation of the amount of the deduction under r. 6 (6) regard was to be had not to the actual cost of the construction or renewal respectively of the tracks, but to the actual cost to the corporation of such construction or renewal.

(c) That in arriving at the amount of the actual cost to the corporation of such construction and (or) renewal the amount contributed by the Dunlop Rubber Co., Ltd. and the Unemployment Grants Committee towards the cost of such construction and (or) renewal fell to be taken into account and deducted from the said sums of £54,752 and £271,399 respectively.

(d) That the deductions allowed in the assessments when added to the deductions allowed for previous years, amounted in the aggregate to the actual cost of the tracks to the corporation.

(e) That the deductions had rightly been restricted to the amounts allowed in the assessments.

14. The commissioners who heard the appeals held that the actual cost of the tracks to the corporation was the net cost after deducting from the total amount expended on the construction of the tracks that part of the expenditure which was paid by the Unemployment Grants Committee and by the Dunlop Rubber Co., Ltd. They accordingly adopted the view that the deductions allowed amounted in the aggregate to the actual cost of the tracks to the corporation, and they rejected the appeal.

15. The corporation immediately after the determination of the appeal declared to the commissioners its dissatisfaction therewith as being erroneous in point of law, and in due course required them to state a case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149.

The Court of Appeal held, reversing the decision of FINLAY, J. (the MASTER OF THE

ROLLS dissenting), that the actual cost to the corporation was the amounts paid for the work less the sums received from the company and committee. The Birmingham Corporation appealed.

A. M. Latter, K.C., *Wilfrid Greene, K.C.*, and *Blanco White* for the appellants.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *R. P. Hills* for the respondent.

The House took time for consideration.

March 8. **LORD ATKIN.**—The question in this case arises on the construction of a few words in one of the rules relating to the computation of income tax under Sched. D. It has evoked so far an equal division of judicial opinion, and no one therefore would be inclined to express his opinion as not admitting a doubt; but I have come to a conclusion which leads me to invite your Lordships to allow the appeal. The facts can be shortly stated. In 1920, the Birmingham Corporation laid a new tramway track between Salford Bridge, Erdington, and the works of the Dunlop Rubber Co., Ltd. They laid the track by direct employment of labour, and it cost for labour and materials £54,732. By agreement in writing between the Dunlop Company and the corporation dated April 19, 1920, the corporation agreed to construct the tramway, and the company agreed that if the corporation had completed the tramway and commenced a reasonable service on or before June 1, 1920, the company would pay the corporation £10,000, and a further sum of £50 a day for each day saved before June 1. £5,000 was paid on March 30, while the work was in progress, the balance, including £806 further dispatch money, was paid after the work was completed. There was no stipulation as to any express use to which the £10,000 was to be put, and so far as I can see the corporation were free to use it as they pleased. In fact, as was natural, they treated it as a receipt of the tramway undertaking, and their amount of expenditure on permanent way in the year 1920 shows a sum of £43,945 as being the total sum expended, being the actual sum less the payment made by the Dunlop Co.

In 1921 the corporation embarked on the reconstruction of certain tramway tracks, upon which they expended £271,399. In December, 1920, the Unemployment Grants Committee had intimated that the government had decided to provide a grant of £3,000,000 to assist local authorities to carry out works at which unemployed men could be engaged. The corporation applied for a grant in respect of the work on the tramway tracks just mentioned. The work began on Feb. 8, 1921; the application was made on Feb. 10. On Feb. 21, 1921, the Unemployment Grants Committee intimated that they were prepared to make a grant of £30,000 on certain conditions mentioned. From time to time further grants were applied for and were acceded to. Applications for payment of the promised grant were made on the appropriate forms, the substance of the matter being that the corporation certified that the stipulated number of unemployed men had been employed and that wages had been paid up to or in excess of the amount of the promised grant. Payments were made by the committee on these applications in respect of these tramway tracks to the amount of £46,238, thus reducing the amount actually borne by the corporation to £225,161.

The question that arises on these figures is as to the amount which the corporation is entitled to claim as an allowance for wear and tear in respect of these tramway tracks under r. 6 of the rules of Cases I and II of Sched. D of the Income Tax Act, 1918. I will not read the rules, but will premise that it is common ground that the corporation were entitled to an allowance for these tracks on the footing that they were new tracks. The allowance is claimed in computing the profits of the corporation in respect of their tramway undertaking.

In pursuance of r. 6 (1) an allowance has been made to the corporation year by year in accordance with a scheme adopted by the Board of Revenue in 1922 by agreement with representatives of the various local authorities possessing tramway undertakings. By this scheme allowances were granted "on the basis of the sum actually expended and of the agreed life" with a proviso that the allowances were to continue until the "full cost" had been allowed. The latter proviso was no doubt intended to give effect to sub-r. (6) of r. 6. It is not contended that this agreement can alter the true meaning of the rules: but it serves to illustrate the possible use of words the true construction

A of which has to be sought in the section. The life of the tramways under the agreement was computed at twelve years and each year the corporation received an allowance of £4,563 or one-twelfth of £54,732 in the case of the first tramway, and of £22,617, one-twelfth of £271,399, in the case of the second tramway. Apparently a question had arisen in 1926 before the commissioners as to the amount upon which an allowance should be made in the case of another local authority which had also received a grant. B The commissioners then decided that the grant must be based upon the total expenditure, leaving the question as to the limit of the aggregate to be determined when that question arose under sub-r. (6).

In the present case it arose in the case of the first tramway for the year 1930–31; in the case of the second tramway for the year 1931–32. The Inspector of Taxes claimed that "the actual cost to the corporation" must be measured by deducting C from the total expenditure in the first case the amount paid to the corporation by the Dunlop Co., in the second case the amount of the government grant. Added to the previous allowances the full allowances would make up for the years in question an aggregate in excess of the "actual cost" so ascertained. The question now is whether this meaning of "actual cost to the person" is correct. In my opinion the words "the actual cost to the person by whom the trade is carried on" used in this context D have no relation to the source from which that person has received the money which he has expended on the plant. One is assisted in the construction by the history of the legislation. In 1876 for the first time statutory authority was given for making an allowance to persons carrying on a trade in respect of diminution in value of their plant by reason of wear and tear. It was a deduction from profits which business men ordinarily make with a view of making good an essential capital asset which sooner E or later will have to be replaced. As it was given, in terms corresponding to sub-rr. (1) and (2), it had obviously nothing to do with the question how or with what funds the business man acquired the plant. In any case he would make a deduction from profits; and the deduction would be based on the value of the plant and its expected life. In 1906, however, there arose a case before WALTON, J., of *John Hall Junior & Co.* v. *Rickman* (1) in which a shipowner claimed depreciation allowance in respect of a ship F which being used as a hulk was held to be plant. The allowances had continued so long in respect of this ship that if granted for the tax year in question they would have exceeded 100 per cent. of the cost of the ship to the shipowner. The Inland Revenue authorities objected, but the judge, though thinking the objection reasonable, could find in the Income Tax Act no restriction on the aggregate of the allowances to be granted. He pointed out, as is conceded, that if the plant were sold the allowances G would begin again on the value of the plant to the new owner. After this decision, and undoubtedly in consequence of it, there was passed in 1907 a section in the terms of the present sub-r. (6). I entirely agree with the submission of the Attorney-General that you must not restrict the plain words of a remedial section so as to apply them only to the mischief which occasioned the enactment. But you may look at the mischief as one of the elements assisting you to construe the words of the remedy. You may also H look at the use of the same words in relation to the same subject-matter in the same enactment.

The word "actual" itself gives me no assistance. It serves, as Mr. Latter suggested, to give emphasis to the word following. It is to be the cost, the whole cost, and nothing but the cost. It removes any question of estimate, and in cases where the plant has been purchased for a lump sum, together with factory premises, it may give rise to a I difficult question of fact. The word "actual" is used in the same emphatic sense in r. 3 in respect of actual wages, actual expenditure, and actual loss. I do not read actual cost to mean anything more than cost accurately ascertained.

But it is said that the words "to the person" in the phrase "actual cost to the person" plainly indicate that the section is intending to confine the relief to an aggregate equal to the sum of money which the person has defrayed out of his own resources, the cost of which burden has ultimately fallen upon him. I confess I do not think that this is the natural meaning of the words. What a man pays for construction or for the purchase of a work seems to me to be the cost to him; and that whether someone has given him the money to construct or purchase for himself; or before the event has promised to give him the money after he has paid for the work; or after the event has promised or given the money which recoups him what he has spent. In the present case the corporation paid the whole of the cost of the tramways out of their funds unless the first half of the Dunlop contribution was so applied; as to which there is no evidence; nor is it material. I myself should not have thought the answer of Birmingham to the question put by ROMER, L.J., would have been what he suggests. On the hypothesis that the Dunlop Co. had recouped the corporation the whole of the cost of the first tramway I should have thought the answer to "what did it cost you?" or "what did it actually cost you?" would have been "it actually cost us £54,732, but none of the burden of that cost will fall on the corporation for the Dunlop Co. have paid us the full amount." I think the same result is arrived at by saying actual cost to the person is the same thing as the amount expended by the person. One is assisted in this construction by consideration of the words at the end of sub-s. (*b*) which, as pointed out by Mr. Blanco White, include in the actual cost any expenditure in the nature of capital expenditure. Here there are no qualifying words, and I think the phrase guides one to the conclusion that expenditure on capital improvements by the person regardless of source will be the same as actual cost to the person also regardless of source. No doubt you must give the whole phrase its full meaning. But I find the reference "to the person" fully satisfied when I remember that as pointed out by WALTON, J., in the case that gave rise to the new limitation the person claiming a reduction may vary from time to time, and that with each successive purchaser you are to begin again. The words also serve to make it clear that the cost is the cost to the person carrying on the business and will include a profit paid by him to a contractor if one has been employed.

I do not think that it is necessary for the purpose of this case to discuss the question which may arise where the person carrying on the business has acquired the plant by gift, a question that will arise probably if at all in respect of a gift under a will. Various problems arise involving amongst others the possible contention that where there has been no cost there is no measure, no yardstick, by which to restrict at all the allowance granted by sub-r. (1). I prefer, therefore, to say nothing on this topic. I find myself in the result in agreement with LORD HANWORTH, M.R., and FINLAY, J., and I move your Lordships that this appeal be allowed and the order of FINLAY, J., restored, and that the appellants have the costs here and in the Court of Appeal.

LORD TOMLIN.—I agree in all respects with the opinion which has just been delivered, and I have nothing to add.

LORD RUSSELL.—I also agree.

LORD MACMILLAN.—I also agree.

LORD WRIGHT.—I agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for *J. H. C. Wiltshire*, Town Clerk, Birmingham; *Solicitor of Inland Revenue.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*

LONDON CORPORATION *v.* LYONS, SON & CO., LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Romer and Maugham, L.JJ.), May 30, 31, June 3, July 17, 1935]

[Reported [1936] Ch. 78; 105 L.J.Ch. 1; 153 L.T. 344; 51 T.L.R. 563; 79 Sol. Jo. 558]

Market—Auctioneer—Right to sell customer's goods in market—Right to sell outside market if entry refused.

There is a duty on the grantee of a market franchise to provide accommodation for members of the public who desire access to the market for the legitimate purpose of selling within it, and that is so whether the member of the public is a person wishing to enter the market for the purpose of taking thither and offering for sale and selling his own goods or is an auctioneer who seeks to sell by auction goods entrusted to him by other persons for such sale. Should the grantee fail in his duty, any member of the public who, by reason of such failure, is prevented from selling his goods in the market is entitled to sell them outside the market in circumstances which would otherwise constitute a disturbance of the grantee's franchise rights in the market and give the grantee a right of action against him. The owner of goods who desires to sell them in a market is entitled to sell them in any way that may prove to be the most effective and convenient way, by auction as well as by private treaty. An auctioneer has a special property in the goods entrusted to him for sale, and in respect of that property he has as good a right to use the market as is possessed by the owner of the goods.

Per MAUGHAM, L.J.: To establish the fact that a rival market is being levied it is necessary to show that the defendant is providing facilities for a concourse of buyers and sellers of goods ordinarily dealt with in the plaintiff's market so that there is a probability of the plaintiff being deprived of tolls, stallages, or other profits or emoluments appertaining to the market. There must be an element of rivalry in the case. The mere fact that the defendants cause to assemble a certain concourse of buyers at certain hours does not itself create a rival market.

Notes. As to the rights and duties of owners of markets and the rights of the public, see 22 HALSBURY'S LAWS (2nd Edn.) 46, 47, and for cases, see 33 DIGEST 528 et seq.

Cases referred to:

(1) *Great Eastern Rail. Co.* v. *Goldsmid* (1884), 9 App. Cas. 927; 54 L.J.Ch. 162; 52 L.T. 270; 49 J.P. 260; 33 W.R. 81, H.L.; 33 Digest 525, *18*.

(2) *Re Islington Market Bill* (1835), 3 Cl. & Fin. 513; 12 M. & W. 20, n.; 6 E.R. 1530; 33 Digest 553, *352*.

(3) *Prince* v. *Lewis* (1826), 5 B. & C. 363; 8 Dow. & Ry. K.B. 121; 4 Dow. & Ry. M.C. 19; 4 L.J.O.S.K.B. 188; 108 E.R. 135; 33 Digest 548, *302*.

(4) *Mosley* v. *Walker* (1827), 7 B. & C. 40; 9 Dow. & Ry. K.B. 863; 5 L.J.O.S.K.B. 358; 108 E.R. 640; 33 Digest 532, *91*.

(5) *Dorchester Corpn.* v. *Ensor* (1869), L.R. 4 Exch. 335; 39 L.J.Ex. 11; 21 L.T. 145; 34 J.P. 167; 33 Digest 532, *94*.

(6) *Yard* v. *Ford* (1670), 2 Saund. 172; 1 Mod. Rep. 69; 1 Lev. 296; 2 Keb. 689, 706; 1 Vent. 98; T.Raym. 195; 85 E.R. 922; 33 Digest 551, *330*.

(7) *Morpeth Corpn.* v. *Northumberland Farmers Auction Mart Co. & Donkin, Ltd.*, [1921] 2 Ch. 154; 90 L.J.Ch. 420; 125 L.T. 659; 37 T.L.R. 225; 21 L.G.R. 321; 33 Digest 549, *316*.

(8) *Elwes* v. *Payne* (1879), 12 Ch.D. 468; 48 L.J.Ch. 831; 41 L.T. 118; 28 W.R. 234, C.A.; 33 Digest 558, *406*.

(9) *Williams* v. *Millington* (1788), 1 Hy. Bl. 81; 126 E.R. 49; 3 Digest 35, *255*.

(10) *Consolidated Co.* v. *Curtis & Son.*, [1892] 1 Q.B. 495; 61 L.J.Q.B. 325; 56 J.P. 565; 40 W.R. 426; 8 T.L.R. 403; 36 Sol. Jo. 328; 3 Digest 47, *325*.

(11) *McManus* v. *Fortescue*, [1907] 2 K.B. 1; 76 L.J.K.B. 393; 96 L.T. 444; 23 T.L.R. 292, C.A.; 3 Digest 5, *20*.

A (12) *Nicholls* v. *Tavistock Urban District Council*, [1923] 2 Ch. 18; 92 L.J.Ch. 233; 128 L.T. 565; 87 J.P. 98; 67 Sol. Jo. 298; 21 L.G.R. 194; 33 Digest 529, *60*.

(13) *Wilcox* v. *Steel*, [1904] 1 Ch. 212; 73 L.J.Ch. 217; 89 L.T. 640; 68 J.P. 146; 20 T.L.R. 78; 2 L.G.R. 105, C.A.; 33 Digest 550, *322*.

(14) *Downshire* v. *O'Brien* (1887), 19 L.R.Ir. 380; 33 Digest 523, n. li.

(15) *A.-G.* v. *Horner* (1885), 11 App. Cas. 66; 55 L.J.Q.B. 193; 54 L.T. 281; 50 J.P. B 564; 34 W.R. 641; 2 T.L.R. 202, H.L.; 33 Digest 532, *98*.

(16) *Austin* v. *Whittred* (1746), Willes, 623; 125 E.R. 1353; 33 Digest 528, *57*.

(17) *Townend* v. *Woodruff* (1850), 5 Exch. 506; 19 L.J.Ex. 315; 155 E.R. 221; 33 Digest 545, *258*.

(18) *Duke of Newcastle* v. *Worksop Urban Council*, [1902] 2 Ch. 145; 71 L.J.Ch. 487; 86 L.T. 405; 18 T.L.R. 472; 33 Digest 540, *176*.

C (19) *Brecon Corpn.* v. *Edwards* (1862), 1 H. & C. 51; 31 L.J.Ex. 368; 6 L.T. 293; 26 J.P. 614; 8 Jur. N.S. 461; 158 E.R. 797; 33 Digest 348, *305*.

Action for injunction to restrain the defendants from "disturbing" the plaintiffs' market at Spitalfields, in the city of London, by holding auction sales on their premises or from describing their premises as "within" the market. The defendants counterclaimed for a declaration that they were entitled to sell by auction within the market, D of which, they said, their premises formed a part.

LUXMOORE, J., held that the defendants were entitled, in common with all other persons, firms, and companies desiring to sell fruit, vegetables, and other like commodities within Spitalfields market, to conduct sales by auction within the market on payment of the customary tolls and subject to such byelaws as might from time to time be made by the plaintiff corporation for the conduct of the market, and that the premises E occupied by the defendants in Steward-street were not within the market.

The plaintiff corporation appealed against the first of these findings.

Wilfrid Greene, K.C., *Gavin Simonds, K.C.*, and *Wilfrid M. Hunt* for the plaintiffs.

Linton Thorpe, K.C., and *H. Heathcote Williams* for the defendants.

Cur. adv. vult.

F July 17. The following judgments were read.

LORD HANWORTH, M.R.—This action was brought by the plaintiffs to secure protection to them in the maintenance of their rights and privileges as owners of Spitalfields market. The charge against the defendants is that they have held at Nos. 36 and 37, Steward-street, a street on the west side of the market, auctions of fruit, vegetables G and produce similar to those sold in the market and have thereby (a) levied a rival market, or (b) caused a disturbance of the rights and privileges of the plaintiffs in the maintenance of their market.

The defendant company admits that it has held sales by auction of fruit, vegetables, and other produce similar to those sold in the market at 36 and 37, Steward-street, and that it intends to continue this business. It contends that the premises on which their H auctions are conducted are within Spitalfields market, and thus that it is entitled to do what others do, or have done, in the market; or, alternatively, if the said premises are not within the market, it is justified in its actions, because the corporation has refused to allow it the necessary facilities for selling by auction within the market. The defendant company deny that they have levied a rival market, or have caused a disturbance of the rights and privileges of the plaintiffs. The company counterclaims for a declara- I tion that it is entitled to sell its goods by auction within the market upon payment of the reasonable and customary tolls.

The learned judge upon the material before him held that the part of 36 and 37, Steward-street which is occupied and used by the defendant company is not within the Spitalfields market, and from this conclusion there is no appeal. He also made a declaration that the defendant company are entitled in common with all other persons, firms, and companies desiring to sell fruit, vegetables, and the like, within Spitalfields market, to conduct sales by auction within the market upon payment of the customary tolls and subject to any such byelaws as may from time to time be made by the plaintiffs.

There was little dispute upon the facts of the case, and the learned judge recalled the principle that the question whether a rival market has been levied, or not, is necessarily a question of fact, and he stated his several conclusions that are relevant to the issues raised. It will, therefore, be useful to re-state the findings of the learned judge before considering the points to be decided upon the appeal.

The history of the market, for practical purposes, may be said to begin with the grant of the right to hold the market now known as Spitalfields market by King Charles II by letters patent dated July 29, 1682, to Balch and his heirs and assigns. That grant has been established as valid by the decision of the House of Lords in *Great Eastern Rail. Co.* v. *Goldsmid* (1). The rights thus granted are now vested in the plaintiffs. The market is now held on all days of the week upon an area which does not include 36 and 37, Steward-street. The main market, which the judge interprets to mean the original market, and the western extension of it, comprises sixty-eight shops or warehouses let to fifty different tenants and 188 stands let to 114 different tenants. He finds that "apart from the stands there is no space in the main market, or in the streets or buildings surrounding it, upon which members of the public desiring to sell fruit, vegetables or other commodities can expose their wares for sale." He states that the evidence satisfied him that auction sales both in the original market, and after the western extension was completed, in the main market, were held at least from 1897 onwards till the war of 1914–18, and were re-started again when the corporation had acquired control of the market, that is, on June 7, 1920. The earlier auction sales took place during the period when Robert Horner was conducting the market in that part of the original market which was occupied by stands, and were held once or twice a week between the month of September and the following April. They were held in spaces allotted for the purpose by Horner, and at times when the business in the market was slack, generally at about two o'clock in the afternoon.

Then comes an important finding of fact:

> "There was no difficulty in obtaining facilities for holding an auction, and no inconvenience was apparently caused to any one by the holding of these auctions. After the corporation took over the conduct of the market the same practice was followed. A trader desirous of holding an auction advertised the fact, and on the morning on which the auction was to be held the superintendent of the market allotted a space for it. Shortly before the auction took place a bell was rung by an official of the corporation to warn the persons in the market that the auction was about to take place. I am satisfied that no inconvenience was caused by any of these auctions."

The learned judge expressly says that he preferred the evidence given by the witnesses who were called by the defendant company on the question whether the auctions had become objectionable. After 1924 the auction sales were held in several different premises belonging to the corporation outside the main market, and caused no inconvenience to any one engaged in selling their goods in the original or in the main market. The judge states that the last sale by auction before the opening of the London Fruit Exchange took place on July 30, 1929. After that date the corporation has declined to allow any facilities for sales by auction to any person, company, or firm, other than those constituting, or interested in, the London Fruit Exchange Brokers' Association, Ltd.

The judge finds upon the evidence that there would be no difficulty in holding sales by auction in the market in exactly the same way as such sales were held before the London Fruit Exchange was built; and also that the corporation could properly assent to such sales taking place, so far as the defendant company is concerned, on the premises 36 and 37, Steward-street. He says:

> "I am satisfied that the refusal of the corporation to allow the defendant company to sell by auction is not due to any present want of accommodation or to any real apprehension of inconvenience within the market, but to a desire to give effect to the original understanding that the lessees of the London Fruit Exchange should have the sole right of selling by auction within the market."

He rejects evidence as to want of accommodation and the likelihood of inconvenience.

These findings of fact appear to be of primary importance. They were reached after a trial which was heard on ten days in March and April, 1934, and the learned judge gave his judgment after deliberation on Nov. 30, 1934.

They appear to me to connote this, namely, that: (a) The circumstances in which the auctions conducted by the defendant company were held must be examined in order to determine whether their purpose was to assert a right independent of and as a challenge to the plaintiffs' rights. (b) The holding of an auction on premises outside the main market ought not, under the circumstances of the case, per se to be treated as the levying of a rival market. (c) The assent of the corporation could have been given to the auction sales conducted by the defendant company on their premises at 36 and 37, Steward-street. (d) Such consent was withheld, not because of the likelihood of any inconvenience being caused, but for an ulterior motive, namely, in order to give effect to the original understanding that the lessees of the London Fruit Exchange should be protected in an exclusive right of selling by auction within the market. That understanding was expressed in the letter, dated June 20, 1930, addressed to the secretary of the London Fruit Exchange Brokers' Association as follows:

> "The corporation will be vigilant to see that their market rights as owners of Spitalfields market or otherwise are not infringed, and it is obvious that the special position of your association as lessees under the proposed lease will then be substantially safeguarded."

(e) Consequently, the action of the defendant company in selling by auction at 36 and 37, Steward-street was not to be attributed to setting up a rival market against, or as a challenge, to the plaintiffs' rights of market. The defendant company are ready and willing to pay the reasonable customary market tolls. It is admitted that the company tendered certain tolls which were refused by the plaintiffs. The defendant company have paid into court a sum to represent the tolls due from them. (f) Following the *Islington Market Bill Case* (2) (3 Cl. & F. at pp. 518 and 519), a good defence to an action for setting up a rival market, or for disturbance of a market, may be founded upon a plea of want of accommodation. (g) The action of the defendant company in selling by auction where they do was to be attributed to the refusal of the plaintiffs to afford them accommodation within the market, as they could do if so minded. That accommodation would enable the defendant company to carry on auction sales in the manner usual down to July 30, 1929, but now refused; not for any reason directly arising from the want of space in the market, but for the reasons, and with the purpose, already referred to. (h) This conduct of the plaintiffs was not adopted by the plaintiffs in the exercise of their consideration for the public attending the market, whether as vendors or purchasers.

In my judgment, there was abundant evidence upon which the judge could come to those conclusions of fact, and the inferences which he drew from them were also justified. It seems, therefore, that the question of law which remains for decision is whether the defendant company, when it was refused facilities for holding its auctions within the market, was justified in taking the course it did in holding auctions upon premises outside the market, or whether this conduct must be taken to amount to a disturbance of the market rights of the plaintiffs.

Prince v. *Lewis* (3) was decided in 1826. It was held that the lord of the market could not maintain an action against an individual for selling vegetables, in the neighbourhood of his market, where the space reserved for the market had been diminished by being appropriated to purposes other than those specified in the grant, and the remaining part of the market had become insufficient for the accommodation of the public. As BAYLEY, J., said (5 B. & C. at p. 371):

> "Whenever there is the franchise of a market, the lord has certain rights; but he has also certain duties to perform towards the public in respect of those rights. One of those duties toward the public is that the lord shall, as far as the limits of the market will allow of, take care that there is sufficient room for all the purposes of the market."

In *Mosley* v. *Walker* (4), where a man had a stall in the market which he might have occupied, but sold goods in a house adjoining the market, it was held, from the state of the market place, that the defendant had a reasonable cause for selling in the private house and not in the market.

> "It is always a question of fact whether there has been in the particular instance such an exclusion or not, and such an appropriation of a particular place"

(see Bayley, J., 7 B. & C. at p. 54). So far then as it is a question of fact, the learned judge has in his findings or conclusions (d), (e), and (g) held in favour of the defendant company.

Price v. *Lewis* (3) and *Mosley* v. *Walker* (4) were cited with approval by the learned judges in giving their answer to questions propounded to them by the House of Lords in the *Islington Market Case* (2), Littledale, J., on behalf of the judges' unanimous opinion, stated the law as follows (3 Cl. & F. at p. 518):

> "An obligation is cast upon (the grantee) by his acceptance of the grant to provide convenient accommodation for all who are ready to buy and sell in the public market. If he does not do so, or if after having once appropriated a particular site for the use of the public to a market place, he afterwards employs or permits it, or part of it, to be employed for other purposes, without providing as convenient a place for the public to buy and sell in elsewhere within the limits of his grant, the consequence would be first that there would be a good defence to an action brought by the grantee of the franchise against any persons for selling out of the market to the prejudice of his right, provided such person had been prevented from selling in the market by the want of convenient room."

The principle contained in these passages cited is clear. There is a duty on the grantee of a market franchise towards members of the public who desire access to the market for the legitimate purpose of selling within it. The grantee must not neglect this duty and attempt to justify his neglect by saying there is no sufficient space within the market for the applicant to have facilities for selling within it, and upon this point the grantee cannot rely upon the allocation of some of the space to other purposes than those which are appropriate to the proper user of the franchise. The grantee cannot charge a defendant with setting up a rival market or disturbing his market when the action of the defendant is due to the grantee's arbitrary conduct without due consideration of his duty to a member of the public.

Some passages in the speech of Lord Blackburn in *Great Eastern Railway* v. *Goldsmid* (1) were cited by counsel for the plaintiffs in support of his argument, in which, no doubt, that learned lord emphasised the principle that a person who holds the franchise of a market can maintain an action against one who sets up a rival market, or disturbs his market, so as to injure him, and whether it did so or not was a matter of evidence: "The question whether it did actually injure him or not being a matter of fact" (9 App. Cas. at p. 958).

It is true that it is not necessary for the owner of the franchise, who seeks protection, to prove actual damage: see *Dorchester Corpn.* v. *Ensor* (5) (L.R. 4 Exch. at p. 343); *Yard* v. *Ford* (6) (2 Saund. at p. 174); *Morpeth Corpn.* v. *Northumberland Farmers Auction Mart Co. and Donkin, Ltd.* (7). Lord Blackburn also points out (ibid.) that in an action by the lord to obtain protection for his market, an averment that the plaintiff has provided sufficient stalls in the market is not necessary; or that he had kept the market open in such a way that persons might enter into it (see 9 App. Cas. at p. 960); and Lord Selborne said that mere insufficiency of accommodation, although it might affect the quantum of damages,

> "yet that cannot possibly be an answer justifying an infringement of the market right."

But upon the point that I am dealing with, whether a defendant who has been arbitrarily refused facilities in the market can justify selling outside it, Lord Blackburn says (9 App. Cas. at p. 961):

> "If you read carefully what Littledale, J., giving the opinion of himself and Parke, B., says, it is impossible not to perceive that they did not consider that in *Prince* v. *Lewis* (3), the fact that the plaintiff did not maintain the market in good and sufficient order was a bar to an action such as this for disturbing the market, or even to an action against an individual for disturbance; but only that if it was the fact that it did prevent a person from using the market, that might disprove the allegation that he had disturbed the market by selling as he did, inasmuch as he could not have sold in the market but was prevented from doing so. That is what they pointedly say, and that I think no one would quarrel with."

But then it is argued that, although a trader may claim facilities for selling his goods within a market, it is quite otherwise when the claim is made by an auctioneer to carry on the business of auctioneering within the market such goods as all and sundry may place in his hands to sell by auction, of which he is not the grower or the owner. This objection needs consideration. It is not concluded by the previous practice that obtained down to July, 1930. It must be recognised that business is now carried on in a market in ways manifoldly different from the days of Edward III when the market originated or in the days of Charles II when the grant was made to Balch. The quantum of produce to be dealt with has reached proportions unknown in simpler days.

Sir George Jessel, Master of the Rolls, in *Elwes* v. *Payne* (8) (12 Ch. D. at p. 473), states his opinion in clear terms that selling cattle by auction amounts in certain circumstances to establishing a rival market.

> "I do not think that any possible definition of the word 'market' would exclude what the defendants are doing. They are inviting the public to send their cattle, their horses, and their sheep, and other animals for sale to this place which they have built as a place of sale for cattle and horses. They invite people to come in and buy the cattle. It makes no difference, in my opinion, whether there is a sole seller, or a sole stall-keeper. In fact, in many ancient markets you could only sell before the clerk of the market or other officer of that kind. It was necessary to do that in order to make a valid sale at all, and therefore the mere fact that all the sales are to take place before one individual does not appear to me to make any difference."

These observations of the learned Master of the Rolls arose from considering the activities of an auctioneer from a point of view different from that which is under discussion; but they clearly indicate that in his view auctioneering was what may be called a market operation, and not a method of dealing in goods which is alien to the carrying on of a market.

It is an insufficient statement of the position and duties of an auctioneer to say that he is a mere seller of goods not his own, for other owners of them. He has a possession coupled with an interest in goods which he is employed to sell, not a bare custody like a servant or shopman: see per Lord Loughborough in *Williams* v. *Millington* (9) (1 Hy. Bl. at p. 84). He has a special property with a lien for the charges of the sale, the commission, and the auction duty which he is bound to pay. He must receive payment. If he gives credit to the purchaser it is at his own risk. He may maintain an action for goods sold and delivered against a buyer, and he can maintain trespass or trover against persons wrongfully interfering with or converting the goods (ibid.), and see *Consolidated Co.* v. *Curtis & Son* (10). He has power also to sign a sufficient memorandum under the Sale of Goods Act, 1893, s. 4: see *McManus* v. *Fortescue* (11) ([1907] 2 K.B. at p. 4).

A consideration of these features and duties of an auctioneer's work leads me to the conclusion that he can claim rightly to be admitted to a market to exercise his calling as much as the growers and owners who enter it to sell their own goods to purchasers attending it.

In *Nicholls* v. *Tavistock Urban Council* (12), my brother Romer, sitting as a judge of first instance, held that a person who was by the common law entitled to access to a market for the purpose of selling his goods by auction without any restriction whatever being placed upon his user of it was not liable to have this right curtailed, even though the restriction imposed by the byelaw was only to require the consent of a superintendent officer to the manner in which, and persons by whom, the auction should be conducted. One of the plaintiffs in that action was an auctioneer who was to sell the cattle of, and for, the other plaintiff. Romer, J., held the byelaw invalid as repugnant to the laws of that part of the land in which the market was situated, and he decided that the defendant council were not entitled to prevent the one plaintiff, who was the farmer and owner, or the other plaintiff, the auctioneer, from selling their cattle in the market by public auction, or to impose the limitations intended by the byelaw. In my judgment, this decision was right. It goes far to establish that an auctioneer as such has the right of access to and user of a market, and from this case and the other considerations that I have also advanced, I think that no objection or exception is to be taken to the defendants who are and intend to act as auctioneers, and have been excluded from the market, not from direct, but from ulterior motives by the plaintiffs.

For these reasons I am of opinion that the judgment of Luxmoore, J., was right, and that the appeal should be dismissed with costs.

ROMER, L.J.—This appeal raises a question of market law that is one both of novelty and difficulty. It can, as I see it, be stated in the following way. Every member of the public has a right of access to Spitalfields market for the purpose of selling such goods as are commonly dealt with there. The market is not one limited by metes and bounds, and the plaintiffs as the owners of the market are under an obligation to provide accommodation for the public for that purpose. Should they fail to do so, any member of the public who, by reason of such failure, is prevented from selling his goods in the market is entitled to sell them outside the market in circumstances that would otherwise constitute a disturbance of the plaintiffs' franchise rights in the market and that, but for such failure, would give the plaintiffs a right of action against him. The plaintiffs' failure to provide adequate accommodation in the market would, in other words, be a good defence to any action instituted by them for such disturbance. All this is settled law: see *Prince* v. *Lewis* (3); *Mosley* v. *Walker* (4); and the *Islington Market Bill Case* (2).

At the time when these propositions of law were first established it is probable that the ordinary method of sale was by private treaty, and that sales by public auction were rare, even if they were not unknown. But the owner of goods who desires to sell them in a market must be entitled to sell them in any way that, having regard to the changing habits of the times, may prove to be the most effective and convenient way, and the propositions of law would seem to be as applicable to sales by auction as to sales by private treaty. I so held in *Nicholls* v. *Tavistock U.D.C.* (12), and I see no reason for altering the opinion that I expressed in that case.

The question to be determined on this appeal is, however, a somewhat different one. It is the question whether those propositions of law apply to a person who desires to sell, not his own goods, but goods of others entrusted to him for that purpose.

In the *Tavistock Case* (12) to which I have just referred, the right of an auctioneer to sell by auction in a market goods entrusted to him by others for sale in that manner was upheld by me. There were two plaintiffs in the action, one of them was a farmer and the other an auctioneer. The farmer sought to establish the right of having his cattle sold in the market by the auctioneer, and the auctioneer sought to establish his right to sell cattle by auction on behalf of his co-plaintiff or any other person who might think fit to employ him for that purpose. The owners of the market denied that either the farmer or the auctioneer had any such right, relying upon a byelaw made by their predecessor in title, which purported to prohibit sales by auction by any person whoever he might be without the consent therein mentioned. The defendants did not contend that in the absence of the byelaw sales by auction were illegal. The only question, therefore, that I had to decide was whether this byelaw was valid. The defendants do not appear to have suggested that in this respect the case of the auctioneer differed in any way from that of the farmer. Nor, indeed, was it material to do so. For the byelaw was indivisible, and if it was bad as regards the farmer it was bad altogether. But in the course of my judgment I appear to have said this:

"I have, therefore, to consider whether that byelaw is valid or invalid. If it be

> invalid, then, as I understand the law, the plaintiff and Mr. Callaway can attend at the cattle market and other parts of the market at which cattle may be sold and dispose of cattle by auction, except in those parts of the cattle market which may have been validly leased for the purposes of sales by auction to the auctioneer-lessees exclusively."

If this be right, and further reflection has not made me think that it is not, the defendants have a right of access to Spitalfields market for the purpose of selling by auction marketable goods entrusted to them for sale, and the plaintiffs are under an obligation to provide them with accommodation necessary to enable the sales to take place. As was said by Lord Loughborough in the case of *Williams* v. *Millington* (9) to which the Master of the Rolls has referred, an auctioneer has a special property in the goods entrusted to him for sale, and in respect of that property I see no reason why he should not have as good a right to use the market as is possessed by the owner of the goods. But the question still remains to be decided whether the refusal by the plaintiffs to provide such accommodation justifies the defendant company in conducting such sales outside the market.

The considerations relevant to the decision of this question are as follows. In the *Islington Market Case* (2), Littledale, J., in delivering the opinion of the judges, called in to advise the House of Lords on the second occasion, enumerated the consequences that ensue upon the failure of the owner of a franchise market to fulfil his duty of providing convenient accommodation for those entitled to use it. One consequence is that there would be a good defence to an action brought by the owner against any person for selling out of the market to the prejudice of his rights. A second consequence is that the breach of duty, if persisted in, might furnish a ground for a scire facias to repeal the patent by which the market was granted. Thirdly, it is possible that the breach of duty might render the owner liable to an indictment. But these, said the learned judge, are the only consequences of the breach of duty. It cannot operate in point of law as a ground for granting a new charter to another to hold a market within the common law distance. If the breach of duty does not enable the Crown to grant such a charter, a fortiori it will not enable a member of the public to act as though such a charter had been granted to him. It may be observed that the plaintiffs in this respect are also protected by the charter of Edward III, which has statutory effect. In these circumstances the question to be determined is whether the defendants in the present case can properly be said to be levying a rival market. As to this the plaintiffs place reliance upon certain authorities that must be considered.

In *Dorchester Corpn.* v. *Ensor* (5), the plaintiffs as owners of an ancient market complained that the defendant was creating a disturbance of the market by conducting sales by auction of marketable chattels in a field adjoining a market. In giving judgment Channell, B., said this:

> "Now the evidence showed that the defendant Ensor was an auctioneer, who at one time sold cattle by auction, under the authority of the corporation, at their market, but that latterly he had held, at another place close by, a fortnightly sale of cattle by auction, which appeared to have been regularly advertised. There can be no question that this is substantially another market, and that it differs very much from the case of a man selling his own goods out of the market, which may or may not be a wrongful disturbance, according to the circumstances. The cases, therefore, as to the right of persons in some boroughs, where there is an ancient market to sell marketable goods on their own premises and the like, do not, we think, apply; because what is complained of is, not that the defendants sell their own goods, but that they provide a means for others to sell their goods without bringing them to the market."

Much to the same effect are the observations made by Sir George Jessel, the Master of the Rolls, in *Elwes* v. *Payne* (8).

In neither of these cases, however, did the court have to determine whether the defendant could justify his acts on the ground that the owner of the market had failed in his duty of providing adequate accommodation. In both cases the question was whether the defendant's acts constituted a disturbance of the plaintiff's market, and the description of those acts as being, or being substantially, the levying of a rival market may well have been used for the purpose of emphasising how widely those acts differed from ordinary sales of marketable goods at a shop outside the market, sales which do not as a rule amount to a disturbance of the market. It may well be that in both cases the defendant was in fact behaving, or threatening to behave, as though he possessed a franchise of market, but I cannot regard the cases as authorities for the proposition that every auctioneer selling goods by auction is necessarily so behaving. In *Wilcox* v. *Steel* (13), the acts of the defendant were also described both by VAUGHAN WILLIAMS and ROMER, L.JJ., as the setting up of a rival market, but the defendant had done no more than sell by auction in a place adjoining the plaintiff's market a number of cobs, ponies and colts consigned to him by a Welsh breeder of such animals. He had, indeed, caused a disturbance of the plaintiff's market by acts that differed widely from an isolated sale in a shop—as was pointed out by ROMER, L.J.; but those acts bore little resemblance to the acts of a man who possesses a charter market, and, as I read the *Islington Market Case* (2), it is only acts of that character that cannot be justified by a breach of duty on the part of the market owner.

It may not always be easy to say in any particular case whether a person is committing acts of that character, but, in my judgment, the defendants in the present case are not doing so. They sell by auction fruit entrusted to them for that purpose by two persons only. They do not seek to attract to their auction rooms fruit sellers in general. There is no concourse of sellers in their auction rooms. The notices of their sales expressly state that buyers only will be admitted, or that goods are being offered to wholesale buyers only. "A market," said CHATTERTON, V.-C., in *Downshire* v. *O'Brien* (14) (19 L.R. Ir. at p. 390),

> "is, properly speaking, the franchise right of having a concourse of buyers and sellers to dispose of commodities in respect of which the franchise is given."

It is admitted that the defendants are willing to pay to the plaintiffs tolls in respect of the goods they sell, and I cannot think that what they are doing can truly be said to resemble the acts of an owner of a franchise market. This was the conclusion at which LUXMOORE, J., arrived, after hearing the evidence, and in my opinion his conclusion was right.

The appeal, in my judgment, fails and must be dismissed.

MAUGHAM, L.J.—By this appeal on behalf of the mayor and commonalty and citizens of the city of London, plaintiffs in the action, an injunction is sought perpetually to restrain the defendants, who are fruit brokers, from holding sales by auction of fruit, vegetables, or other like commodities in or upon their premises Nos. 36 and 37, Steward-street, in the city of London, and from establishing or carrying on any market for fruit or vegetables upon the said premises and from using, or permitting to be used, such premises or any other premises in such manner as to disturb or interfere with or prejudicially affect any of the rights or privileges of the plaintiffs in or in respect of the market known as Spitalfields market. This is the main subject of the appeal, but the plaintiffs also sought to have discharged a declaration made by the learned judge upon the counterclaim that the defendants, in common with all other persons, firms and companies desiring to sell fruit, vegetables, and other like commodities within Spitalfields market, are entitled to conduct sales by auction within the market upon payment of the customary tolls and subject to any such byelaws as may from time to time be made by the plaintiffs for the conduct of the market. The declaration was made without prejudice to the rights conferred by the plaintiffs on their lessees and on the respective tenants of stalls, warehouses, and other premises within the limits of the market. Having regard to the careful and accurate statement of the title and the facts by LUXMOORE, J., and to the summary of the facts by the MASTER OF THE ROLLS, which I have had the advantage of reading, it does not seem to me necessary to do more than state some of the basic facts on which the fate of the appeal must depend.

I will content myself with saying that the right to hold the market known as Spitalfields market was granted by King Charles II, by letters patent dated July 29, 1682, to one Balch, his heirs and assigns. The validity of the grant was finally established by a decision of the House of Lords in *Great Eastern Rail. Co.* v. *Goldsmid* (1). The franchise included the right to keep two general markets in every week, the first on Thursday and the other on Saturday, in or near (in sive juxta) a certain place called the Spittle Square in the parish of Stepney, together with all tolls, tolns, piccage, stallage, and other profits advantages and emoluments whatsoever, to such markets in any wise belonging, appertaining, issuing or arising or with the same usually had and enjoyed. The House of Lords held in another case, *A.-G.* v. *Horner* (15), that the market granted by the letters patent was not a market limited by metes and bounds and that the grant permitted the extension of the market beyond Spittle Square into the surrounding area if the market owners thought fit and had the means of so doing.

The franchise of market and the freehold lands forming the then site of the market were transferred to the use of the plaintiffs, the corporation, in fee simple by a conveyance dated May 8, 1902. Four private Acts of Parliament have been passed with reference to the market. The first which I think it necessary to refer to is the City of London (Various Powers) Act, 1922. This Act contains in s. 3 a definition of the undertaking. It conferred by s. 5 power to the corporation to acquire the undertaking so far as not already acquired by the corporation. By s. 9 the corporation was also given power to purchase any lands which they might require for the purpose of enlarging and improving the market or the approaches thereto. By s. 16 power was given to the corporation to make such byelaws as they might think fit for a number of purposes; but no byelaws have in fact been made. Section 29 provides that the corporation should not let or otherwise dispose of any stall or standing in Spitalfields market for a longer period than one week. By the City of London (Various Powers) Act, 1914, the corporation was, amongst other things, empowered to execute certain improvements, and by s. 12 the corporation was empowered to take and use certain specified lands for the purposes of providing space for the erection of buildings adjoining or near to the market or for the purpose of recoupment or exchange or for any purpose in connection with Spitalfields market. Under this Act the corporation duly acquired certain lands.

By the City of London (Various Powers) Act, 1922, various further powers were given to the corporation, and by s. 19 it was provided that it should be lawful for the corporation on every day of the week, except Sunday, to hold, keep and maintain the market. It also contained a provision empowering the corporation to levy, receive and recover market dues, tolls and such like payments at or in respect of the market from the sellers or salesmen of commodities in the market. This was subject to the corporation completing certain improvements which they did in fact complete. It should perhaps be mentioned that at the date of the trial the main market comprised 68 shops or warehouses and 188 stands, let on weekly tenancies to a number of tenants. The learned judge held that apart from the stands there was no space in the main market or in the streets or buildings surrounding it upon which members of the public desiring to sell fruit, vegetables and other commodities could expose their wares for sale. The market is now held on every weekday and is used for the sale of fruit, vegetables and other like commodities. It has never in recent times been used as a general market. The corporation is, we were informed, the owner of several other markets in the city, including those well known by the names of Smithfield, Billingsgate and Islington. It may be mentioned that the other important fruit and vegetable and flower market in London is Covent Garden market, which is in private hands.

According to the finding of the learned judge, auction sales of fruit and vegetables were carried on from time to time in the original market and in the western extension of it though the business of selling such commodities has mainly been carried on by private treaty by the tenants of the shops and stands. There was no difficulty in obtaining facilities for holding such an auction generally about two o'clock in the afternoon, and no inconvenience was proved to have been caused to anyone by the holding of these auctions. The learned judge did not accept evidence on behalf of the corporation that the auctions became very objectionable owing to the ringing of a bell used to inform persons in the market that the auction was about to take place. The bell in fact was rung by the directions of the corporation. After the year 1924 the auction sales were held in several different premises belonging to the corporation in the vicinity of the A market, and these sales again caused no inconvenience to anyone engaged in selling goods in the original market or in the western extension. The last sale by auction before the opening of a building called the London Fruit Exchange, used for a purpose which I must deal with in some detail, took place on July 30, 1929.

The London Fruit Exchange is erected on a site which with other premises was acquired by the corporation under the Act of 1914 above referred to. By a lease dated B July 4, 1930, and made between the corporation, of the first part, the London Fruit Exchange Brokers' Association, Ltd., of the second part, and five companies and a firm who collectively are described as the guarantors, of the third part, the corporation demised to the London Fruit Exchange Brokers' Association, Ltd., the basement, ground, first and second floors of a building which had been erected, known as the London Fruit Exchange and Auction Sales Building, together with a number of other C facilities for the term of twenty-one years from Sept. 29, 1929. The annual sum payable by the lessees during the continuance of the term is £24,000, of which £14,000 is expressed to be in respect of rent and £10,000 is expressed to be in lieu of any tolls. The lessees covenant, among other things, not to use the premises for any other business than that of sale by auction or otherwise of fruit, vegetables or other commodities of the like nature and as offices in connection therewith, and they covenanted at all times to D develop to the utmost of their power the business of the sale by auction of fruit, vegetables or other commodities of a like nature and to comply with the byelaws, rules, orders and regulations for the time being in force governing Spitalfields market, so far as the same might be applicable to the said business. The lessees went into possession of the demised premises some months before the lease was granted and sales by auction in the premises started in September, 1929. The lessees and the guarantors endeavoured E to obtain from the corporation the sole and exclusive right to sell by auction in the market fruit, vegetables and such like commodities and the corporation was not unwilling to concede this right, but was advised that it was inexpedient to enter into any covenant to that effect, on the ground that such a covenant was illegal. The lease was finally granted in its present form on the faith of a letter written on behalf of the corporation dated June 20, 1930, in the following terms: F

> "As requested, I am writing to record the result of the conference with the Central Markets Committee on Dec. 11, 1929, which was attended by Mr. Isaacs, Mr. Greenwood, Mr. Simons, and Mr. Drake. It is understood that the protection which your Association and its constituent members desired before moving to Spitalfields was that no trade or business of any kind in fruit or vegetables, or other G like commodities, should at any time be carried on in the parts of the London Fruit Exchange and Auction Sales Building, not included in the lease to your Association, and further that the corporation would take all measures within its power to secure that no auction sale of fruit, vegetables or other like commodities should at any time be held in the Spitalfields market or in the City of London or in any market under the control of the corporation. The corporation are advised that H they cannot either by way of provision in the lease to be granted to your Association, or otherwise, undertake that your Association shall have this measure of protection. You may, however, rest assured that the corporation will be vigilant to see that their market rights as owners of Spitalfields market or otherwise are not infringed, and it is obvious that the special position of your Association as lessees under the proposed lease will then be substantially safeguarded." I

Since July 30, 1929, the corporation have consistently refused to consent to the holding by any person, firm, or company of any sale by auction of the commodities in question in or near the market, except by one of the companies or firms (whom I will refer to as "the six brokers") constituting the London Fruit Exchange Brokers' Association, Ltd. In effect, the corporation claims by virtue of its privilege a right to confer upon any companies or firms at its pleasure the monopoly of carrying on the well-known business of auctioneers of fruit and vegetables within the market or near the market. It should be added that the London Fruit Exchange Brokers' Association, Ltd., only permit persons armed with cards to obtain admission to their sale rooms and that the cards or tickets contain the following clause:

> "The user of this ticket undertakes not to sell to or buy from or attempt to trade with any person or persons while in the Fruit Exchange except the brokers who are members of this Association."

The granting or refusing of tickets of admission to the Exchange is apparently a matter left to the will and pleasure of the six brokers, and it was proved that an application for a ticket of admission was refused to one J. Lyons, the managing director and promoter of the defendant company.

The defendant company was incorporated on Sept. 30, 1931, and since its incorporation has carried on business as fruit brokers in rooms at Nos. 36 and 37, Steward-street, in close proximity to the market. The learned judge has held that there is no evidence to support the defendants' contention that the corporation have included in the market area that part of Nos. 36 and 37, Steward-street, which is in the occupation of the defendants. The business of the defendants consists in selling by auction fruit belonging in part to themselves, but chiefly to other persons, in which case the sales are, of course, on commission. These sales have mainly been sales by sample of imported fruit to wholesale dealers. The defendants have always been ready and willing to pay to the plaintiffs the reasonable and customary market tolls in respect of the business carried on by them at Nos. 36 and 37, Steward-street, but the plaintiffs have refused to accept the same. It should be added that the corporation, since it acquired the market in the year 1920, has demanded and obtained sums of money, designated in the books of the corporation as tolls, from persons or firms engaged in the sale of fruit and vegetables in shops and premises outside the area occupied by the market and the surrounding streets, and the learned judge has drawn the inference that the corporation by imposing and accepting the payments has agreed to treat the premises in respect of which payments were made as included within the market, at any rate, so long as the respective agreements to make such payments remained in force.

It is well settled that when a market ought lawfully to be held, every member of the public has of common right the liberty to enter and frequent the market place for the purpose of exposing for sale and selling or of buying such commodities as are vendible in the market: see *Austin* v. *Whittred* (16), *Townend* v. *Woodruff* (17), *Prince* v. *Lewis* (3), *Duke of Newcastle* v. *Worksop Urban Council* (18). It follows, in my opinion, that the London Fruit Exchange has never been used for the purposes of a market, since the public has never been allowed access thereto, either for the purpose of buying or selling.

The claim of the corporation amounts to this—that the selling by auction of fruit and vegetables is a course of dealing which the corporation is at liberty to prevent, both in the Spitalfields market and elsewhere within the common law limits of a market. The corporation bases its contention on the ground that the acts of the defendants amount to the levying of a rival market. If this is correct, the corporation would be entitled to rely upon the decision of the House of Lords in *Great Eastern Rail.* v. *Goldsmid* (1), by which it is established that, if a rival market is set up, this is such a disturbance of the original market rights that, even if it is proved that there is not such accommodation provided by the owners of the franchise in their market, that circumstances would afford no answer to the action for an injunction. On the other hand, it is not in dispute that an obligation is cast upon the owners of a market to provide convenient accommodation for all who are ready to buy and sell in the public market, and that, if he does not do so or if he allows the market or part of it to be employed for other purposes without providing as convenient a place for the public to buy and sell in elsewhere within the limits of his grant, one consequence will be that there would be a good defence to an action brought by the grantee of the franchise against any person for selling out of the market to the prejudice of his right, provided such person has been prevented from selling in the market by the want of convenient room. I am here in substance quoting from the opinions of the judges in *Islington Market Bill Case* (2) (3 Cl. & F. at p. 518). The judges approved of the decision of the court of King's Bench in *Prince* v. *Lewis* (3) a case which related to Covent Garden market. The distinction, in my opinion, is between establishing a rival market at which the public or a section of the public is invited to come for the purpose of buying and selling, and the carrying on by an individual, firm, or company of the business of selling goods for their own benefit. If the present case were one of mere disturbance of market, the corporation would, I think, have considerable difficulty in establishing that the disturbance is of an actionable kind, since it was not done with intent to evade payment of a toll: *Brecon Corpn.* v. *Edwards* (19), but, however this may be, it cannot be doubted that if there were a mere disturbance primâ facie actionable it would be excused, since at the time and under the circumstances of the sales by the defendant he was being excluded from selling goods by auction in the place at which the market was held.

The question then arises as to the meaning of the phrase "levying a rival market." There is no doubt that a franchise of market involves a right to be protected from the setting up of a rival market within a distance of seven miles or, more strictly, six and two-third miles: Bracton, Book IV, Chap. 46; Comyn's Digest Market C.2; and if the rival market is held on the same day or days and within the common law distance, it is not necessary to prove actual damage: *Dorchester Corpn.* v. *Ensor* (5) (L.R. 4 Ex. 335, at p. 343). In *Great Eastern Rail. Co.* v. *Goldsmid* (1) and in *Wilcox* v. *Steel* (13), the Lords of Appeal and the Lords Justices seem alike to have taken the view that it was necessary to consider the facts and to see whether as a matter of substance the defendant had established a new market rivalling the old market. In other words, it is a question of substance in each case whether the defendant is establishing a new rival market within the common law distance of an old market. No doubt a rival market held within the limit on the same day or days is primâ facie injurious to the old market, since it is an invasion of a franchise; and, on the other hand, it is clear that it is not necessary that the rival market should purport to be a franchise market, nor is it necessary that the defendant should have any intention of setting up a rival market if what he does amounts to such a rival market.

I must here observe that unless the question whether or not a rival market has been established is a question of fact to be considered having regard to all the circumstances of the case, as the authorities cited seem to show, the results in law are very extraordinary. In the present case (as in many others) the market is a general market under the Charter of Charles II, though confined, as I have said, in practice to the sale of fruit and vegetables and like commodities. The common law right to restrain the setting up of a rival market extends to the whole radius of nearly seven miles, and if there is no necessity to establish any pecuniary damage, or the probability of such damage, the monopoly conferred upon the corporation under the franchise would primâ facie extend to a right to prevent the setting up of markets of every character over an area of some 150 square miles containing a vast population, and although the goods sold were not fruit and vegetables. Further, if the corporation is right in its contention that every sale by auction amounts to the levying of a rival market, it would seem to follow that within the common law limit, every sale by the hundreds of auctioneers who carry on business within the limit might be restrained by the corporation, although such sales in no way injure the corporation and although the auctions were of goods which have never been sold at Spitalfields market. We were invited not to be surprised at such a result, having regard to the peculiar nature of market rights; but, for my part, in the complete absence of any authority to show that the rights of market owners are so extensive in character I hesitate before acceding to the contention. It seems to me that in order to establish the fact that a rival market is being levied it is necessary to show that the defendant is providing facilities for a concourse of buyers and sellers of goods ordinarily dealt with in the plaintiff's market, so that there is a primâ facie fraud upon the market owner (to use an old phrase), in other words, so that there is a probability of his being deprived of tolls, stallages, or other profits or emoluments appertaining to the market. To put it in another way, there must be an element of rivalry in the case. I do not doubt that a man may set up such an auction mart as to amount to a rival market. *Great Eastern Rail.* v. *Goldsmid* (1) and *Wilcox* v. *Steel* (13) are examples. I do, however, deny that an auction sale or periodical auction sales necessarily amount to the levying of rival markets, and I do not see any reason for thinking that the hundreds of auction rooms where chattels and goods are sold in London, and in most of the cities and towns of England were established by and exist on the sufferance of market owners.

Do the acts of the defendants in this case amount to the levying of a rival market? Their business consists, as alleged by the plaintiffs, "in selling by auction fruit belonging mainly, if not entirely, not to themselves, but to a large number of persons, such sales being on commission." The sales are stated to have been extensive, and the defendants, no doubt, to some extent take advantage of the concourse of buyers at the market and of the fact that their premises are in the neighbourhood of the market. The defendants advertise their sales by advertisements or notices. The sales are mainly of imported fruit. The premises of the defendants, as I have already stated, are not included in the market area, because the corporation declines so to include them. The sales they effect are in a private room to wholesalers only, and they are sales by sample. The notices of the sales have been distributed through the medium of the post office. The defendants, I repeat, have no desire to avoid payment of the customary tolls, and they have been in effect forced to take the action they have taken because of the refusal of the corporation to include their premises in the market or to allow them to sell by auction in the market area.

It is matter of common knowledge that sales by auction by auctioneers selling on commission have been a common practice in markets in London, and I would add, all over the country. For example, such sales are and have for many years past been the ordinary way of disposing of large quantities of fruit and vegetables in Covent Garden market, originally founded, like the Spitalfields market, by a charter of Charles II. Nearly all imported fruit is sold to wholesalers in that market by auction. At Billingsgate everyone knows that the sales of trawl fish are effected by auction, and that land borne fish are sometimes sold by auction and sometimes by private sale. The same is true of the markets at Hull and Grimsby. It is also matter of common knowledge that at markets and fairs for the sale of cattle and horses such animals are to a large extent sold by auction in the market. I have not been able to find in the evidence in this case any ground for the view that a vendor in the market is not entitled to sell his goods by auction to the highest bidder. On the other hand, nobody has ever suggested that a vendor of goods in a market is entitled only to sell his own goods. So long as the proper toll is paid, how is the market owner prejudiced? I do not understand why there should be any objection to a salesman in a market acting as agent for the sale of the goods of others, whether for a commission or otherwise. Commission agents, in fact, abound in large markets. No good reason has been suggested for the view that an auctioneer is making an improper use of a market if he sells the goods of others by auction in the usual way. In all the many authorities upon market law, I have not found any suggestion in any judgment that such sales by auction are not, subject, of course, to reasonable regulations, permissible to all members of the public who attend the market, and it is quite certain that such sales in the case of fish, cattle, and horses have been perfectly usual all over the country for many years, if not from time immemorial. The reason is not far to seek. Where the circumstances are such that the goods sold or intended to be sold in the market cannot in practice be removed, if unsold, by the persons who have brought them to the market, private sales afford a most unsatisfactory method of dealing with the commodities in question, because the vendor, if he is unable to sell by auction, is bound when buyers are scarce or hesitating to keep on reducing his prices, sometimes to a ruinous extent during the time the market continues in order to get rid of them. These considerations apply with great force to foreign fruit. Cargoes of fruit arrive day after day at the London docks, and the importers have to get rid of them to the wholesale distributors without delay. It is plain from the evidence that, with regard to the enormous business of the sale of imported fruit, a very large proportion is now sold by auction to wholesalers in London. An illustration of the modern tendency in regard to imported fruit is to be found in the report, dated Jan. 29, 1928, by Major Millman, the clerk and superintendent of Spitalfields market, to the chairman and members of the Central Markets Committee. He stated, among other things, that at that date the total imports of fruit from abroad amounted to nearly fifty millions per annum, and were rapidly increasing. On Dec. 17, 1929, after the six brokers had commenced their business, Major Millman in a memorandum of that date stated that the six brokers in one week had sold as many packages as Mr. Lyons had sold in six years, and that the six brokers had sold 70,000 packages in one day, these goods being, of course, disposed of in the ordinary way by auction. The amount of fruit and vegetables now sold by the six brokers at the Fruit Exchange has grown to huge figures.

The decision of Romer, J., in *Nicholls* v. *Tavistock Urban Council* (12) supports the view that sales by auction are a proper exercise of the rights of salesmen in a market. I have already noted that auction sales were held in the main market at Spitalfields at least as early as the year 1897, and were permitted by the corporation after they took over the conduct of the market till July, 1929. The London Fruit Exchange was built by the corporation for the express purposes of giving adequate facilities for the sale by auction of foreign fruit, and I draw the inference that at the present time foreign fruit cannot in practice be sold to the large wholesalers in any other way.

In my opinion, then, such sales by auction as the defendants have effected would have been a proper exercise of the rights of salesman in Spitalfields market, and therefore the declaration granted on the counterclaim of the defendants should stand. It does not necessarily follow that such sales by auction outside the market do not amount to the levying of a rival market; but, as I have said, all the circumstances of the case must be considered and the element of rivalry in some sense must be established. For reasons of their own the corporation have ceased to permit sales by auction of fruit in the market; it is a branch of the trade no longer carried on in the market, and they are in no way prejudiced, as matters stand, by the defendants' acts. To this fact it should be added, first, that the defendants have offered to treat their premises as added to the market, and, in any event, to pay lawful tolls, and, secondly, that their sales are held in private, and to wholesalers only. The mere fact that the defendants cause to assemble a certain concourse of buyers (though not of sellers) at certain hours does not itself create a rival market. If it did, every large shop within the common law limit, or, at any rate, every large shop which by its nearness to a market takes advantage of the existence of the market might be forced by the market owner to close its doors. It is too late to set up any such contention in our courts, though it might, perhaps, have succeeded three hundred years ago, when shops were few and goods were generally bought and sold in a market. It may be here observed that markets in ancient days were usually employed for the purpose of selling goods retail, and that the tolls were payable in respect of goods which were brought into the market for that purpose. Markets in modern times have largely been used for the purpose of sales to wholesalers, and I repeat that the modern trade in relation to imported fruit, involving as it does an elaborate system of distribution, is generally effected by sales by auction to wholesale distributors, the sales being by sample. Although in an action for disturbance by setting up a rival market it is not necessary to show that the defendant should have intended to evade the payment of toll, I am of opinion that the fact that he is willing to pay the proper tolls, whatever they may be, and that he is not selling in the market only because the market owner declines to allow him to sell his goods in the way in which he desires to sell them, namely by auction, is a circumstance of great importance which has to be borne in mind in considering whether as a fact his acts amount to a setting up of a rival market: see *Brecon Corpn.* v. *Edwards* (19) and particularly the judgments of Baron Bramwell and Baron Wilde.

I have not thought it necessary to repeat the remarks made by my brother Romer on the various authorities relied on by the corporation as tending to show that any auction sale within the common law limit of the market amounts to the establishment of a rival market. In most of these cases the element of rivalry clearly existed, tolls were being evaded, and it was reasonably plain that the defendants' actions were calculated seriously to damage the market owner. The Court of Appeal in *Elwes* v. *Payne* (8) (overruling Sir George Jessel and thus, I think, diminishing the value of his dicta) declined to grant an interlocutory injunction to restrain the defendants from holding auction sales within half-a-mile of the plaintiffs' market on a day different from the usual market day.

The judgment of JAMES, L.J., seems to me strongly to support the view that unless damage is proved or can be inferred, the market owner has no right to complain.

In all the circumstances I come to the conclusion that whatever the defendants are doing does not, as a fact, amount to the levying of a rival market. As I understand the judgment appealed from, the learned judge arrived at that conclusion of fact, and I not only do not differ, but for the reasons I have endeavoured to give, I have arrived at the same finding. I wish to add for myself that, even if I thought that technically the defendants' acts do amount to the levying of a rival market, I should not in the special circumstances of the case have thought it right to grant the injunction claimed by the corporation. The remedy by injunction is an equitable remedy, and when it is sought to protect a monopoly such as a franchise of market, I think it is the duty of the court to decline to grant the injunction if the owners of the franchise are seeking, not to protect their own rights, but to carry out an understanding with third parties to whom they have in effect promised a monopoly which they could not properly confer on them. Those, I think, are the facts in this remarkable case. In the result the appeal must be dismissed.

Appeal dismissed.

Solicitors: *A. F. Ingham Pickford*; *Edward Betteley, Smith & Stirling.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

HILLEN *v.* I.C.I. (ALKALI), LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Tomlin, Lord Thankerton, Lord Wright and Lord Alness), May 28, 30, 31, July 4, 1935]

[Reported [1936] A.C. 65; 104 L.J.K.B. 473; 153 L.T. 403; 51 T.L.R. 532; 41 Com. Cas. 29]

Invitee—Negligence—Invitee going outside scope of invitation—Barge—Discharge of cargo—Hatch coverings wrongfully used in process of loading—Collapse of hatch coverings owing to weight of superimposed cargo—Injuries caused to stevedores—Whether barge crew had authority to invite stevedores to use hatch covers—Liability of barge-owners—Docks Regulations, 1925 (*S.R. & O.* 1925, *No.* 231), reg. 34 (b)—*Factory and Workshop Act*, 1901 (1 Edw. 7c. 22), s. 79.

Trespasser—Negligence—Extent of duty to—Invitee going outside scope of invitation—Stevedores wrongfully using hatch covers as loading stage.

The plaintiffs, who were stevedores, were employed by the owners of the steamship D. in loading cargo from a barge belonging to the defendants. After some of the cargo had been removed from the hold of the barge the crew put some of the hatch covers on again, but did not put on the fore and aft beams used to support these hatch covers. At the suggestion of the engineer of the barge the plaintiffs used the hatch covers, which had been put on in this way, as a stage from which to load cargo. During the loading the hatch covers collapsed and the plaintiffs and the engineer were thrown into the hold and severely injured. The plaintiffs knew that it was wrongful and dangerous to put cargo on hatch covers, and to load off them. On a claim by the plaintiffs for damages for their injuries,

Held: the plaintiffs' claim failed because (i) while the plaintiffs were invitees of the barge-owners on the barge, and the barge-owners owed them a duty as such, this duty to an invitee only extended so long as, and so far as, the invitee was making what could reasonably be contemplated as an ordinary and reasonable use of the premises for the purposes for which he had been invited;

(ii) any invitation to use the hatch covers for loading given by the crew of the barge was wholly without the authority of the barge-owners and quite outside the ostensible scope of the authority of the crew;

(iii) as the plaintiffs' use of the hatch covers was to their knowledge wrongfully dangerous and improper, they were trespassers, and not invitees, thereon;

(iv) the only duty of the occupier of land to a trespasser is that of abstaining from doing an act which is intended to injure him, and, when the trespasser is known to be present, of abstaining from doing an act which, if done carelessly, must reasonably be contemplated as likely to injure him, the barge-owners had no reason to anticipate the plaintiffs' use of the hatch covers for loading cargo and so were not bound to provide against it;

(v) furthermore (per Lord Alness), the plaintiffs, even if they were invitees, were guilty of contributory negligence.

Per Lord Atkin (Lords Tomlin, Thankerton and Wright concurring). The owner of a barge does not clothe the crew with apparent authority to use it or any part of it for purposes which are known to be extraordinary and dangerous.

If (a servant) saw a trespasser unwittingly entering into danger upon the employers' property he might owe a moral duty to the trespasser to warn him. But for breach of a servant's moral duty an employer is not vicariously liable.

Decision of the Court of Appeal ([1934] 1 K.B. 455) affirmed, but on other grounds.

Notes. The 1925 Regulations have now been replaced by the Docks Regulations, 1934 (S.R. & O. 1934 No. 279) which are in different terms. The Factory and Workshop Act, 1901, s. 79, has now been replaced by the Factories Act, 1937, s. 60; s. 159 (1) of the 1937 Act continues the 1934 Regulations in force as if they were made thereunder.

Considered: *Henaghan* v. *Rederiet Forangirene*, [1936] 2 All E.R. 1426; Distinguished: *Jerred* v. *Roddam Dent & Son, Ltd.*, [1948] 2 All E.R. 104; Referred to: *Marshall* v. *Lindsey C. C.*, [1936] 2 All E.R. 1076; *Hanlon* v. *Port of Liverpool Stevedoring Co., Ltd.*, [1937] 4 All E.R. 39; *Horton* v. *London Graving Dock*, [1951] 2 All E.R. 1; *Young* v. *Box & Co., Ltd.*, [1951] 1 T.L.R. 789, C.A.

As to the liability of an invitor being commensurate only with his invitation, see 23 Halsbury's Laws (2nd Edn.) 606, para. 855, and for cases on the subject, see 36 Digest (Repl.) 61, *330–332*. As to duty to trespassers, see 23 Halsbury's Laws (2nd Edn.) 613, para. 864, and for cases on the subject, see 36 Digest (Repl.) 70, *376–382*. As to the Docks Regulations, see 17 Halsbury's Laws (3rd Edn.) 128, para. 207. For the Factories Act, 1937, s. 60, s. 159 (1), see 9 Halsbury's Statutes (2nd Edn.) 1046, 1121. For the Docks Regulations, 1934, see 8 Halsbury's Statutory Instruments 161–174.

Case referred to:

(1) *The Carlgarth, The Otarama*, [1937] P. 93; 96 L.J.P. 162; 136 L.T. 518; 17 Asp. M.L.C. 195, C.A.

Appeal from the decision of the Court of Appeal (Scrutton, Lawrence and Greer, L.JJ.), reported [1934] 1 K.B. 455. The plaintiffs, who were stevedores, claimed damages in respect of personal injuries sustained by them while loading cargo from a barge belonging to the defendants. The facts are set out in the opinion of Lord Atkin.

The Court of Appeal held, reversing the decision of Goddard, J., that the illegality of the operation of loading from the hatch coverings, known as it was to the workmen, excluded any duty on the barge-owners other than that of abstaining from doing acts to injure the workmen. There was no obligation on the part of the barge-owners to make the illegal operation of loading from the hatch coverings safe for the workmen.

The workmen appealed.

D. P. Maxwell Fyfe, K.C., and *G. H. Oliver* for the workmen.

Viscount Erleigh, K.C., and *F. A. Sellers* for the barge-owners were not called upon to argue.

The House took time for consideration.

July 4. The following opinions were read.

LORD ATKIN:—I am asked to say that my noble and learned friends LORD THANKERTON and LORD WRIGHT concur in the opinion which I am about to deliver.

This is an appeal from an order of the Court of Appeal, who reversed a judgment for the workmen, the two plaintiffs given by GODDARD, J., at a trial in Liverpool with a common jury. The two workmen, the plaintiffs, now appellants, were dock labourers employed by the Pacific Steam Navigation Company to load the steamship *Darro*. They were members of a stevedores' gang working under a foreman named Senior. On the day in question they were directed to assist in loading cargo on the *Darro* from the barge *Hibernia* lying alongside. The *Hibernia* was owned by the defendants, and her cargo consisted of soda in kegs and bags, the kegs being on top. She had one hold and a hatch 41 ft. long and about 11 ft. 6 ins. wide, which was covered by twenty hatch covers. There were two hatchway beams athwart the hatch and fore and aft beams in three sections which passed along the centre of the hatch resting on the crossbeams, and served to support the hatch covers when in position. They had to be removed when the barge was being loaded or unloaded. The hatch had coamings about 1 ft. 3 ins. high. The hold was about 15 ft. deep. The barge had a crew of three, master, mate and engineer. The stevedore foreman required the bags to be hoisted on the *Darro* before the kegs. The kegs were therefore placed apparently by hand on the narrow deck of the barge, a passage about 3 ft. wide; and the bags were conveyed to the *Darro* in canvas slings carried by the ship's derricks. The barge cargo for the *Darro* was contained in the after third of the hold, abaft the after transverse beam. The remainder of the hold was occupied by cargo for two other vessels to which the barge was to proceed after completing her discharge to the *Darro*. After the bags for the *Darro* had been transported in the slings the crew of the barge put the hatch covers on the after portion, which had been uncovered. They did not put on the fore and aft beams. The kegs still remained to be shipped from the barge to the *Darro*. The engineer threw a sling on to the covered hatch and assisted the two workmen to place eight of the kegs in the sling. He probably told them it was all right. When seven kegs were in the sling and the eighth was being put in, two of the hatch covers gave way, and the two workmen and the engineer fell through into the hold. One of them, Pettigrew, received very serious injuries. The workmen brought separate actions, afterwards consolidated, against the barge-owners on the ground that the barge-owners were negligent in providing unsafe hatch covers, or at any rate in not warning them that the hatch covers were not at the time supported by the fore and aft beam.

The judge left to the jury the question whether the workmen had voluntarily incurred the risk and danger. Other questions, including a plea of contributory negligence, were apparently left for decision to the judge. In a considered judgment he found that there was a duty on the crew of the barge to warn the workmen of an added risk, namely, the absence of support to the hatch covers of which they were ignorant, and gave judgment for the damages found by the jury.

On appeal the members of the Court of Appeal came to the conclusion that by the terms of rule 34 (*b*) of the Docks Regulations, 1925, made under s. 79 of the Factory and Workshop Act, 1901, it was unlawful to use the covered hatch for the purpose of discharging cargo from it; and that no duty towards the workmen in those circumstances could be established against the barge-owners.

The rule is:

> "(*b*) Hatch coverings shall not be used in the construction of deck or cargo stages, or for any other purpose which may expose them to danger."

The rules admit of doubt as to whether this wording is applicable to hatch covers placed in position. It is suggested that the other purpose must be some such purpose as the construction of a stage where the rule seems to contemplate their separate use when removed from the hatch. Your Lordships did not find it necessary to ask counsel for the barge-owners to discuss the construction of the rule, and express no opinion upon it; as it seems sufficient to decide this case upon a ground which does not involve a finding of illegality. I do not therefore propose to canvass the judgments in the Court of Appeal on this matter.

The rights of the parties appear to me to be ascertained when reference is made to the admission of the plaintiff workman Hillen.

> "I know it is not the right thing to do to load off hatch covers. . . . I have seen cargoes put on hatch covers, it is wrongfully dangerous, and should not be done."

This evidence is confirmed by the foreman. The workmen's claim against the barge-owners is based upon the theory that they were invitees of the barge-owners for business purposes, and that the barge-owners consequently owed them a duty to take reasonable care to see that the barge was reasonably safe, or at least to warn them against any hidden danger of which they were unaware but which was known, or ought to have been known, to the barge-owners or their servants. In my opinion this duty to an invitee only extends so long as, and so far as, the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use. As SCRUTTON, L.J., has pointedly said (*The Carlgarth, The Otarama* (1), [1927] P. at p. 110): "If I invite a man to go down my staircase I do not invite him to slide down the banisters." So far as he sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but a trespasser, and his rights must be determined accordingly. In the present case the stevedores knew that they ought not to use the covered hatch in order to load cargo from it: for them for such a purpose it was out of bounds: they were trespassers. The barge-owners had no reason to contemplate such a use: they had no duty to take any care that the hatch when covered was safe for such a use: they had no duty to warn anyone that it was not fit for such use. I know of no duty to a trespasser owed by the occupier of land other than when the trespasser is known to be present, abstaining from doing an act which if done carelessly must reasonably be contemplated as likely to injure him, and, of course, abstaining from doing acts which are intended to injure him. The owners of the barge, therefore, were not guilty of any breach of duty to the workmen.

It is said, however, that whatever may have been the scope of the general invitation of the owners to the stevedores' men, in this case the owners' servants, the crew, extended a special invitation to the workmen to use the hatch for the particular purpose: and neglected to warn them of the danger which they knew and the workmen did not. I am far from satisfied that anyone so invited the workmen. I think the engineer's part was confined to a friendly suggestion that they should all do something irregular together. But whether there was an invitation by the crew, or any member of the crew, I am quite satisfied that it was wholly without the authority of the owners: and quite outside the ostensible scope of the authority of the crew. The owner of a barge does not clothe the crew with apparent authority to use it or any part of it for purposes which are known to be extraordinary and dangerous. The crew could not within the scope of their employment convert it into a dancing hall or a drinking booth. They could not invite stevedores to work the engines or take part in the navigation. The most that could be said of the engineer is that if he saw a trespasser unwittingly entering into danger upon the employer's property he might owe a moral duty to the trespasser to warn him. But for breach of a servant's moral duty an employer is not vicariously liable. In the circumstances of this case it matters not whether the fore and aft beams had or had not been at any time in position: any action of the crew in respect of them imposed no liability upon the barge-owners. I am of opinion that the facts proved disclosed no cause of action against the owners of the barge, and that this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

LORD TOMLIN.—I have had an opportunity of considering in print the opinion which has just been delivered by my friend on the Woolsack and I concur in it in all respects.

LORD ALNESS.—In my judgment the workmen's claims fail. In the first place, I am of opinion that they have not proved negligence on the part of the barge-owners. The evidence demonstrates that the hatch was put by the workmen to a use which the barge-owners had no reason to anticipate, and against which they were therefore not bound to provide. No duty having been left undischarged by the barge-owners, no liability attaches to them. As regards the invitation which the engineer is alleged to have given, I am of opinion that that invitation is not proved, and, further, that, if it had been proved to have been given, it was outside the scope of the engineer's authority to give it. If these views be sound, no negligence on the part of the barge-owners is established, and that in itself is sufficient for the disposal against the workmen of the case.

But, in the second place, on the evidence of the plaintiff Hillen—and the other plaintiff Pettigrew, who was too ill to be examined, was taken as concurring with Hillen's evidence—a case of contributory negligence, persisting up to the time of the accident, is disclosed. Said the workman Hillen:

> "I know it was not the right thing to do to load off hatch covers. . . . I have seen cargoes put on hatch covers; it is wrongfully dangerous, and should not be done."

That, in my opinion, is an unqualified admission of contributory negligence on the part of Hillen.

It is to me a novel doctrine of law that an employer in the position of the barge-owners is bound to foresee and provide against a course of conduct on the part of an employee of another employer which is admitted by him to be wrong and dangerous. The workman Hillen's admission, in my judgment, puts him out of court, and disentitles him from recovering damages from the barge-owners. To hold otherwise would be to subvert the principles upon which, as I apprehend, the law of reparation is based. The plaintiff Pettigrew's case must, in the circumstances, share the same fate as that of the plaintiff Hillen.

I find it difficult to understand why the learned trial judge neither dealt in his judgment with the plea of contributory negligence, nor submitted it to the adjudication of the jury. The plea is none the less effective, even at this late hour, on that account. It furnishes, I think, a complete answer to the plaintiffs' claims.

I therefore arrive at the same conclusion as my noble and learned friend on the Woolsack, and I concur in the motion which he has moved.

Appeal dismissed.

Solicitors: *Pattinson & Brewer*, for *G. J. Lynskey & Sons*, Liverpool; *William Morris.*

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

THE SKARP

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), May 2, 3, 7, June 7, 1935]

[Reported [1935] P. 134; 104 L.J.P. 63; 154 L.T. 309; 51 T.L.R. 541; 41 Com. Cas. 1; 18 Asp. M.L.C. 576]

Shipping—Bill of lading—Damage to cargo—"Shipped in good order and condition"—"To be delivered in like good order and condition"—Insertion of "condition unknown"—Arbitration clause—Shipowners not estopped from denying that goods shipped in good order and condition—Short delivery—"Conclusive evidence" clause.

A cargo of timber was shipped at Parrsboro, Nova Scotia, on board the defendants' vessel *S.* for carriage to Manchester under bills of lading the form of which was prescribed by the charterparty, which was in the common form of charterparty of the Chamber of Shipping British North American (Atlantic) Wood Charterparty, 1914. The cargo was described in the bills of lading as "shipped in good order and condition," and the bills of lading further contained the words "to be delivered in like good order and condition," and "quality, description, and measurement unknown." On arriving at Parrsboro to load the cargo the master found that it "was in a very bad state," and he inserted the word "condition" in front of the words "quality . . . unknown" in the bills of lading, so that the clause read: "condition, quality . . . unknown." The plaintiffs bought the timber from the shippers on contracts which contained clauses providing that in the event of any dispute the plaintiffs should not reject the goods, but should refer the dispute to arbitration. They received and took up the bills of lading before the timber arrived. Subsequently, they brought this action against the defendants claiming in respect of 72,889 pieces of timber delivered in a damaged condition and 1,892 pieces short delivered, the claim being based on breach of contract and estoppel. As to the two parcels of timber short delivered, one contained 1,398 pieces and the other 494. The bills of lading were expressed to be subject to the terms of the charterparty, which provided that the bills of lading should afford conclusive evidence of the number of pieces delivered to the ship. Both parcels had been lost from a scow alongside the ship during a storm before shipment. The bill of lading in respect of the 1,398 pieces made this clear, and as regards the second parcel as to which there was a shortage, the clause in the bill of lading was "494 pieces of these lots not on board, being included in specification as being part of scow 5 lost from the ship."

Held: (i) the words "shipped in good order and condition" were not words of contract: dictum of CHANNELL, J., in *Compania Naviera Vasconzada* v. *Churchill and Sim* (1), [1906] 1 K.B. 237, at p. 247, applied; there was, therefore, no ascertainable antecedent state to which the words "to be delivered in like good order and condition" could be referred to make them capable of a contractual meaning; and, accordingly, the claim in contract failed because the words "to be delivered in like good order and condition," when reference could not be had to any antecedent state to discover what was the order and condition to which "the like" could be compared, could not stand alone so as to make a contract to deliver in good order and condition;

(ii) the insertion of the word "condition" in the way in which it was inserted by the master before the words "quality, description, measurement unknown" was not such a qualification of the original statement "shipped in good order and condition" as to convey to the mind of anybody reading the document that the goods were, or even appeared to anyone who had seen them to be, as in fact they were, damaged goods, and, if the plaintiffs had acted on the statement to their detriment, the defendants would have been estopped from denying that the goods were shipped in good order and condition, but in view of the arbitration clause in the contract of sale (which could be referred to for its terms and analysed, since it was the res out of which the complaint in the action arose), the plaintiffs could not show that they had acted upon the statement to their detriment;

(iii) as regards the 494 pieces short delivered the bill of lading was not so worded as to bring it to the notice of the plaintiffs that these pieces were not delivered to the ship; that the defendants were bound by the "conclusive evidence" clause; and that the plaintiffs succeeded as to 494 pieces, but failed as to the shortage of 1,398 pieces.

Notes. Referred to: *Dent* v. *Glen Line, Ltd.* (1940), 45 Com. Cas. 244.

As to bills of lading, see 30 HALSBURY'S LAWS (2nd Edn.) 373 et seq., and for cases, see 41 DIGEST 369 et seq.

Cases referred to:

(1) *Compania Naviera Vasconzada* v. *Churchill and Sim*, [1906] 1 K.B. 237; 75 L.J.K.B. 94; 94 L.T. 59; 54 W.R. 406; 22 T.L.R. 85; 50 Sol. Jo. 76; 10 Asp. M.L.C. 177; 11 Com. Cas. 49; 41 Digest 379, *2254*.

(2) *The Tromp*, [1921] P. 337; 90 L.J.P. 379; 125 L.T. 637; 37 T.L.R. 752; 15 Asp. M.L.C. 338; 41 Digest 384, *2288*.

(3) *Nippon Menkwa Kabushiki Kaisha* v. *Dawson's Bank, Ltd.* (1935), 51 Ll.L.Rep. 147; sub nom. *Dawson's Bank, Ltd.* v. *Japan Cotton Trading Co., Ltd.*, 79 Sol. Jo. 213, P.C.; Digest Supp.

(4) *Silver* v. *Ocean Steamship Co., Ltd.*, [1930] 1 K.B. 416; 99 L.J.K.B. 104; 142 L.T. 244; 46 T.L.R. 78; 73 Sol. Jo. 849; 35 Com. Cas 140; 18 Asp. M.L.C. 74, C.A.; Digest Supp.

(5) *Amis, Swain & Co.* v. *Nippon Yusen Kabushiki Kaisha* (1918), 1 Ll.L.Rep. 51.

(6) *Vigers Bros.* v. *Sanderson Bros.*, [1901] 1 K.B. 608; 70 L.J.K.B. 383; 84 L.T. 464; 49 W.R. 411; 17 T.L.R. 316; 45 Sol. Jo. 328; 6 Com. Cas.; 41 Digest 257, *990*.

(7) *Evans* v. *James Webster Bros., Ltd.* (1928), 45 T.L.R. 136; 73 Sol. Jo. 60; 34 Com. Cas. 172; Digest Supp.

Action for damage to and short delivery of cargo.

The plaintiffs, the owners of the cargo lately laden on board the Norwegian steamship *Skarp*, claimed damages from the defendants, the owners of the *Skarp*, in respect of 74,781 pieces of timber of which the plaintiffs alleged that the defendants acknowledged shipment in good order and condition for carriage from Parrsboro, Nova Scotia, to Manchester, but of which they delivered 72,889 pieces in a damaged condition and failed to deliver 1,892 pieces at all.

The facts and the contentions of counsel appear in the judgment of the learned judge.

Sir Robert Aske, K.C., and *Harry Atkins* for the plaintiffs.
David Davies, K.C., and *Cyril Miller* for the defendants.

June 7. **LANGTON, J.**—This case has given me no little amount of trouble. It arises out of a shipment of certain parcels of spruce deals and ends. These goods were shipped in the *Skarp* at Parrsboro, Nova Scotia, by George McKean & Co. for delivery at Manchester. So far as I am concerned with them the parcels were sold, and I will detail later the process of sale. The damage complained of was, as regards certain parcels, that they were delivered wet and mouldy, and, as regards two other parcels, that they were short delivered.

The main part of the case centres round the damaged goods. To deal first with the business of the matter, this was put before me by the cashier in the firm of one of the receivers or assignees of the bills of lading. His evidence was that the method of conducting the business (and I understand it was accepted on both sides that the business in all cases in this litigation was the same) was this—the receivers bought on a sale note and there was then a formal contract. Much turns upon the formal contract. Then the documents—that is to say, the policy of insurance, and the bills of lading—were seen by the buyers. The sale was on the usual c.i.f. terms, and the buyers were entitled to the policy of insurance and bill of lading. There were some ten bills of lading; nine of them were in one form and one of them was in another form. Owing to the conclusion to which I have been reluctantly forced it makes no difference which A form of bill of lading one adopts. But the point of difference was that in nine bills of lading the document was qualified by the insertion of the word "condition" in type before the printed words "quality, description and measurement unknown, steamer not responsible for splits and shakes."

The plaintiffs' case was put in two or three ways, but the principal controversy as regards these damaged goods centres upon the question whether the shipowners were B estopped by the statement in the bills of lading that the goods were "shipped in good order and condition" from asserting that they were shipped in a different condition, namely, a damaged and wet condition. For the purposes of that argument it is a matter of prime importance whether this qualification produced by the word "condition" appeared in the bills of lading or not. I mention this in passing to show that I have considered all the cases that were put before me, and have not omitted the single C instance where the word "condition" did not appear in the bill of lading.

I will now consider the business from the other end. The shipowner carried these goods under the common form of charterparty of the Chamber of Shipping British North American (Atlantic) Wood Charterparty, 1914. Under cl. 18 of the charter:

> "bills of lading in the form endorsed on this charterparty, shall be signed by the master: freight and all conditions, terms and exceptions as per this charterparty"; D

and then, curiously enough, the clause goes on to detail certain clauses that are to be in the bills of lading. It was a feature not much stressed in argument, but in this charterparty there are two clauses incorporated on the back of the bills of lading in the form prescribed, and it is interesting to note that the first of them is

> "quality, description, and measurement unknown. Steamer not responsible for E splits and shakes."

That actually appears in cl. 18 of the charterparty, and it is a matter which, in another case, may be interesting as a subject for argument, whether with a charterparty of this kind in which all conditions are to be, "as per charterparty" the shipowner can have any right at all to alter the form set out in that charterparty, and introduce into the bill of lading terms for which there is no provision in the charterparty itself. However, F that is not the line upon which the case was argued here.

To continue the history from the shipowners' point of view, when the master arrived at Parrsboro he found the cargo in anything but a good condition, and in fact he entered in his log "the cargo lay in lighters, so a tallyman had to be kept at each hatch to tally each sling. Moreover, the cargo was in a very bad state; very black, wet and partly musty." In that difficult state of affairs the master appears to have sought counsel G from a gentleman who was connected with his insurance company, and between them they seem to have determined that they would deal sufficiently with the rights of parties who might ship, or receive, the goods, and at the same time protect the owners of the ship, by inserting the word "condition" in the place I have indicated, namely, in front of the qualification "quality, description and measurement unknown."

The goods arrived at Manchester preceded by the bills of lading, which, so far as their H condition was concerned, had no other qualification upon them than the insertion of this typed word "condition." They were, in all cases, taken up by the buyers, and, now that the condition of the goods is known, the buyers claim against the shipowners and say: "You, the shipowners, are estopped from saying that these goods were otherwise than in a good order and condition because you so asserted on bills of lading, and have led us to act to our detriment." That shortly is the contention upon which the I first dispute is founded.

Counsel for the plaintiffs, oppressed by the difficulty which I shall have later to notice, put his case at first upon a different ground from that which I have indicated, and I do not wish to suggest that he ever retracted from his first point; on the contrary he emphasised it very much in his reply. He said:

> "I do not need any estoppel here, and I do not need to rely upon the doctrine of estoppel. Further, I agree that the words 'shipped in good order and condition' are not words of contract."

Indeed, that matter was made abundantly clear by Channell, J., in *Compania Naviera Vasconzada* v. *Churchill and Sim* (1) ([1906] 1 K.B. at p. 247). In a judgment which, so far as I know, has never been criticised, and was never taken to the Court of Appeal, Channell, J., said:

> "The words 'shipped in good order and condition' are not words of contract in the sense of a promise or undertaking. The words are an affirmation of fact, or, perhaps rather in the nature of an assent by the captain to an affirmation of fact which the shipper may be supposed to make as to his own goods."

Counsel's contention, however, was that the words "to be delivered in like good order and condition" are words of contract, and that, if the goods are not delivered in good order and condition, there is a breach of contract. It is nothing against this point that it is an entirely novel one. I do not even know that it is a serious criticism of the point that, although it has been open for many years to be taken in cases of this class, it apparently never has been taken until this case. But I cannot accept it. "To be delivered in the like good order and condition," if one is to base anything upon it at all, must refer to some antecedent state—one cannot cut out the words "the like," and give any sense to these words of contract. Unless one refers to some ascertainable antecedent state, there is no standard of comparison, and I am at a loss to understand how a shipowner can be said to be under a contractual obligation to deliver goods "in the like good order and condition" when regard cannot be had to any antecedent state to discover what was the order and condition to which "the like" is comparable. It is for that reason, therefore, upon its merits, and not because of any quality of novelty, that I have been driven to believe that this point is a false one.

The controversy then centred upon this main question of estoppel. The textbooks do not show any case in which a shipowner has attempted to clause his bill of lading by the introduction of the word "condition" in these circumstances. For, be it observed, one is dealing here with timber goods, and there is no question that there are many classes of goods as to which there may be a distinction when one is speaking of their apparent condition and of their real condition. Potatoes in sacks may be in apparent good order and condition because the outside of the sacks is dry and in good condition, although in fact the condition of the potatoes inside the sacks may be deplorable. But we are here dealing with goods as to which the condition must refer to real condition, and the bills of lading, as they stand, make two completely contradictory statements: (i) "shipped in good order and condition," and (ii) "condition unknown." Counsel for the defendants, in an adroit argument, said that this is the way in which a shipowner ought to deal with a matter of this kind. If he wants to say that he has not measured the goods he says "measurement unknown"; if he wants to say that he has not weighed them he says "weight unknown"; and, if he wants to say that he makes no representation as to condition, he puts in "condition unknown." It is the method sanctified by usage and time. I have considerable doubt as to the soundness of that contention. Still more have I doubt when in the charterparty itself the clauses to be incorporated in the bills of lading are in terms laid down. Furthermore, I think that it is profitable in this case to take account of how and why the master came to insert this word in the bills of lading.

The master was confronted with the fact that the goods were certainly damaged. The straightforward thing to do was surely to put upon the bills of lading, in the ample margin which is apparently provided for that purpose, a clause which would clearly advertise to any buyer of a particular bill of lading that the goods he was going to receive were not in good order and condition. It would not have been beyond the master's power to take the entry from his own log, and to put upon the bills of lading "very black, wet and partly musty." If he could see it for the purposes of his log, he could with the same eye have seen it for the purposes of the bills of lading. But in truth and in fact he was much worried about his own employers' interests, and it was for that reason that he took this circuitous route of putting the word "condition" in what is, to my mind, a most obscure place. That is the genesis of the matter.

One must look at it as a matter of construction. What would those words in a bill of lading convey to anybody who read them? What, in the first place, would "shipped in good order and condition" followed by "condition unknown" convey? Speaking for myself, they would have conveyed nothing at all to me. The only witness who was called (although I think he was an entirely honest man, I cannot place much dependence upon him, because he was the cashier and did not appear to have had any long experience of the business side of this class of transaction) said that he had regarded the bill of lading as "clean." To my mind, having regard to the well-known method which is always at the disposal of the masters of steamships to describe damaged goods, this is a wholly unsuitable method—a most ambiguous method—and does not convey at all that the goods are damaged or even may be damaged. If I had to speculate as to what was the most probable effect on the mind of anybody who read the bill of lading so phrased, I should say that he would think that this master had got some idea that he was responsible for the condition of the goods, whether it was ripe or overripe or something of that sort; but I cannot imagine that it would bring to the mind of the reader the fact that a man who had been at no pains to clause the bill of lading in the natural way meant to convey that the goods were or might be damaged. Another and, perhaps, clearer way of putting it is that it is difficult to understand why the affirmation or acceptance of one untruth should be cured by a deliberate statement of another untruth. It is true that the words "shipped in good order and condition," as CHANNELL, J., pointed out, are not words of contract, but they are an affirmation or assent to an affirmation of fact, and in this case they were an affirmation of an untruth. They were words which to the plain knowledge of the master were totally untrue; the goods were not shipped in good order and condition, and well he knew it. It is argued that he escaped from any difficulties occasioned by this assent or affirmation of an untruth by making of his own free will another statement which he knows quite well to be untrue, namely, that "the condition was unknown." The condition was not unknown. The condition was stated clearly, forcibly and lucidly in his log, and it would be deplorable that a person should be allowed to escape from the penalties, if any, attached to the first assent to one untruth by a deliberate statement of another.

Primarily, however, this is a matter of construction, and I hold that the insertion of the word "condition" in the way it was inserted here, is not such a qualification of the original statement "shipped in good order and condition" as to bring to the mind of anybody reading that document that the goods were, or even might be apparently, and to the knowledge of anyone who had seen them, damaged goods.

Counsel for the plaintiffs further argued that there was another ground upon which he could claim estoppel. He said that, even assuming that the argument of counsel for the defendants would hold good as to the word "condition," there was still the word "order" in the bills of lading, and upon LORD MERRIVALE'S judgment in *The Tromp* (2)—and, indeed, upon general principles—he could argue that the insertion of the word "condition" did not cover the whole of the area of a representation made by the words "shipped in good order and condition." It is only fair, in case this case goes higher, to say that counsel for the plaintiffs was equally tenacious of this point as of the other points and that it was by no means a subsidiary point. I am afraid that it does not appeal to me. Counsel for the defendants was quick to rejoin that in the old form of bills of lading it was not unusual to find the word "condition" in one part of the document and "order and condition" in another. There is, too, the unfortunate feature that in this very judgment in *The Tromp* (2) LORD MERRIVALE goes out of his way—true, it is only obiter—to fasten upon the case of timber goods as an illustration of where the words "good order" and "good condition" may perhaps have the same meaning. There is another point which counsel for the defendants was too chivalrous to press; the able and careful pleader had clearly not envisaged this subtle argument of his leader, because he also had fallen into the somewhat common fallacy, if counsel for the plaintiffs is right, of regarding the two words as covering a similar area. I deprecate excursions into dictionaries or into philological matters which are beyond my ken, but I can see no ground on which one can stand to differentiate in this case between the words "order" and "condition." I am, therefore, against the plaintiffs upon that contention, though I go wholeheartedly with them when they say, as a matter of con-

A struction, that the bills of lading should be construed in the way for which they contend.

I come to the second part of this question of estoppel. I called attention during the argument to LORD RUSSELL's recent pronouncement in *Nippon Menkwa Kabushiki Kaisha* v. *Dawson's Bank, Ltd.* (3) in the Privy Council upon this subject, and because it is, so far as my knowledge goes, the most lucid statement of the matter in a small compass, I will quote it again here. LORD RUSSELL said (51 Ll.L.Rep. at p. 150):

B

> "Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action. It is a rule of evidence which comes into operation if (*a*) a statement of the existence of a fact has been made by the C defendant or an authorised agent of his to the plaintiff or someone on his behalf, (*b*) with the intention that the plaintiff should act upon the faith of the statement, and (*c*) the plaintiff does act upon the faith of the statement."

I have no difficulty here with regard to the first of the three conditions there laid down. I am satisfied that "a statement of the existence of a fact," namely, that the D goods were shipped in good order and condition, has been made by the defendants, or an authorised agent of theirs, to the plaintiffs or to someone on their behalf. I have equally no difficulty with regard to the second, that it was made "with the intention that the plaintiff should act upon the faith of the statement." But the crux comes over the third condition. Did the plaintiffs act upon the faith of the statement? As to that, a consideration of the dicta of the Court of Appeal in *Silver* v. *Ocean Steamship* E *Co.* (4) ([1930] 1 K.B. at pp. 428, 434, 441) is important. In that case all three judges of the Court of Appeal went further, I think, than anyone had gone up to that date in assisting plaintiffs placed in the difficult circumstances in which merchants are placed by these misstatements in bills of lading. SCRUTTON, L.J., said:

> "The last objection was that the witness did not say he relied on the bill of lading being a clean bill of lading by reason of the statement as to good order and con- F dition. The mercantile importance of clean bills of lading is so obvious and important that I think the fact that he took the bill of lading, which is in fact clean, without objection, is quite sufficient evidence that he relied on it."

GREER, L.J., stated much the same doctrine, though with a little doubt. He said this:

> G "I think, however, though with some doubt, that the court would be entitled to conclude on the grounds of high probability that he was influenced by the statement that the goods were shipped in apparent good order and condition, and that he must have believed that they were free from reasonably discoverable damage when shipped, and that in accepting the bill of lading and taking delivery he acted to his detriment, but I am not satisfied that all such damage would be apparent on any H reasonable examination. On the other hand, I am satisfied that if there was any considerable damage when the goods were shipped, in excess of the fifty cases that were rejected, a substantial part of such damage would have been discovered on a reasonable examination."

SLESSER, L.J., said:

> I "The appellant took the bill and may be assumed to have relied upon it to his detriment in the absence of any evidence to the contrary."

These observations certainly assist the plaintiffs in this case. The evidence was meagre, and, indeed, so far as this matter was concerned, confined to the evidence of the cashier of one of the shippers, who went so far as to say for his part that, had the bill of lading notified to him that the goods were shipped in bad condition, his principals would have claimed total rejection. I have no reason to suppose that that is not a perfectly bona fide statement on the part of the cashier. But at this point counsel for the defendants brought into play the contract upon which these goods had been bought, and I cannot see that he is not entitled to take the contract and analyse it for A the purpose of this case. Counsel for the plaintiffs said, among other things, that this contract is res inter alios acta. That is a perfectly fair comment, but, on the other hand, it is the res out of which the complaint here springs. The plaintiffs say: "We acted to our detriment in the matter of this contract owing to your misstatement." The whole of their estoppel must be based upon this contract, and I cannot see that it is wrong to examine the features of this contract, or, indeed, that one could act otherwise, B to test whether the plaintiffs are right in saying that they acted to their detriment. The doctrine laid down by the Court of Appeal in *Silver* v. *Ocean Steamship Co.* (4) gets the plaintiffs so far that they are entitled to say that in the absence of evidence to the contrary the court must assume that the plaintiffs did act to their detriment in taking up the bills of lading. It cannot take them far enough to be able to say that no evidence to the contrary can be considered. C

The contract says in the clearest possible terms:

> "Should any dispute arise respecting the fulfilment of this contract, or should the shipment be delayed beyond the time stipulated, the buyers shall not reject the goods, nor refuse immediate payment for same in manner stipulated. When due payment has been made, the dispute shall be referred to two arbitrators for settlement, one to be named by each party, with power to name a mercantile umpire. D The decision of such arbitrators or of their umpire to be conclusive and binding upon all disputing parties, the expense of such arbitration to be equally divided, and the decision may, and shall, be made a rule of His Majesty's High Court of Justice, on the application of either party."

Counsel for the plaintiffs cited several cases which, he says, go to show that the courts E would never allow such a clause to be weighed against the plaintiffs in these circumstances. He cited, among others, *Amis, Swain & Co.* v. *Nippon Yusen Kabushiki Kaisha* (5); the well-known decision of BIGHAM, J., in *Vigers Bros.* v. *Sanderson Bros.* (6); and the dictum of WRIGHT, J., in *Evans* v. *James Webster Bros., Ltd.* (7). I have looked through those cases with care and with sympathy with counsel's contention, but I cannot see that any of them have any real bearing upon this point. The circumstances F of those cases are widely different, and the only points of general doctrine to be collected were, first, the well-known doctrine that where goods were not of merchantable quality a buyer would be entitled to reject, and, secondly, that courts would not be astute to suppose that any merchant would be eager to break his contract. Counsel was bound to argue that he might have been in a better position if he had broken his contract. I cannot think that this is a tenable argument. It is difficult to see how courts of law are G to prosecute their business if they are to speculate upon what the rights and duties of persons are, not upon the theory that they keep their contracts, but on the theory that they break them. That is introducing, to my mind, a novel and most unwelcome class of speculation.

I think I must assume that the plaintiffs would have kept their contracts and, if so, in view of these wide words "should any dispute arise respecting the fulfilment of this H contract," and in view of the undisputed fact that these goods were goods within the contract description, I fail to see how they could have acted otherwise than as they did, even if the bills of lading had been what I prefer to call honestly claused rather than ambiguously claused. If they had been honestly and clearly claused as appertaining to damaged goods, so long as they did not suggest that the goods were unmerchantable or of different quality, and of different sizes to the contract goods, so far as I can see the I plaintiffs would have been obliged to do what they have done, namely, take up the documents, pay for the goods, and then seek an allowance by way of arbitration.

I am sorry to have had to come to this conclusion, but since the days when CHANNELL, J., gave his decision in *Compania Naviera Vasconzada* v. *Churchill & Sim* (1) it is common knowledge that there has been a great advance in this matter of commercial arbitration. It is not for me to say whether that is wise or unwise, but I cannot shut my eyes to it, and merchants cannot have it both ways. If they prefer to submit their disputes to commercial arbitration and to put clauses of this character into their contracts, I do not think that they can be heard to say that their position has been in any way altered by the fact that the bill of lading fails to give them information which would not have enabled them, in the circumstances, to act in a different way.

That, I think, disposes of what is really the main dispute, the question of the damaged goods. Because they cannot fulfil the third condition, showing that they have acted to their detriment, the plaintiffs cannot, I think, rely upon this question of estoppel. If they have not got estoppel and they have not got the ground of contract, there is nothing left of their case upon the question of damage.

The second point—the question of shortage—can, I think, be dealt with much more quickly. Here, again, there is really a question of construction. The point arises as regards two bills of lading only, one of them relating to a comparatively large parcel of 1,398 pieces. The bill of lading in that case stated the full number as being on board, but as to these 1,398 pieces it was claused in this way: "Being our order II and not on board of ship being lost from scow 5 during storm alongside." The description of the pieces was quite clear upon that bill of lading—1,320 deals and 78 ends, making 1,398. The second parcel as to which there was a shortage was as regards 494 pieces, and there the clause is "494 pieces of these lots not on board, being included in specification as being part of scow 5 lost from the ship." The question of construction as to what would be conveyed to persons reading these documents seems to me to be largely a question of first impression. Indeed, I am not sure that first impression is not really the safest guide—the natural and ordinary meaning when the document is presented to a merchant in the course of business. Applying this test, the two cases seem to me to fall upon different sides of the line. As regards the 1,398 pieces, I, personally, would, I think, have been perfectly clear as to what was intended, namely, that they never were on board the ship and were lost from the scow during a storm alongside. As regards the second, the 494 pieces, I am quite certain that my first feeling upon reading that clause would have been one of complete bewilderment, and I cannot imagine that that bewilderment would have been resolved if I had read further or studied more, and, therefore, I do not think, as regards the 494 pieces, that the bill of lading has been so claused as to bring to the mind of the person reading it that the 494 pieces were not shipped on board at some time. The importance of this ruling is that the charterparty contains a conclusive evidence clause, and there is, therefore, no doubt that the shipowner is bound by the quantity in the bills of lading, unless the bills make it perfectly clear that some portion of what is there stated as shipped on board was not delivered to the ship at all, and the undisputed effect of that conclusive evidence clause was to put the burden on the shipowner when once the number of pieces shipped has been stated in the bill of lading. My decision, therefore, on this matter of shortage is that the plaintiffs succeed as to the 494 pieces, but fail as to the shortage of 1,398 pieces.

Solicitors: *Waltons & Co.*; *William A. Crump & Son.*

[*Reported by* J. A. Petrie, Esq., *Barrister-at-Law.*]

DEWAR *v.* INLAND REVENUE COMMISSIONERS

[COURT OF APPEAL (Lord Hanworth, M.R., Romer and Maugham, L.JJ.), July 3, 1935]

[Reported [1935] 2 K.B. 351; 51 T.L.R. 360, 536; 153 L.T. 357; 104 L.J.K.B. 645; 79 Sol. Jo. 272, 522]

Surtax—Income for purposes of surtax—Interest payable on legacy—Legatee undecided whether to accept or disclaim interest.

By his will dated Oct. 22, 1927, a testator appointed J. A. D. and another to be his executors, and bequeathed to J. A. D. a legacy of £1,000,000 free of legacy duty and also two-thirds of his residuary estate. On April 11, 1930, the testator died, and accordingly as from April 11, 1931, the legacy carried interest at four per cent. per annum. On April 14, 1932, acting on advice, J. A. D. decided to allow the question of interest on the legacy to stand over, but on that date he commenced to draw sums on account of the legacy. The estate was at all material times sufficient for the payment of the interest, but J. A. D. did not in fact receive interest. For the year ending April 5, 1933, J. A. D. was assessed to surtax in a sum which included £40,000, representing interest at four per cent. on the legacy.

Held: the £40,000 was wrongly included in the assessment and was not liable to surtax because (*a*) J. A. D. had not received the interest, (*b*) he had not exercised any dominion over it, and (*c*) the money was not under his control; and, therefore, J. A. D. had not enjoyed the £40,000 so as to render it taxable, it being irrelevant that the money had not been received or placed at his disposal owing to his own voluntary act or omission.

Notes. Considered: *Curtis-Wilson* v. *Inland Revenue Commissioners* (1950), 66 (pt. 2) T.L.R. 269.

As to income due but not received, see 20 HALSBURY'S LAWS (3rd Edn.) 409, para. 757.

Cases referred to:

(1) *St. Lucia Estates* v. *St. Lucia* (*Colonial Treasurer*), [1924] A.C. 508; 93 L.J.P.C. 212; 131 L.T. 267; 68 Sol. Jo. 456, P.C.; Digest Supp.

(2) *Lambe* v. *Commissioners of Inland Revenue*, [1934] 1 K.B. 178; 103 L.J.K.B. 69; 150 L.T. 190; 18 Tax Cas. 212; Digest Supp.

(3) *Read* v. *Brearley* (1933), 17 Tax Cas. 687; Digest Supp.

(4) *Wood* v. *Penoyre* (1807), 13 Ves. 325; 33 E. R. 316; 23 Digest 406, *4770.*

(5) *Re Stokes, Bowen* v. *Davidson*, [1928] Ch. 716; 97 L.J.Ch. 273; 139 L.T. 331; 72 Sol. Jo. 384; Digest Supp.

(6) *Bullivant* v. *A.-G. for Victoria*, [1901] A.C. 196; 70 L.J.K.B. 645; 84 L.T. 737; 50 W.R. 1; 17 T.L.R. 457, H.L.; 12 Digest (Repl.) 338, *2623.*

(7) *Ormond Investment Co., Ltd.* v. *Betts*, [1928] A.C. 143; 97 L.J.K.B. 342; 138 L.T. 600; 13 Tax Cas. 400, H.L.; Digest Supp.

(8) *Inland Revenue Commissioners* v. *Blott*, [1921] 2 A.C. 171; 90 L.J.K.B. 1028; 125 L.T. 497; 37 T.L.R. 762; 65 Sol. Jo. 642; 8 Tax Cas. 101, H.L.; 28 Digest, 107, *663.*

(9) *Eisner* v. *Macomber*, 252 U.S. 189.

(10) *Simpson* v. *Maurice's Executors* (1929), 45 T.L.R. 581; 14 Tax Cas. 580, C.A.; Digest Supp.

(11) *London County Council* v. *A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 49 W.R. 686; 17 T.L.R. 131; 4 Tax Cas. 265, H.L.; 28 Digest 73, *392.*

(12) *Leigh* v. *Inland Revenue Commissioners*, [1928] 1 K.B. 73; 96 L.J.K.B. 853; 137 L.T. 303; 43 T.L.R. 528; 11 Tax Cas. 590; Digest Supp.

Appeal by the Crown from an order of FINLAY, J., dated April 5, 1935, reported 153 L.T. 357. The matter came before FINLAY, J., on a Case Stated under the Finance Act, 1927, s. 42 (7), and Income Tax Act, 1918, s. 149, by the Commissioners for the

A Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on May 10, 1934, Mr. John Arthur Dewar (hereinafter called the taxpayer) appealed against an assessment to surtax in the sum of £50,180 for the year ending April 5, 1933.

2. By his will dated Oct. 22, 1927, Lord Dewar, after appointing the taxpayer and Mr. B Peter Dewar to be the executors and trustees thereof, bequeathed to the taxpayer the sum of £1,000,000 free of legacy duty. Under the said will the taxpayer was also residuary legatee to the extent of two-thirds of the residue of Lord Dewar's estate.

3. Lord Dewar died on April 11, 1930, and his said will was proved on May 30, 1930.

4. As from April 11, 1931 (one year from the date of the death of Lord Dewar), the said legacy of £1,000,000 in law carried interest at the rate of four per cent. per annum C on such part of it as for the time being was unpaid.

5. The first payment received by the taxpayer in respect of the said legacy was made on April 14, 1932.

6. The estate of Lord Dewar was at all times material to this case sufficient to enable interest to be paid on the said legacy.

7. On or about April 14, 1932, the taxpayer, acting on the advice of his accountant, D decided to allow the question of interest on the said legacy to stand over and he has not at any time received any sum in respect of interest thereon. It was stated by the taxpayer's counsel on his behalf that the taxpayer at the date of this appeal had made no election as to whether or not he would claim the interest.

8. In the assessment under appeal there is included a sum of £40,000 representing interest at four per cent. on the said legacy of £1,000,000.

E 9. It was contended on behalf of the taxpayer that: (*a*) In computing the taxpayer's total income for the purposes of surtax no sum fell to be included in respect of interest on the said legacy. (*b*) The assessment should be reduced by £40,000.

10. It was contended on behalf of the Crown that: (*a*) The said sum of £40,000 was at all material times at the disposal of the taxpayer, and was, therefore, correctly included in the computation of his total income for the purposes of surtax for the year ending F April 5, 1933. (*b*) The assessment was correct in principle and amount and should be confirmed.

11. Having considered the evidence and arguments adduced before them, the commissioners decided as follows:

> "(1) The question for our decision in this case is whether a sum of £40,000, representing interest at four per cent. on a legacy of £1,000,000 bequeathed to the [taxpayer] under the will of his uncle Lord Dewar, should be included in the assessment to surtax made upon the [taxpayer] for the year 1932–33.
>
> "(2) Under the said will the [taxpayer] was appointed an executor and also became entitled to two-thirds of the residuary estate.
>
> "(3) It was admitted that as from April 11, 1931 (one year from Lord Dewar's H death), the [taxpayer] was entitled to interest at four per cent. on the legacy of £1,000,000, and it was further admitted that the estate was at all material times able to pay the said interest.
>
> "(4) Acting on the advice of his accountant, the [taxpayer] on April 14, 1932, decided to allow the question of interest on the legacy to stand over, but on that date he commenced to draw sums on account of the legacy.
>
> I "The [taxpayer] has not in fact received any sum on account of interest on the legacy.
>
> "(5) In our opinion the principle laid down in such cases as *St. Lucia Estates* v. *St. Lucia* (*Colonial Treasurer*) (1) and *Lambe* v. *Commissioners of Inland Revenue* (2) does not apply to a case such as the present where there has been no default in payment.
>
> "In this case the [taxpayer] has for the present for reasons of his own voluntarily waived his right to receive the payment of interest, and on these facts we hold that the voluntary foregoing of the interest ought to be regarded simply as being an

application of the interest: (see *Reade* v. *Brearley* (3), 17 Tax Cas. at p. 693, per FINLAY, J.). A

"(6) We, therefore, hold that the said sum of £40,000 has been correctly included in the assessment under appeal which will stand confirmed."

12. The [taxpayer] immediately after the termination of the appeal declared to the commissioners his dissatisfaction therewith as being erroneous in point of law, and in due course required them to state a case for the opinion of the High Court pursuant to B the Finance Act, 1927, s. 42 (7), and Income Tax Act, 1918, s. 149.

FINLAY, J., held that the £40,000 was not liable to surtax and should not have been included in the assessment.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *R. P. Hills* for the Crown.
Sir Leslie Scott, K.C., A. M. Latter, K.C., and *A. Andrewes-Uthwatt* for the taxpayer. C

LORD HANWORTH, M.R.—This is an appeal from a decision of FINLAY, J., upon a Case Stated, and the question that has to be determined is whether or not the taxpayer, Mr. John Arthur Dewar, is liable under an assessment in respect of a sum of £40,000 which was an item included in an assessment made upon him for a total sum of £50,180 for surtax in the year ending April 5, 1933.

Lord Dewar by his will, which was dated in October, 1927, appointed the taxpayer D and Mr. Peter Dewar to be executors and trustees of his will, and he bequeathed to the taxpayer a sum of £1,000,000 free of legacy duty. Under the will the taxpayer was also residuary legatee to the extent of two-thirds of the residue of Lord Dewar's estate. Lord Dewar died on April 11, 1930. His will was proved on May 30 of the same year, and what may be called the executors' year expired on April 11, 1931, and from and after that time the executors had to pay the sum of £1,000,000, the legacy which had E come to the taxpayer, and it is stated in the Case that this legacy carried interest at the rate of four per cent. per annum for such time and upon such part of it as remained unpaid. It is perhaps not unimportant to bear in mind that this right to be paid interest is an old-established, I think I may say, custom. It is not derived under the statute of Will. 4. In *Wood* v. *Penoyre* (4) decided in 1807, SIR WILLIAM GRANT, M.R., said:

> "Wherever legacies are given out of personal estate, consisting of outstanding F securities, those legacies cannot be actually paid until the money due upon such securities is actually got in; but by a rule that has been adopted for the sake of general convenience this court holds the personal estate to be reduced into possession within a year after the death of the testator. Upon that ground interest is payable upon legacies from that time, unless some other period is fixed by the G will."

To quote a modern confirmation of that same rule, this is to be found in *Re Stokes, Bowen* v. *Davidson* (5), where it was held that the ordinary rule was that a legacy carried interest only from a year after the death. That is based upon the definite rule which has been adopted now for so long.

Therefore, the position on April 12, 1931, was that the taxpayer was entitled to receive H his legacy and if and so long as the payment of the legacy or a part of it was in default, he would be entitled to ask for and to receive under that rule interest on the delayed portion of the legacy at the rate of four per cent. As a matter of fact, the payments that had been made on account of the legacy were small. During the course of the year 1932–33 the total sum that was paid on account of it was, if my figures are correct, £115,000, paid in comparatively small sums. There is one cheque of £30,000, one cheque I of £20,000, one cheque of £28,000, and the other cheques are all of smaller sums.

On April 14, 1932, the taxpayer, acting on the advice of his accountant, decided to allow the question of interest on the legacy to stand over, and he has not at any time received any sum in respect of interest thereon. It was stated by his counsel that the taxpayer at the date of appeal had made no election as to whether he would or would not claim interest. But in spite of that in this assessment, which is made upon him for the year ending April 5, 1933, an assessment to surtax, he is treated as having received £40,000, representing the interest on the total value of the legacy delayed for a total time of twelve months. In fact, the taxpayer, as is found in the case, has not received any sum on account of interest on the legacy.

The way in which it is claimed that he ought to be subject to assessment in respect of £40,000 is that the £40,000 was at all material times at his disposal. Exactly what does that mean? The taxpayer in his capacity as legatee could demand from the executors, of which he was one, that from and after April 12, 1932, the legacy should be paid, and if and when it was not paid he could demand that there should be interest on the aliquot portion not paid or handed over to him. The fact is found that the estate was in a position under which it could have paid the interest and I suppose the legacy too. The actual terms of the findings are:

> "It was admitted that as from April 11, 1931 (one year from Lord Dewar's death) the [taxpayer] was entitled to interest at four per cent. on the legacy of £1,000,000, and it was further admitted that the estate was at all material times able to pay the said interest."

I pause there, upon these facts, to consider what the position is. He has made, in his capacity as legatee, no demand for the full payment of the legacy, or at the material times he had not, and he has made no demand for payment of interest upon it. He has been quiescent in that. He has occupied a position which is neutral. Ought that £40,000 then to be included in the assessment upon him and on what ground? It is said that it was at his disposal. Now observe the facts. It is not a case in which the legatee, exercising his own volition, has told the executors to put the money into a bank or to hold it in a bank to his use; he has not made any direction of any sort or kind in respect of the £40,000. The money is left in this way, that if he were minded to ask for £40,000, or a part of it, it would have been possible for him to have been paid and to have received it. But the fact is he has not done anything at all in respect of that and the money has not been appropriated to his use, it has not been deposited at his direction, and it is not lying under his name, either in the hands of the bank or any other agent.

It is not quite easy to see why this total sum of £40,000 should be claimed, because upon the facts indicated on the table of payments, it does not appear that the £40,000 is a sum which would have been payable if the taxpayer had made a demand, which as I say he has not done. But I pass over that entirely, and I treat it like this: can there be a liability to pay super tax in respect of this sum not received, not lying to his use or to his order, but in respect of which the Crown say that he should have exercised his powers, and so it is to be treated as at his disposal?

I want to make two observations in reference to income tax and surtax generally. As has often been pointed out, if the subject is within a charging section, he must pay; if he is not within the charging section he has not got to pay. No doubt there can be cases in which some specious documents have been executed for the purpose of appearing to have effected a disposal of money or property so as to, what is called, evade a tax which ought to be paid. But where there is no such device resorted to, it is not true to say that a man who does not pay is evading the tax. You have got to show that the tax is exigible in the facts of the case, and if it is not exigible it is not a case of evasion at all. The words of LORD HALSBURY in *Bullivant* v. *A.-G. for Victoria* (6) ([1901] A.C. at p. 202) make that abundantly plain:

> "People are not bound to continue in the same condition of things, either as regards their direct or indirect taxation, which will render either the consumption of articles in the one case, or the property they have in the other, always liable to the tax,"

and he points out that the word "evasion" is not an accurate word to use with regard to cases where the facts do not bring the charge down upon the subject.

The other observation I want to make is this, and it is the answer which SIR LESLIE SCOTT gave to the proposition advanced by the Attorney-General, that there would be a serious danger in this case, or some other cases if, the subject not being liable under the words of a particular section of a statute, this court were to hold, for instance, that the words which are to be found in Sched. D of the Act of 1918, under cl. 1 of Sched. D, "the annual profits or gains arising or accruing," words which are not found in cl. 1 (*b*) ought to be carried over and made applicable to (*b*), although they are not there. SIR LESLIE SCOTT pointed out that if the words are not there you cannot, in a taxing Act, bring them forward for the purpose of the Crown. Either in the clear words of a taxing statute the subject is liable, or if he is not within the words he is not liable.

Some observations made in the speech of LORD SUMNER in *Ormond Investment Co., Ltd.* v. *Betts* (7) are relevant upon this point. That was a case in which in this court we had applied a certain rule, which was applicable to Cases I and II of Sched. D to the rules which are applicable to the receipt of dividends of foreign securities, and we had treated it as analogous. LORD SUMNER says ([1928] A.C. at p. 158):

> "In its express terms this rule applies to trading profits. The contention is that by analogy it can be applied to foreign shares, which are not in themselves stock-in-trade and the dividends of which are not trading profits. I cannot accept this. The analogy between the date of starting a trade, which is an aggregate of many operations, and the date when an investor buys a stock to hold, is too remote to be applicable, and in any case the Crown does not tax by analogy but by statute, and there is nothing in the Act which says what is here contended for. It is said that singular results and even a loss of tax will occur on the appellants' contention, and that this cannot have been intended by the legislature, but it is not for us to say, nor do we know, what the legislature may or may not have meant, apart from their words, by which we are bound alike to what they say and in what they do not. Words which impose tax in general terms may still receive a particular limitation where the computation rules omit the directions appropriate and indispensable to levying the tax in the particular case."

That passage is very important. It supports the view presented by SIR LESLIE SCOTT that you must construe the taxing Act strictly and you cannot apply a doctrine of analogies to it. You cannot impute what you may think the legislature may or may not have meant; you are bound by the words as to what they have done and what they have not done.

I, therefore, turn to see whether or not the statutes which apply to surtax cover this case upon the facts which I have recounted. I have come to the conclusion, in association with FINLAY, J., that they do not, and I think FINLAY, J.'s judgment is right. Surtax is the successor of super tax. Super tax was originally established by the Finance (1909–10) Act, 1910, s. 66, which imposed a further income tax called super tax. When the Income Tax Act, 1918, was passed, ss. 4 and 5 imposed the super tax. Section 4 of the Act of 1918 provides:

> "In addition to the income tax charged at the rate prescribed for any year, there shall be charged, levied, and paid for that year in respect of the income of any individual, the total of which from all sources exceeds £2,500, an additional duty of income tax (in this Act referred to as super tax). . . ."

Section 5 (1) provides:

> "For the purposes of super tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemption or abatement under this Act. . . ."

That is how super tax originated.

We have got its successor, surtax, and surtax was imposed, or the plan of surtax was imposed, because it enabled a single return to be made which could be used for the income tax and for the surtax. The result is that by the Finance Act, 1926, there were modifications made in the matter of the super tax, and by the Finance Act, 1927, we have the first reference and imposition of what is called surtax. In the Finance Act, 1927, s. 38 (1) (*b*) it is provided that if the tax payable in respect of the total income of the individual

> "is greater than the amount which would have been payable by him in respect thereof if income tax had been chargeable at the standard rate only, the difference

> between those two amounts (in this part of this Act referred to as 'surtax') shall be computed, assessed, charged, collected and paid as a deferred instalment of income tax according to the provisions of this part of this Act relating to surtax."

In its essence, therefore, whether it is super tax or whether surtax, it is a deferred instalment of income tax, and it is to be assessed, charged, collected and paid as an instalment, but a deferred instalment, of income tax.

Under s. 100 of the Act of 1918 it is provided that there shall be a return made by "every person chargeable under this Act," and the correct statement in writing is to contain

> "the amount of the profits or gains arising to him, from each and every source chargeable according to the respective schedules."

Observe, it says, "arising to him." If it has not arisen to him, if he has not become the dominus of this sum, if it does not lie to his order in the hands of his agent, can it be said that it has arisen to him? I think the answer definitely upon the facts must be: No, it has not. Then

> "the amount of the profits or gains arising to him according to the provisions and rules of this Act."

We turn, therefore, to Sched. D to see what is charged by Sched. D. Sched. D, under cl. 1 (*a*), deals with annual profits or gains arising or accruing from any kind of property whatever, whether situate in the United Kingdom or elsewhere, but it goes on under cl. 1 (*b*) to say that the tax under this schedule shall be charged in respect of "all interest of money, annuities and other annual profits." This is undoubtedly interest of money. It, therefore, falls under cl. 1 (*b*) and not under cl. 1 (*a*). Clause 1 (*b*) does not contain, as I have already pointed out, the words "profits or gains arising or accruing," and following the direction of LORD SUMNER, I am quite unable to introduce those words into cl. 1 (*b*).

Then under cl. 2 we have that general direction broken up into the various cases, and the suitable case in respect of this sum is Case III,

> "tax in respect of profits of an uncertain value and of other income described in the rules applicable to this case."

One turns, therefore, to the rules applicable to this case, and one finds that r. 1 provides:

> "The tax shall extend to—(*a*) any interest of money, whether yearly or otherwise, or any annuity or other annual payment whether such payment is payable . . . either as a charge on any property or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods."

I think the words "received and payable" there are cut down by "half-yearly or at any shorter or more distant periods." The word "payable" there does not mean: if you like to put out your hand and ask for it it will then be payable to you; it is dealing with a sum which, whether yearly or otherwise, is in fact received, whether it is payable and in fact received half-yearly or at any shorter or more distant periods. That is the rule which applies here. Can it be said here that there has arisen a personal debt or obligation? Something more is required than the mere fact that there is a capacity on the part of the estate to pay the money if it should be demanded. But it does not say—it cannot be said—that there is a debt when there has been no demand.

I turn on to Case IV for the purpose of illustrating by way of contrast what is provided and laid down as to income tax. Case IV relates to income arising from securities out of the United Kingdom, and you find in r. 1 under Case IV:

> "The tax in respect of income arising from securities in any place out of the United Kingdom shall be computed on the full amount thereof arising in the year of assessment, whether the income has been or will be received in the United Kingdom or not."

This and other provisions have been enacted for dealing with a practice which obtained whereby persons who were entitled to dividends or income arising from securities situate abroad gave a direction that those dividends or income should be paid to an agent or bank abroad and left there. The sums were at their disposal, the sums were had and received to their use, but they were not brought over to this country in the hope thereby of escaping the tax which would have fallen upon them. Rule 1 and other provisions have prevented that device from succeeding and a taxpayer must include in his return sums which are lying at his disposal, whether the income or dividend has been remitted to this country or not. But so far one has not found anything in Sched. D which says that a sum of money which is not a debt and has not been received and is not in the hands of an agent, is to be taxable. Case V also deals with profits or gains not falling under any of the foregoing cases, and it is complementary to Case IV.

In the Miscellaneous Rules applicable to Sched. D, r. 1 is:

> "Tax under this Schedule shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income in respect of which tax under this Schedule is hereinbefore directed to be charged."

Some emphasis is placed upon those words "entitled to." When all conditions have been fulfilled it may be treated as his income. But the words are sufficiently fulfilled by your treating the "receiving" as applicable to the money which has been paid over to the subject, and "entitled to" means moneys which the subject has got at his disposal but which have not at the present time been remitted from another country to him. It appears to me that there is no emphasis to be placed either one way or the other upon that.

Then reference is made to the declaration under cl. 17, which is to be found in the Dowell's Income Tax Laws (9th Edn.), at p. 787. Here there is required to be made by the subject, first,

> "A declaration of the amount of value of property or profits or gains returned, or for which the claimant has been, or is liable to be, assessed."

Then, secondly, sums "in respect of which the claimant is liable to allow the tax, with the names of the respective persons by whom such payments are to be made"—that gives information to the Revenue authorities—and, thirdly, ground rent and the like; and, fourthly, the ultimate statement, when those steps have been gone through indicated in the first, second and third declarations, of the amount of income derived according to the three preceding declarations. I do not dwell upon the actual machinery sections, but those are the sections which are material for the return by the subject of moneys which are subject to, or caught by, or rendered chargeable to income tax or surtax, and in none of those do I find the apt words to deal with this sum which has not yet been reduced at least into possession, and which is not a matter of a dividend arising from a foreign possession.

The matter is not without some guidance from authority. In *Inland Revenue Commissioners* v. *Blott; Same* v. *Greenwood* (8), there is a statement by Lord Finlay ([1921] 2 A.C. at p. 195) where he says this:

> "There can be no super tax upon income unless it has been received by the taxpayer."

Then he quotes the passage from Pitney, J., in *Eisner* v. *Macomber* (9). No doubt those words must be taken in relation to the whole paragraph. It could not be taken as an exhaustive statement because there can be super tax on some sum which has not been actually received into the pocket over here of the subject, but which is received in this sense that it is under his control and standing in his agents' hands. But it is plain, from the whole passage, that Lord Finlay is seeking first to find out whether there has been in any case a sum actually received or potentially received in the sense that it is at the disposal of the subject. In *Simpson* v. *Maurice's Executors* (10) (14 Tax Cas. at p. 601) there is the following passage:

> "The facts must be taken as they are in truth and in substance: then, if income tax attaches, it can be recovered; but if it does not attach then the income tax is lost from it,"

and you cannot torture the facts in order to see how the aliquot part of it can be received by the Crown.

In *St. Lucia Usines and Estates Co.* v. *St. Lucia* (*Colonial Treasurer*) (1) Lord Wrenbury applied a test, and says ([1924] A.C. at p. 512):

> "The words 'income arising or accruing' [words which we have not got in the present case] are not equivalent to the words 'debts arising or accruing.' To give them that meaning is to ignore the word 'income.' The words mean 'money arising or accruing by way of income.' There must be a coming in to satisfy the word 'income.'"

Again, those words must be taken in their true sense, because that is not an exhaustive definition of what is taxable under an Income Tax Act. Profits and gains are taxable, although they do not in the true sense come in. The profit and gain which arises from the occupation of property, and which falls under Sched. A, is subject to income tax, although there is not something actually coming in, but there is something enjoyed, and that is the gain which is covered by the tax. Nor is it literally true to say what Lord Macnaghten said in *London County Council* v. *A.-G.* (11), words which have been often quoted and misquoted. Lord Macnaghten is dealing in that case with the proposition which was made by the then Attorney-General, that income tax could be a tax upon capital. The Attorney-General had said that it is a tax not only on income, but on capital, and Lord Macnaghten, answering that, said that income tax was a tax on income, and not meant to be a tax on anything else. Again that is not intended to be an exhaustive definition and must be treated in the sense in which it is used. But all those observations tend in this direction, that you must find something which is in the enjoyment of the subject. He could make use of the money which lies abroad to his use. It is in that sense in his enjoyment. At the present time, upon the present facts, there is no enjoyment by him, there is no gain by him, he has derived no profit and there is nothing in his hands which will answer the test of what you mean by "income."

Then I come to *Leigh* v. *Inland Revenue Commissioners* (12), in which Rowlatt, J., whose experience and knowledge of the Income Tax Acts was quite unrivalled, says ([1928] 1 K.B. at p. 77):

> "It is to be remembered that for income tax purposes 'receivability' without receipt is nothing. Before a good debt is paid there is no such thing as income tax upon it."

I agree with those words. It appears to me that the reason why you make up the return for the particular year is that you look to see in the course of that twelve months what has been received, and it may be that a good debt will be paid in a subsequent twelve months and not in the twelve months in respect of which you are making your declaration, and you cannot anticipate that the money will come in in its proper place in the following twelve months. I think Rowlatt, J., was right in saying that for income tax purposes receivability without receipt is nothing.

Finally, with regard to *Lambe* v. *Commissioners of Inland Revenue* (2), I do not want to say anything about that case. If the subject had in any way intervened so as to say what was to be the disposal of this sum, he would have become liable to tax. You cannot, by the use which you make of a sum which has been received or which has come into your disposal, escape tax. But the truth here is that upon the facts there has been no receipt and there has been no disposal by the taxpayer, of this sum of money. There are no apt words in respect of that which would fit the case, and I cannot mould or adapt the words which do not exist in the relevant sections from sections where they do exist so as to make the taxpayer liable to this sum. The truth of the matter is that it either falls within the table which is to be returned of sums which he has received and in respect of which he is liable to tax, or it does not, and upon the facts of this case it does not fall within that table and therefore I have come to the conclusion that tax is not exigible and the decision of Finlay, J., is right. The appeal must be dismissed with costs.

ROMER, L.J.—I have come to the same conclusion. For the purposes of this case, it does not appear to me to be necessary to ascertain the origin or the precise nature of a legatee's right to receive interest on an unpaid legacy as from the expiration of one year from the testator's death. I am perfectly willing to approach this case on the footing that the taxpayer had £1,000,000 owing to him upon which interest was payable at the rate of four per cent. per annum as from April 11, 1931. The question which has to be determined in those circumstances is whether, no such interest having, in fact, been paid to the taxpayer or placed at his disposal—the taxpayer contemplating the possibility, though he has not definitely made up his mind about it yet, of releasing his debtor altogether from the claim to interest—he is nevertheless assessable in respect of such interest, or the interest for the year ending April 5, 1932, assessable in respect of that interest to surtax.

Surtax, as the Master of the Rolls has pointed out, as distinct from super tax, was first heard of when the Finance Act, 1927, was passed. I do not intend to read the relevant sections of Part III of that Act. It is sufficient to say that no item of property is assessable to surtax in any year unless income tax at the standard rate could be claimed in respect of that item of property for that year. So that the question to be determined on this appeal is whether, in respect of the interest for the year ending April 5, 1932, the taxpayer, I will not say became liable to be assessed, because in no case would he be liable to be assessed as I understand the law, but whether interest for that year became liable to income tax at the standard rate. If it did it must be by virtue of the Income Tax Act, 1918, Sched. D, cl. 1 (*b*), namely, as being interest of money. So far cl. 1 (*b*) of Sched. D does not throw any light upon the question of what interest of money is brought into tax, nor is any further light thrown on that subject by cl. 2 of the schedule which contains the cases under which tax under the schedule is to be charged. The particular case that applies here, if the schedule applies at all, is Case III:

> "Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this case."

It is not until you come to look at the rules applicable to the case that light is thrown upon the question of what interest is chargeable under Sched. D, cl. 1 (*b*).

Rule 2 of the rules applicable to Case III is as follows:

> "The tax shall, subject as hereinafter provided, be computed (*a*) as respects the year of assessment in which the profits or income first arise on the full amount of the profits or income arising within that year; and (*b*) as respects subsequent years of assessment, on the full amount of the profits or income arising within the year preceding the year of assessment."

Interest, therefore, for the year ending April 5, 1932, is not taxable under Sched. D, unless it can be properly described as being "profits or income arising within that year."

We are not without assistance from the authorities upon the question as to what is income. I will not read the passages with which the Master of the Rolls has already dealt, with the exception of the statement made by Lord Wrenbury in *St. Lucia Usines and Estates Co.* v. *St. Lucia* (*Colonial Treasurer*) (1) ([1924] A.C. at p. 512). He is dealing with the meaning of the word "income," and he says:

> "The words 'income arising or accruing' are not equivalent to the words 'debts arising or accruing.' To give them that meaning is to ignore the word 'income.' The words mean 'money arising or accruing by way of income.' There must be a coming in to satisfy the word 'income.'"

Much to the same effect was said by Rowlatt, J., in *Leigh* v. *Inland Revenue Commissioners* (12) ([1928] 1 K.B. 73) and Lord Finlay in *Inland Revenue Commissioners* v. *Blott* (8) ([1921] 2 A.C. 171), and Finlay, J., in *Lambe* v. *Inland Revenue Commissioners* (2) ([1934] 1 K.B. 178). Has there been a coming in of interest for the year ending April 5, 1932? Assuredly there has not. That being so, it appears to me that the interest for that year is not brought into tax by Sched. D.

It is said, and said truly, that it has not been received by the taxpayer or placed at his disposal owing to his voluntary act or omission; that is to say, the interest has not been paid, not because the debtor cannot pay it, but because the taxpayer has not thought fit to ask for payment, and, further, has intimated the possibility of his releasing the creditor altogether from payment of that interest. But for the purposes of income tax, one does not take an account of a possible income on the footing of wilful default. The question is what income the man has received, and not what income he has received or but for his wilful default might have received. The truth of the matter here is that no one owes a duty to the State to maintain his assessment for surtax at the highest possible figure. If a subject thinks proper so to do he assuredly may get rid of an income-bearing security for the purposes of avoiding the addition of the income from that security to his assessment for surtax purposes. That is admitted. A tenant for life, if he thinks fit, may surrender his life interest. If he does so, most assuredly he does not remain liable to be assessed to income tax in respect of the income which he has surrendered, and I for myself can see no reason why a man should not, if he thinks fit, retain the corpus of an income-bearing fund and release his right to receive the income, either for one year or two years or altogether. If he does so, in my opinion, he does not receive the interest. For that reason that interest cannot be assessed for surtax.

For those reasons, it seems to me the learned judge arrived at a right conclusion in this case and this appeal must be dismissed with costs.

MAUGHAM, L.J.—I am of the same opinion and desire to say only a few words in reference to the case. I do not want, in what I am going to add, there to be any doubt as to the correctness of what has fallen from my brother ROMER on the more general propositions. But I want, in a few words, if I can, to explain grounds on which, I think, without going quite so far, the judgment of the learned judge can be supported.

We are dealing here with a claim for surtax for the year ending April 5, 1933, and I think it is beyond dispute that the claim is based on a claim of right to tax levied under Case III of Sched. D. The sum involved is a large sum of £40,000, interest said to be due in respect of a pecuniary legacy of £1,000,000.

For my part I attribute some importance to the fact that the taxpayer cannot be compelled to receive interest on that legacy. The legal position, as explained in the rather quaint language of SHEPHERD'S TOUCHSTONE at pp. 284 and 285, is that the law will not compel a man to take property bequeathed to him by will against his will. I concede that there is no doubt at all that in the case of pecuniary legacies the legatee is entitled to disclaim part of the legacy, if he likes, and to disclaim in particular the interest on the legacy, being a pecuniary legacy, if he so wishes. The disclaimer may be inferred from the conduct of the party, and it certainly may arise from a parol statement by the legatee, and no release under seal, or anything of that sort, is required in such a case.

Having said that, I want to observe that it is beyond doubt that the standard of the assessment varies according to the source from which the taxable income is derived and that we are not dealing here with a case which might well have a different result, of interest payable in respect of a foreign possession, because there there are exceptional words. The point that arises is whether the principle which is to be derived from such cases as the *St. Lucia Usines and Estates Co.* v. *St. Lucia Colonial Treasurer* (1), *Lambe* v. *Commissioners of Inland Revenue* (2), and I will add *Leigh* v. *Inland Revenue Commissioners* (12)—all cases which decided that tax was not leviable where income of the nature therein mentioned was not received—does not apply to such a case as the present, for the reason given by the Commissioners for Special Purposes, that there has been no default in payment. For my part, I accept the view that there has been no default in payment, and I understand the finding in the Special Case "the [taxpayer] has for the present for reasons of his own voluntarily waived his right to receive the payment of interest," as meaning no more than this, that he has not claimed such interest.

For the reasons given, in particular by the MASTER OF THE ROLLS, who has dealt with those cases in some detail, I am of opinion that the cases were correctly decided and that they do not depend on or relate solely to cases where there has been a default in payment by a debtor. I think they have a wider range than that, and include cases where the debtor, if there is a debtor, for some reason other than default, and without any act on behalf of the creditor which might be alleged to amount to an exercise of dominion over the debt, has not in fact paid the sum of interest in question during the year of assessment.

As I have said, I do not want to elaborate what has already been said in the cases. I accept as correct the judgment of FINLAY, J., in *Lambe's Case* (2) and for the reasons he states there. I accept the decision of ROWLATT, J., in *Leigh* v. *Commissioners of Inland Revenue* (12) as also being correct for the reasons he gave. I do not regard those decisions as limited to cases where there is a debt and the debtor has committed default. I think in the present case two circumstances may be accurately stated in regard to the sum of £40,000 which it is said can be brought into charge. The first is that the sum of £40,000 was not during the year of assessment a debt due by the executors to the taxpayer, and, secondly, that the sum in question may never be paid or received at all.

In those circumstances, I think the decisions, which I follow, are sufficient to give reasons for the dismissing of the present appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue*; *Jacobson, Ridley & Co.*

[*Reported by* J. H. G. BULLER, ESQ., *and* GEOFFREY P. LANGWORTHY, ESQ., [*Barristers-at-Law.*]

ELLIOT *v.* JOICEY

[HOUSE OF LORDS (Lord Tomlin, Lord Russell and Lord Macmillan), December 7, 13, 1934, February 14, 1935]

[Reported [1935] A.C. 209; 104 L.J.Ch. 111; 152 L.T. 398; 51 T.L.R. 261; 79 Sol. Jo. 144]

Will—Gift of share to person "leaving issue him surviving"—Inclusion of issue en ventre sa mère at person's death.

Words in a testamentary disposition referring to children or issue "born" before, or "living" at, or "surviving," a particular point of time or event will not, in their ordinary or natural meaning, include a child en ventre sa mère at the relevant date, but the ordinary or natural meaning of the words may be departed from and a fictional construction applied to them so as to include therein a child en ventre sa mère at the relevant date and subsequently born alive if, but only if, such fictional construction will secure to such child a benefit to which it would have been entitled if it had been actually born at the relevant date. The only reason and justification for applying such a fictional construction is that where a person makes a gift to a class of children or issue described as "born" before or "living" at or "surviving" a particular point of time a child en ventre sa mère must necessarily be within the reason and motive of the gift. So, if the person who uses the words confers no gift on the children or issue described, but confers the gift on someone else, it is impossible (except in the light of subsequent events) to affirm either that the fictional construction will secure to the child en ventre sa mère a benefit which, if born, it would be entitled to, or that the child en ventre sa mère must necessarily be within the reason and motive of the gift made. In those circumstances the words used must bear their ordinary or natural meaning.

The testatrix, who died in 1912, by her will, in exercise of a power of appointment given to her under her father's will, appointed that a fund subject to the power should after her death be held in trust for all or any of her children who should survive her and, being male, should attain the age of twenty-one years, or, being female, should attain that age or marry under it, and if more than one in equal shares. She directed that the income on a share should be paid to each child of hers during the period of twenty-one years from her death, and, if any child of hers should die within the twenty-one years without having appointed his or her share as mentioned in the will, then (a) in the event of such child of hers "leaving any issue him or her surviving," in trust for such child of hers absolutely; and (b) in the event of such child of hers "not leaving issue him or her surviving" such share should go to the share or shares of any other child or children of the testatrix who should survive her. The testatrix left a son who died intestate before the termination of the period of twenty-one years, leaving a widow, who was enceinte at his death and gave birth to a posthumous child thirty-two days afterwards. On the question whether this son's share of the appointed legacy should go to the representative of his estate, or accrue by way of addition to the shares of other children of the testatrix.

Held: if the fictional construction were applied to the words "issue him surviving" in the will the result would be, not to bring the posthumous child within the benefit of the bequest as a direct participator therein, but to benefit his father's estate; the child's interest in that estate as his father's next of kin was not sufficient to bring him within the reason and motive of the bequest; and, therefore, the gift over must take effect.

Evidence—Foreign law—Scots law—Judicial notice by House of Lords.

The House of Lords, being the commune forum of both England and Scotland, takes judicial notice of the law of Scotland which, when before the House, is matter of law and so need not be proved as matter of fact.

Notes. Applied: *Re Hodgson*, [1952] 1 All E.R. 769. Referred to: *Re Heath, Stacey* v. *Bird*, [1945] Ch. 417; *Re Castle's Will Trusts*, [1948] 2 All E.R. 927.

As to a person en ventre sa mère being treated as born or living, see 34 Halsbury's Laws (2nd Edn.) 298 et seq., and for cases, see 44 Digest 834 et seq. As to proof of foreign law, see 15 Halsbury's Laws (3rd Edn.) 328–332, 335, 336, and for cases, see 22 Digest (Repl.) 611 et seq.

Cases referred to:

(1) *Cooper* v. *Cooper* (1888), 13 App. Cas. 88; 59 L.T. 1 H.L.; 11 Digest (Repl.) 491, *1137*.

(2) *Villar* v. *Sir William Gilbey*, [1907] A.C. 139; 76 L.J.Ch. 339; 96 L.T. 511; 23 T.L.R. 392; 51 Sol. Jo. 341, H.L.; 44 Digest 836, *6886*.

(3) *Burns's Trustees* v. *Burns*, 1917 S.C. 117; 54 Sc.L.R. 111; 1916 2 S.L.T. 318; 44 Digest 834, *6857 iv*.

(4) *Re Burrows, Cleghorn* v. *Burrows*, [1895] 2 Ch. 497; 65 L.J.Ch. 52; 73 L.T. 148; 43 W.R. 683; 11 T.L.R. 527; 39 Sol. Jo. 656; 13 R. 689; 44 Digest 835, *6884*.

(5) *Re Griffiths, Griffiths* v. *Waghorne*, [1911] 1 Ch. 246; 80 L.J.Ch. 176; 104 L.T. 125; 44 Digest 504, *3226*.

(6) *Trower* v. *Butts* (1823), 1 Sim. & St. 181; 1 L.J.O.S.Ch. 115; 57 E.R. 72; 44 Digest 835, *6877*.

(7) *Blasson* v. *Blasson* (1864), 2 De G.J. & Sm. 665; 5 New Rep. 65; 34 L.J.Ch. 18; 11 L.T. 353; 10 Jur. N.S. 1113; 13 W.R. 113; 46 E.R. 534, L.C.; 44 Digest 773, *6307*.

(8) *Millar* v. *Turner* (1748), 1 Ves. Sen. 85; 27 E.R. 907, L.C.; 44 Digest 834, *6868*.

(9) *Doe* v. *Clarke* (1795), 2 Hy. Bl. 399; 44 Digest 835, *6872*.

(10) *Thellusson* v. *Woodford* (1805), 11 Ves. 112, H.L.; 1 Bos. & P.N.R. 357; 44 Digest 540, *3571*.

(11) *Gulliver* v. *Wicket* (1745), 1 Wils. 105; 95 E.R. 517; 44 Digest 437, *2636*.

(12) *Pearce* v. *Carrington* (1873), 8 Ch. App. 969; 42 L.J.Ch. 900; 29 L.T. 706; 22 W.R. 41, L.JJ.; 44 Digest 836, *6892*.

(13) *Re Salaman, De Pass* v. *Sonnenthal*, [1908] 1 Ch. 4; 77 L.J.Ch. 60; 98 L.T. 255, C.A.; 44 Digest 836, *6887*.

(14) *Mountstewart* v. *Mackenzie*, 1707, Mor. 14903.

Appeal from an order of the Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.).

The facts are set out in the opinion of Lord Russell.

The Court of Appeal held, affirming the decision of Clauson, J., that the basis of the rule that a devise or bequest to children born or to children living at a given period included a child en ventre at that period and born afterwards was that the potential existence of such a child placed it within the reason and motive of the gift, and it was enough that there should be an interest, not in the child considered alone, but an indirect benefit to it by a benefit given to its parent or parents.

Wilfrid Greene, K.C., and *J. W. J. Cremlyn* for the appellant, a brother of the testatrix's deceased son.

H. B. Vaisey, K.C., and *Norman C. Armitage* for the trustees of the will.

The House took time for consideration.

Feb. 14. **LORD TOMLIN.**—I have had the advantage of considering the opinion which has been prepared and is about to be read by my noble and learned friend, Lord Russell. In the conclusion of that opinion, and in the reasoning on which it is based, I concur in all respects. It is, therefore, unnecessary for me to do more than state shortly the main reasons why I think, as I do, that the courts below have erred.

I may note here that the attention of the courts below was not directed to the fact that Mrs. Elliot was domiciled in Scotland and that her will falls to be construed by Scots law. This oversight, however, raises no difficulty. Your Lordships' House, as the ultimate appellate tribunal both of England and of Scotland, does not require proof of the law of either country, whether the case under consideration be an English case in which a question of Scots law arises, or a case from Scotland in which a question of English law arises, see *Cooper* v. *Cooper* (1) (13 App. Cas. at p. 101).

The first question raised by the will under consideration is one of construction. The critical words are found in the two phrases:

> "In the event of such child of mine leaving any issue him or her surviving [and] in the event of such child of mine not leaving any issue him or her surviving."

I cannot think that upon the true construction of these words a posthumous child of a child of the testatrix is issue left by the parent him surviving. The expression "leaving any issue him or her surviving" is not in its ordinary and natural meaning appropriate to include a posthumous child, and there is nothing, in my opinion, in the context to justify extending the meaning. On the one hand, it is no answer to say that the testatrix intended to cover every contingency, because upon either construction every contingency is covered. Nor is it permissible to adapt the meaning to give effect to what it may be thought would have been the wish of the testatrix if her attention had been called to the possibility of that happening, which in fact happened. On the other hand, the period of distribution is the date of the death of the parent of the posthumous child. The parent or the brothers of the parent are, according to the event, the donee or donees under the appointment. The posthumous child is not a donee nor even an object of the power. There is nothing in the language of the will to suggest or justify the holding up of the distribution to meet the contingency of the birth of a posthumous child who, when born, will not be and cannot be a donee under the appointment.

It remains, therefore, to consider whether there can be applied to this case the doctrine based upon the maxim "fœtus in utero habetur pro jam nato ubi agitur de ejus commodo." So far as the English law is concerned the doctrine in question was explained in your Lordships' House in *Villar* v. *Sir William Gilbey* (2). If the decision in *Burns's Trustees* v. *Burns* (3) is to be accepted as good law the doctrine is not recognised in Scotland. Having regard to the view which I take as to the limits of the doctrine, it is not necessary for the purposes of this case expressly to deal with the decision in *Burns's Trustees* v. *Burns* (3), but I desire to say that as at present advised it seems to me to be in conflict with the statements of writers of authority (e.g., see Lord McLaren's work on Wills and Succession, 3rd ed., vol. 1, p. 696), and to be unsupported by any earlier decision.

A But, assuming that the doctrine has effect in Scotland and that in regard to it English law and Scots law are the same, I am of opinion that the doctrine cannot be applied in the present case.

It is admitted that there is no example in the books of the doctrine, which is really an artificial rule of construction, being applied to the word "surviving" or to the phrase "leaving surviving," but, assuming that in appropriate circumstances it is B applicable, as I think it is, to this word or phrase, the question is: Are the circumstances appropriate here, or, in other words, is it within the meaning of the rule for the child's benefit to apply the rule? The child does not take, and could not take, any benefit directly under the gift. The courts below have taken the view that it must be for the child's benefit as a general proposition that its parent's estate should be increased. The application of this artificial rule of construction cannot, of course, depend upon the C way in which the parent in fact disposes of his estate or upon his domicil at his death or upon the accident of the law applicable to his estate at his death. I do not think the enrichment of the parent's estate is a benefit to the child within the meaning of the rule. In my opinion, the rule contemplates a benefit taken by the child under the instrument as a result of the application of the rule. To give to the rule any other operation would be to make it a rule of great uncertainty and difficult of application.

D The courts below have based themselves upon a decision of CHITTY, J., in *Re Burrows, Cleghorn* v. *Burrows* (4), and a decision of JOYCE, J., in *Re Griffiths, Griffiths* v. *Waghorne* (5). The former decision given before *Villar* v. *Sir William Gilbey* (2) came to your Lordships' House, in my opinion, was wrong, and cannot stand with *Villar* v. *Sir William Gilbey* (2), while the decision of JOYCE, J., was one construing a section of the Wills Act and therefore not strictly in pari materia, though it must not be understood that as E at present advised I accept it as correct.

The result is that, in my opinion, this appeal should succeed. For the reasons about to be indicated by my noble and learned friend, LORD RUSSELL OF KILLOWEN, the order to be made by your Lordships' House should be in the form which he has prepared, and I move your Lordships accordingly.

F **LORD RUSSELL.**—Under the will of her father (who died in the year 1881) Mrs. Elliot had a special power of appointment over certain funds exercisable in favour of her issue born in her lifetime. The funds in question represented a legacy of £50,000 and a share of residue which had been bequeathed by her father's will and in which she took a life interest.

She made her will on March 1, 1910, being then the wife of Thomas Robert Barnewell G Elliot, of Harwood, Hawick, in the county of Roxburgh, and thereby appointed the funds which were subject to her power by providing that the trustees of her father's will should hold them in trust for her children who should survive her and, being male, should attain the age of twenty-one years, or being female, should attain that age or marry under it, and if more than one in equal shares. After certain provisions cutting down shares of daughters and younger sons which need not be referred to in greater H detail, she proceeded to settle the shares of her children in manner following. She directed that during the period of twenty-one years from her death the said trustees should pay the income of each child's share to such child if he or she should so long live, and if such child should die within the said period of twenty-one years then (I quote the words of the will)

> "the said trustees shall hold such share and the income thereof in trust for such I person or persons for such purposes and in such manner in all respects as such child shall by will or codicil appoint and in default of and subject to any such appointment upon the trusts following (namely) in the event of such child of mine leaving any issue him or her surviving in trust for such child of mine absolutely, but in the event of such child of mine not leaving any issue, him or her surviving, then such share and the income thereof shall go and accrue by way of addition to the share or shares in the appointed funds of my other child or children who shall survive me"

as therein mentioned. If the child in question survived the said period of twenty-one years the said trustees were to hold the share or shares (whether original or accrued) of such child in the appointed fund and the income thereof in trust for such child absolutely.

Mrs. Elliot died on Jan. 12, 1912, and her will (with a codicil thereto) was registered in the Books of Council and Session in Scotland on Jan. 23, 1912. Confirmation of the executor therein named was granted by the Sheriff Court of the county of Roxburgh on April 13, 1912, and was resealed in England on April 30, 1912.

Mrs. Elliot had five children who survived her, namely, three sons and two daughters, but the daughters, by reason of the codicil, are not interested in the question now under debate. Of the three sons one, Thomas, died intestate and domiciled in Scotland on May 11, 1932, that is to say within the period of twenty-one years from his mother's death. He had married on April 14, 1931, but no child of the marriage was born during his lifetime. On June 12, 1932, his widow gave birth to a son who is still alive. In consequence of the death of Thomas during the period of twenty-one years the trusts quoted above came into operation, and the question which has arisen is who in the events which have happened became entitled under those trusts to the funds in question.

If the birth of the posthumous child fulfils the event described in the will as the event of Thomas "leaving any issue him surviving," then the absolute trust in favour of Thomas takes effect and the fund forms part of his estate. If, on the other hand, the birth of such a child does not fulfil the event, the fund must go over, because the failure of the event upon which the first trust takes effect necessarily involves, in my opinion, the happening of the event upon which the trust for accruer becomes operative.

Before proceeding to consider the true construction of the clause in question I would call attention to the fact that the will of Mrs. Elliot is a Scottish will, the construction of which falls to be determined according to Scots law. This seems to have been overlooked in the courts below; at all events the matter appears to have been there argued and treated throughout as one to be decided according to English law. I think, nevertheless, that it may be convenient to see how the matter stands under English law before considering how far, if at all, the position is altered under Scots law.

There are many cases decided by the courts in England in which posthumous children have been held to be included in gifts to children born in a father's lifetime, or to children living at a father's death. The foundation of these decisions, however, as has now been clearly and definitely settled, is not that the natural or ordinary meaning of the words used is such that they include a posthumous child, but that an artificial meaning must be placed upon the words because

> "the potential existence of such a child places it plainly within the motive and reason of the gift."

These are the words used by LEACH, V.-C., in *Trower* v. *Butts* (6), and subsequently approved with a defined limitation by LORD WESTBURY in *Blasson* v. *Blasson* (7). Both these authorities have, as will appear, been accepted as correct in your Lordships' House.

There is not, so it happens, any authority precisely covering the event postulated by Mrs. Elliot, namely, the death of a parent "leaving any issue him or her surviving." The word "surviving," however, which, in my view, according to its ordinary meaning requires that the person who is to survive shall be living both at and after a particular point of time, ought, as it seems to me, to be governed by the same considerations as those which have been applied to the word "living," where the event postulated has been that there should be a child living at a particular point of time, e.g., at its father's death.

To refer to all the relevant authorities, which are numerous, would be a useless task. The earlier years show decisions not altogether uniform. It will, I think, suffice if I mention only a few earlier in date to *Trower* v. *Butts* (6) and *Blasson* v. *Blasson* (7).

Millar v. *Turner* (8) was the case of a provision in a marriage settlement in favour of such child or children of the marriage as should be living at the death of the father. It was decided that a child born after the death of the father shared with the rest. LORD HARDWICKE, L.C., stated in regard to a posthumous child:

> "in all cases relating to his advantage he must be considered as in esse, according

> to the rule of the civil law; so on the statute of distribution he shall be considered as living; the intention being to provide for all the children; and if that be so the same reasoning will hold in a marriage settlement, where the intention was to provide for all the children of the marriage."

In *Doe* v. *Clarke* (9) it was stated that it seemed then settled that an infant en ventre sa mère should be considered, generally speaking, as born for all purposes for his own benefit. That was a case in which a devise was made to a man for his life and after his death to all and every such his child or children as should be living at the time of his decease (other than an excepted named child) as tenants in common and the heirs and assigns of such child for ever.

In *Thellusson* v. *Woodford* (10) the matter was debated in your Lordships' House in connection with the question of perpetuity. Peter Thellusson had by his will directed accumulation to take place during the lives of the survivors and survivor of his three living sons, his one living grandson and (putting it shortly) his (the testator's) other issue who might be living at his decease or born in due time afterwards. It was contended amongst other things that this period of accumulation exceeded the limits allowed by law, since the persons born in due time after the testator's decease could not be considered as persons actually born in his lifetime. The opinion of the judges was sought. Their unanimous opinion was delivered by the LORD CHIEF BARON MACDONALD, who reviewed the authorities and concluded the relevant portion of that opinion thus (11 Ves. at p. 141):

> "It seems then that if estates for life had been given to the several cestuis que vie in this will, and after their deaths to their children, either born or en ventre sa mère at the testator's death, they would have been good. No tendency to perpetuity then can arise in the case of such lives being taken, not to confer on them a measure of the beneficial interest, but to fix the time, during which the vesting of the property, which is the subject of this devise, shall be protracted; inasmuch as the circulation of real property is no more fettered in one case than in the other."

It will be observed that this case had nothing to do with any question of construction analogous to the question now in issue; it related solely to the question of the period of gestation in relation to perpetuity. LORD ELDON, L.C., however, in moving that the decree appealed from be affirmed, used certain language which has been quoted in other cases relating to construction, including the case in debate before us to-day. He spoke thus (at p. 149):

> "But, if it is necessary, I have no difficulty in stating, as a lawyer, that the rule of law has been properly laid down, that the time of gestation may be taken both at the beginning and the end; and that is what was meant in *Gulliver* v. *Wicket* (11) in which case the devise was to a child en ventre sa mère, and to go over, if that child should die under the age of twenty-one, leaving no issue. In the construction of that limitation, expressly to a child en ventre sa mère, suppose that child had at the age of twenty married, and died six months afterwards leaving his wife enceinte, that property, absolutely given to him, would not be divested merely because the child was not born till three months after his death. In fair reasoning, therefore, that is the construction of the words."

Trower v. *Butts* (6) is a case of great importance in view of the references to it in subsequent cases. The will of May Smith bequeathed a sum to trustees to invest and pay the dividends to Maria Heathcote for life and after her death to hold the corpus in trust for all the children of Robert Trower "born" in the lifetime of the testatrix. She died in October, 1821, at which time the wife of Robert Trower was enceinte. There were children of Robert Trower already in existence when the testatrix died. In February, 1822, a son was born to Robert Trower. LEACH, V.-C., held that that son was entitled to a share of the legacy; but the grounds of his decision need to be noted. He states the law as "fully settled" in regard to gifts to children living at the death of a testator, namely, that a child en ventre sa mère is within such a gift not because such a child answers the description of a child living, "but because the potential existence of such a child places it plainly within the reason and motive of the gift." He then points out A that the courts in other cases have acted as on the footing that there was no difference between the expressions "born in the lifetime" and "living at the death," and holds that the rule of construction which places a child en ventre sa mère within the intention of a gift to children living at the death of a testator, because plainly within the reason and motive of the gift, should equally apply and for the same reason so as to bring such a child within the intention of a gift to children born in the lifetime of a testator. In B other words, the Vice-Chancellor held that, departing from the ordinary meaning of the words, a gift to children "born in the lifetime" of a testator and a gift to children "living at the death" of a testator stood upon the same footing in this regard, that a child en ventre sa mère at the testator's death is within the gift, but only for the reason that such a child is plainly within the reason and motive of a gift to children described as above. C

Lord Westbury considered *Trower* v. *Butts* (6) when *Blasson* v. *Blasson* (7) came before him on appeal from Kindersley, V.-C. A testatrix had bequeathed moneys to be invested and accumulated during a period the termination of which was the attainment of twenty-one years by the youngest of the children of three named nephew and nieces "who shall have been born and living at the time of my decease," when she directed the fund to be equally divided among all such children of the three nephew and D nieces "as shall be then living, share and share alike." She died on Jan. 8, 1844. The nephew and nieces all had children then actually born, and the youngest of those attained twenty-one on Aug. 20, 1863. One niece had a child born on June 11, 1844, and another subsequently. The other niece had a child born on Aug. 2, 1844, and six others subsequently. Kindersley, V.-C., had held (i) that the period of division was Aug. 2, 1865, when the youngest child en ventre sa mère attained twenty-one, and (ii) that E all children whether born before or after the death of the testatrix who were living at the period of distribution were entitled. Lord Westbury affirmed the Vice-Chancellor on the second point, but held that the trust for accumulation ceased when the youngest of the children actually born and living at the death of the testatrix attained majority. He specifically approved of the decision in *Trower* v. *Butts* (6) as right and well warranted by previous decisions; but he points out that F

> "the fiction or indulgence of the law which treats the unborn child as actually born applies only for the purpose of enabling the unborn child to take a benefit which, if born, it would be entitled to, and that it is limited to cases where 'de commodis ipsius partus quaeritur'."

He describes the means by which an unborn child is included among children born or G living as a "fictitious legal interpretation," and a "peculiar rule of construction," and limits the application thereof to cases where such construction is necessary for the benefit of the unborn child. In the case before him there was no such necessity, for the actual gift clearly included all children living at the period of distribution, whether born or unborn at the death of the testatrix.

In *Pearce* v. *Carrington* (12) a testator by his will gave an annuity to his wife during H widowhood with directions to set aside a fund the income of which would be sufficient to answer the annuity, and after her decease or second marriage he directed his trustees to stand possessed of the annuity fund on trust, in case his daughter should have any child or children who being sons or a son should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, to pay and divide the same unto and between such child or children, and if there should be no such child or I children upon trust for certain named persons. By a codicil he directed that in the event of his daughter not having any such child or children as mentioned in his will, only £40,000 of the annuity fund should be divided among the named persons, the balance to form part of his residuary estate; provided that if his daughter should be living at the expiration of five years from the death of his wife and should not then have had any child or children, he directed that the said sum of £40,000 should be at once paid and divided among the named persons as if his daughter were dead without children after the decease of his wife. The testator died in 1865; his widow died on

Nov. 9, 1867; the first child of the testator's daughter was born on May 4, 1873. She was presumably enceinte when the five years' period expired on Nov. 9, 1872. Wickens, V.-C., held that the gift over of the £40,000 had not taken effect, and his decision was affirmed by James and Mellish, L.JJ. This is an instance of the "fictitious legal interpretation" being applied for the purpose of preventing the divesting of a gift by the testator to a class of which the unborn child when born would be a member. For this purpose the child en ventre sa mère, who when born would be one of the children entitled to share in the annuity fund contingently on attaining the age of twenty-one, was treated as actually born within the period of five years, i.e., the mother was treated as having had a child when the five years' period expired.

Villar v. *Sir William Gilbey* (2) is the most recent decision in your Lordships' House and requires close attention. A testator devised certain real estate in favour of his brother and his brother's sons and daughters, and died on Sept. 18, 1854. At that date the brother had two sons, namely, Alfred (the eldest) and George. After giving his brother a life estate therein, the testator devised the real estate to Alfred for life, with remainder to Alfred's sons successively in tail, with remainders over to Alfred's daughters in tail, and in default of such issue to George for life, with similar remainders to George's sons and daughters in tail, and in default of issue of George to the third, fourth and every other son or sons of the testator's brother severally successively and in remainder one after the other in tail; but he declared his intention to be

> "that any third or other son of my said brother born in my lifetime shall not take a larger interest in my estate than for life only, with remainder to his issue in tail male and then in tail female."

Alfred died in 1879 without ever having had any issue. George died in 1903 without ever having had any issue. A third son, William, had been born to the testator's brother some three weeks after the testator's death, namely, on Oct. 9, 1854, and the question arose whether his estate, which had become an estate in possession, was cut down to an estate for life, upon the footing that he was a son of the testator's brother born in the testator's lifetime. It was held by Swinfen Eady, J. ([1905] 2 Ch. 301) that the words of the will must receive their natural construction, and that considerations of the kind which enabled a child en ventre sa mère to come within such words as "living" or "born" at a certain time for the purpose of taking under or fulfilling the conditions of a gift, had no application to a case where the only result of applying them would be to cut down the child's interest. He, accordingly, declared that William's estate was an estate tail. This decision was reversed in the Court of Appeal ([1906] 1 Ch. 583). Romer, L.J., stated that a long series of cases had established that for many purposes connected with wills and their construction a child en ventre sa mère at a particular time who is subsequently born alive is to be considered as "living" or "born" at that time; and that the rule was not limited to cases where the gift was for the benefit of the child itself. As authorities for this last proposition he cited *Pearce* v. *Carrington* (12) and *Re Burrows* (4). He states the general principle thus:

> "In particular, I think, with regard to wills, that they ought to be construed and given effect to without making any such distinction [i.e., a distinction between a child actually born at a particular time and a child at that time en ventre sa mère and subsequently born alive] unless the context requires a distinction to be made."

He further states that *Blasson* v. *Blasson* (7) ought not to be followed because Lord Westbury limits the indulgence of the law to cases where its application enables the unborn child to take a benefit to which, if born, it would be entitled. "The indulgence of the law," says Romer, L.J., "is not so limited." Cozens Hardy, L.J., took the same view.

> "I think it is now settled by authority that this limitation cannot be maintained. I think that, as a general rule of construction, the word 'child' living at or born at a particular date includes a posthumous child, in the absence of any context indicating a contrary intention, and I desire to base my judgment in favour of the appellant on that broad principle."

He also considered *Blasson* v. *Blasson* (7) to be bad law.

A *Villar* v. *Sir William Gilbey* (2), when it left the Court of Appeal, contained a clearly defined rule of construction applicable to wills which could, I think, easily have been applied to the present will, notwithstanding the different phraseology there employed. The posthumous child would be included in the words "issue him surviving," which only mean children or remoter issue living at and after a particular date, and, accordingly, the event postulated by the will would have happened; Thomas could then well be said to have left issue him surviving. B Your Lordships' House, however, declined and, as I think, emphatically declined to accept this view of the law. The Lord Chancellor said that the case depended upon whether or not such a rule of construction as the Court of Appeal had described had been established by the authorities. He points out that the construction, which includes a child en ventre sa mère in the description of children "living at the father's death," is a straining of language, a fiction or indulgence on the ground that it is for the child's benefit, and that it is everywhere stated or assumed that C no such construction will be applied unless it is for the benefit of the child. After citing *Trower* v. *Butts* (6) and *Blasson* v. *Blasson* (7), and quoting LORD WESTBURY's limitation of the rule, he read the rule laid down by COZENS HARDY, L.J., and proceeded thus ([1907] A.C. at p. 146):

> "It will be observed that this principle is laid down quite broadly and regardless D of the circumstance whether the construction is for the benefit of the child or not. The Court of Appeal thought that this distinction had been overruled by authority. When I examine the cases cited in support of this view. . . . I cannot find that they support it. It seems to me that the sentence I have quoted from LORD WESTBURY, L.C., accurately states the rule and its limitation, and with the utmost respect to the Court of Appeal, I cannot accept the rule without the limitation, because E there is not authority for such a view. I agree . . . that it may be difficult at times to say when a particular construction is for the benefit of a child. But I am not on that account to extend to all cases a construction which has throughout been applied only to a particular class. Authority may compel us to do violence to the English language, and to say that in some cases a child is born weeks or months before it is brought forth. But in my opinion we ought not to say so, knowing that it is not the F fact, unless we are constrained by authority. And we are not so constrained, except where it is for the child's benefit."

LORD MACNAGHTEN agreed with the Lord Chancellor's judgment, so too did LORDS JAMES OF HEREFORD and ROBERTSON, the former adding that the judgment of LORD WESTBURY (i.e., in *Blasson* v. *Blasson* (7)) and the dicta which controlled that judgment ought to prevail in the case before the House. G LORD ATKINSON delivered a judgment in which he considered a large number of the earlier authorities, and in particular *Trower* v. *Butts* (6), *Blasson* v. *Blasson* (7), and *Pearce* v. *Carrington* (12), and held that the Court of Appeal was wrong in holding that the rule of construction was a general rule applicable irrespective of the question of securing a benefit to the child en ventre sa mère.

H The result of the decision in *Villar* v. *Sir William Gilbey* (2) in your Lordships' House seems to me to be threefold: (i) the authority of *Trower* v. *Butts* (6), and of *Blasson* v. *Blasson* (7) is established beyond attack. As MOULTON, L.J., said in the subsequent case of *Re Salaman, De Pass* v. *Sonnenthal* (13):

> "In my view the House of Lords in *Villar* v. *Sir William Gilbey* (2) authoritatively supported the decisions of LORD WESTBURY in *Blasson* v. *Blasson* (7) and LEACH, I V.-C., in *Trower* v. *Butts* (6). (ii) Such words as "living" at a particular time or "born" at or during a particular time or period do not, according to their ordinary or natural meaning, include a child who is en ventre sa mère at the particular time or during the particular period. (iii) They can only include such a child by a fictional construction, which, however, must not be resorted to except in circumstances to which I refer in my summary of what I conceive to be the law as settled by *Villar* v. *Sir William Gilbey* (2).

CLAUSON, J., has decided this case primarily upon the ground that no legal fiction or indulgence is here necessary, because the words "issue surviving a parent A. B." are

A "not inapt" to cover the case of a child "in being" at the death of A. B.; and he adopts what he calls this "loose and secondary meaning," in construing Mrs. Elliot's will. This is to include the posthumous child on the ground that it was in fact living at the crucial date, the very thing which the judgments in *Trower* v. *Butts* (6), *Blasson* v. *Blasson* (7) and *Villar* v. *Sir William Gilbey* (2), as I read them, prevent us from doing. He fortifies himself in this procedure by a reference to a decision of JOYCE, J., B in *Re Griffiths, Griffiths* v. *Waghorne* (5), in which reference is made to a case before CHITTY, J., in *Re Burrows, Cleghorn* v. *Burrows* (4).

It is necessary to examine both these authorities. *Re Burrows, Cleghorn* v. *Burrows* (4) was a case in which a testator bequeathed his residue to his wife for life and on her death as to one moiety—

> C "to my daughter Kate Cleghorn for her absolute use and benefit in case she has issue living at the death of my wife, but in case she has no issue then living"

then to her for life, after her decease to her husband for life, and after his decease to the children of the testator's son. The testator died on Nov. 26, 1894; his widow died on March 9, 1895; and on the following day Kate Cleghorn was delivered of a living child. CHITTY, J., held at the outset of his judgment that the child was "living" when D the widow died, within the words of the will, i.e., his decision was that the words "issue living" included a child en ventre sa mère simply because such a child was "living." He then continued:

> "Then it is said that the rule is that the child en ventre sa mère is not deemed to be living except where there is a benefit passing directly to the child; and as the E mother and not the child in this case takes the benefit, the gift over takes effect. But the question is covered by authority."

He then cites the authority, namely, the passage from LORD ELDON'S judgment in *Thellusson* v. *Woodford* (10), which I have already quoted, and which is merely a dictum uttered in a judgment concerned, not at all with construction, but with perpetuity only. Even viewed as a decision, it would be a decision that the rule of construction was not F subject to any limitation at all, not a decision that, there being the limitation, the rule would apply even if the benefit to the child were only of an indirect kind. *Re Burrows, Cleghorn* v. *Burrows* (4) did not decide that a benefit to the mother was a benefit to the child within the meaning of the limitation. It only decided against the existence of any limitation which forbade the construction which the learned judge had adopted. The decision cannot in my opinion stand after *Villar* v. *Sir William Gilbey* (2).

G *Re Griffiths, Griffiths* v. *Waghorne* (5) was a case under s. 33 of the Wills Act, the relevant words being

> "die in the lifetime of the testator leaving issue and any such issue shall be living at the time of the death of the testator."

A testator made a will dated June 20, 1904, under which a son Arthur took a share. H In April, 1908, Arthur married and he died on Sept. 4, 1908. The testator died on Nov. 9, 1908, and on April 29, 1909, Arthur's widow gave birth to a daughter. Two questions were raised, the first to be argued (and the only one relevant to our present purpose) was whether the posthumous daughter was issue left by Arthur living at the time of the testator's death within the meaning of s. 33. If the answer was in the affirmative, then, there being no contrary intention expressed in the will, the bequest I to Arthur would not lapse, but would form part of Arthur's estate. The argument on this question appears, from the report, to have taken a strange course. Mr. Rolt, on behalf of Arthur's executors, relied on *Re Burrows, Cleghorn* v. *Burrows* (4); Mr. Harman, claiming intestacy as to the share, contended that the point depended on whether the infant took a benefit and cited *Villar* v. *Sir William Gilbey* (2), i.e., he argued that the section did not apply because, since the child was given nothing by the section, there was no justification for the application of the fictional construction under which the posthumous daughter could be included in the words "issue . . . living at the time of the death of the testator." He was stopped by the learned judge. The arguments on the second point were then heard, and at their conclusion the learned A judge delivered judgment on both points without hearing any further argument from Mr. Harman.

His judgment on the first is racy of the judicial soil from which it sprang. It was adverse to Mr. Harman's contention. After stating the facts and reading s. 33, he delivered judgment in these words ([1911] 1 Ch. at p. 253):

> "The defendant Edith Mary Griffith is issue of the testator's son Arthur, and she B was living although not born at the testator's death, and I do not hesitate to decide that s. 33 applies to such a case. If this be a decision requiring the support of authority, it is to be found in *Re Burrows, Cleghorn* v. *Burrows* (4). It would be most unfortunate if the law were otherwise, the case being obviously within the mischief intended to be remedied by s. 33." C

As I read that judgment it decides (i) that the daughter came within the words of the section, not by reason of any rule of construction giving a peculiar meaning to the words of the section, but because she was in fact "living" at the particular date, and (ii) that *Re Burrows, Cleghorn* v. *Burrows* (4) justified that view. It is essential to observe that the question of benefit to the infant (upon which counsel had been stopped), is not in any way dealt with by the learned judge. Whatever may be the true position D in regard to s. 33, it seems clear to me that the grounds upon which this decision is based cannot be justified in the face of *Villar* v. *Sir William Gilbey* (2). CLAUSON, J., was no doubt to some extent justified in claiming *Re Griffiths, Griffiths* v. *Waghorne* (5) and *Re Burrows, Cleghorn* v. *Burrows* (4) in support of his view that a child en ventre sa mère may properly and without legal fiction or indulgence be included in the words "issue surviving a parent A. B.," as being a child "in being" or "living" at the parti- E cular point of time; but he failed to appreciate the full effect of *Villar* v. *Sir William Gilbey* (2) upon those decisions.

In his judgment he next states that there is no authority for the proposition that such an expression as "child living" cannot be treated as including a child en ventre sa mère unless such a child takes a benefit under the clause. This appears to me a crucial statement and an erroneous one. In my opinion, *Villar* v. *Sir William Gilbey* (2), F approving as it does of *Trower* v. *Butts* (6) and *Blasson* v. *Blasson* (7), is a binding decision on the point. *Trower* v. *Butts* (6) (i) abolished the idea that as a matter of ordinary construction the words "born" or "living" could be applied to a child en ventre sa mère, (ii) declared that it was fully settled in regard to gifts to children "living" at the death of a testator that a child en ventre sa mère is included solely because the potential existence of such a child placed it plainly within the reason and motive of the G gift, and (iii) applied the same exceptional construction to a gift to children "born" at the death of a testator. The only cases which (judging from his language) were present to the mind of the Vice-Chancellor as cases in which this exceptional construction was admissible, were cases of gifts to a class of children "living" or "born" at some specified point of time. This exceptional construction, described by LORD WESTBURY in *Blasson* v. *Blasson* (7) as a "fictional legal interpretation," is stated by him H to be applied only for the purpose of enabling the unborn child to take a benefit to which, if born, it would be entitled. That can only mean entitled under the document to which the fictional legal interpretation is being applied. Finally, in *Villar* v. *Sir William Gilbey* (2) which established the authority of *Trower* v. *Butts* (6) and *Blasson* v. *Blasson* (7), your Lordships' House laid it down that the fictional construction ought not to be applied unless the court was constrained by authority. CLAUSON, J., has held that this I construction can be applied, if its application secures a benefit to some other person, who in turn may or is likely to pass on some portion thereof to the unborn child when born. As I have pointed out, there is no authority in favour of this view; nor is it in accordance with the principle approved of in this House. It is impossible to say with any accuracy or certainty that any child of A. born or unborn is within the reason and motive of an absolute bequest to A. The property vests in A. on the death of the testator. True it is that A. may make provision for any or all of his children thereout; but on the other hand he may not. He may assign it away where he pleases in his life-

A time, and bequeath it where he pleases by his will*; or his debts may swallow it up. No one can tell what will happen; and it is, in my opinion, inadmissible to ascertain the meaning of words used in a document by construing them in the light of subsequent events. It is impossible in the present case to predicate, except by guesswork, that the children of Thomas were within the reason and motive of the appointment to Thomas.

In the Court of Appeal the MASTER OF THE ROLLS accepts the view that the rule B which admits of the fictional construction is based upon the child being within the reason and motive of the gift. He then asserts that the children of Thomas are within the reason and motive of this gift. Finally, he holds that *Re Burrows, Cleghorn* v. *Burrows* (4) decided that the fictional construction was applicable even if there was no gift to a child or children, but only some indirect benefit which might be derived from a gift made to its parent; and that *Villar* v. *Sir William Gilbey* (2) in no way overruled C that decision. In reliance on that decision he held that the appeal should fail. LAWRENCE, L.J., agreed, relying, as I read his judgment, entirely on *Re Burrows, Cleghorn* v. *Burrows* (4) and *Re Griffiths, Griffiths* v. *Waghorne* (5) as cases which decided that the fictional construction would be applied in order to preserve a gift to the parent of the child. ROMER, L.J., also agreed. After expressing a doubt whether the law as settled by *Villar* v. *Gilbey* (2) in relation to not treating a child en ventre sa mère "born" D at a particular time unless it is to the interest of the child that he should be so treated, applied also to the construction of the word "living," a doubt which seems to me ill-founded, he affirmed the decision of CLAUSON, J., on the ground that CHITTY, J., had decided in *Re Burrows, Cleghorn* v. *Burrows* (4) that it was not necessary that the child should take a direct benefit under the instrument which was being considered.

I have already indicated my view that *Re Burrows, Cleghorn* v. *Burrows* (4) (founded E on LORD ELDON'S dictum in *Thellusson* v. *Woodford* (10) and *Re Griffiths, Griffiths* v. *Waghorne* (5) (founded on *Re Burrows, Cleghorn* v. *Burrows* (4), are not authorities upon the question of indirect benefit as contrasted with direct benefit, and, moreover, that they cannot stand after *Villar* v. *Sir William Gilbey* (2). If I am right in this, the foundations of the judgments of the Court of Appeal disappear.

The MASTER OF THE ROLLS thought that the Lord Chancellor in *Villar* v. *Sir William* F *Gilbey* (2), when he said that it might be difficult at times to say when a particular construction was for the benefit of a child, indicated a view that an indirect benefit not conferred upon the child by the instrument under consideration was sufficient to justify the fictional construction. I cannot read that meaning into his words, which merely seem to say that the instrument which is being construed may be so worded as to raise a doubt whether a particular construction will in fact benefit the posthumous child. G I see nothing in the language used to indicate a view that the benefit may spring from a source other than the instrument itself.

The law as settled by *Villar* v. *Sir William Gilbey* (2) (but subject to any special context in the document to be construed) may be summed up thus: (i) Words referring to children or issue "born" before, or "living" at or (as I think we must add) "surviving" a particular point of time or event will not in their ordinary or natural meaning H include a child en ventre sa mère at the relevant date. (ii) The ordinary or natural meaning of the words may be departed from and a fictional construction applied to them so as to include therein a child en ventre sa mère at the relevant date and subsequently born alive if, but only if, such fictional construction will secure to such child a benefit to which it would have been entitled if it had been actually born at the relevant date. (iii) The only reason and the only justification for applying such a fictional I construction is that where a person makes a gift to a class of children or issue described as "born" before or "living" at or "surviving" a particular point of time or event, a child en ventre sa mère must necessarily be within the reason and motive of the gift. (iv) That being the only reason and the only justification for applying the fictional construction, it follows that, if the person who uses the words under consideration confers no gift on the children or issue described as above-mentioned, but confers the gift on some one else, it is impossible (except in the light of subsequent events) to affirm either that the fictional construction will secure to the child en ventre sa mère a benefit which if born it would be entitled to, or that the child en ventre sa mère must necessarily be within the reason and motive of the gift made. In these circumstances the words used must bear their ordinary or natural meaning.

---

* See now Inheritance (Family Provision) Act, 1938.

This seems to me to be the inevitable result of the adoption and approval by your Lordships' House of *Trower* v. *Butts* (6) and *Blasson* v. *Blasson* (7), of their acceptance of Lord Westbury's statement of the rule, and of its limitation, namely, "only for the purpose of enabling the unborn child to take a benefit which if born it would be entitled to," and of their refusal to do violence to language unless constrained by authority so to do. According to the law of England as it now stands this appeal must succeed.

In regard to Scots law, if *Burns's Trustees* v. *Burns* (3) was rightly decided it would seem that, according to that law, the fictional construction is inadmissible, and that the word "born" must receive its ordinary or natural meaning. I have, however, had the advantage of reading the opinion of my noble and learned friend Lord Macmillan in the present case, and, agreeing with it as I do, it will be sufficient if I point out that the Scots law being certainly not more favourable to the claims of a child en ventre sa mère than the English law, this appeal must equally succeed under Scots law.

But for the fact next mentioned, the proper order to make would be an order directing that the order of the Court of Appeal be set aside, and the order of Clauson, J., be varied by declaring that the funds therein described belong to the two brothers of Thomas Elliot (namely, the defendants Robert Barnewall Elliot and James Kerr Elliot) in equal shares. The only person, however, who has appealed from the orders of Clauson, J., and the Court of Appeal is the defendant Robert Barnewall Elliot. James Kerr Elliot has never appealed at all, and as against him, therefore, the order of Clauson, J., is binding. He can take no interest in the funds. The proper course to adopt in these circumstances is to set aside the order of the Court of Appeal, and to vary the order of Clauson, J., in manner following: (i) by inserting therein immediately after the words "now belongs" the words "as to one moiety thereof," and by adding at the end of the declaration therein contained the words "and as to the other moiety thereof to the defendant Robert Barnewall Elliot"; and (ii) by striking out the order therein contained as to costs and substituting in its place an order directing that the costs of all parties be taxed as between solicitor and client and paid out of the total funds before division into moieties. As regards the costs of the appeal to the Court of Appeal and to your Lordships' House I think that the costs of the plaintiffs and the defendants as between solicitor and client should be taxed and paid out of the total fund before division as aforesaid.

LORD MACMILLAN.—In the course of the argument for the appellant I drew attention to the circumstance, which had apparently escaped notice in the courts below, that the will which your Lordships are invited to construe, though bearing traces in its language of an English draftsman's hand, is the will of a domiciled Scotswoman. This plainly appears from the facts that the testatrix designates herself as "the wife of Thomas Robert Barnewell Elliot, of Harwood, Hawick, in the county of Roxburgh," that confirmation was taken out in Scotland and that the will was registered in the Books of the Lords of Council and Session. The law applicable to the interpretation of the will is, therefore, the law of Scotland and not, as hitherto assumed, the law of England.

Fortunately this circumstance need not embarrass your Lordships in disposing of the case. No doubt, in the courts below the law of Scotland is a matter of fact and must be vouched there by evidence or admission. But in your Lordships' House the law of Scotland is a matter, not of fact, but of law, for this House is the commune forum of both England and Scotland and your Lordships have judicial knowledge of the laws of both countries. As Lord Halsbury, L.C., said in *Cooper* v. *Cooper* (1) (13 App. Cas. at p. 101):

> "Your Lordships sitting here require no evidence, indeed can receive no evidence, of English or Scottish law."

Nor is it material that in the present case the courts below had neither evidence nor argument on Scots law. In *Cooper* v. *Cooper* (1), which was an appeal from the Court of Session in Scotland, this House decided the case on a point of Irish law on which the Court of Session had no evidence and which was not argued there. I again quote from the same paragraph of Lord Halsbury's speech:

> "if all the facts are before your Lordships for decision . . . then it is not only competent but incumbent upon this House to decide upon the true view of what legal rights these facts establish, although what was a question of fact in the Court of Session was not there mooted but is for the first time argued here before your Lordships."

I proceed, therefore, to consider as a question of Scots law the problem of interpretation which Mrs. Elliot's will presents in the circumstances which have arisen. The problem is whether her son, Thomas William Henry Elliot, who died on May 11, 1932, can be said to have died "leaving any issue him surviving," in view of the fact that, while he had no children at the date of his death, his widow gave birth to a son on June 12, 1932. As it happens, and as will appear in the sequel, there is no difference of doctrine between the law of England and the law of Scotland in the matter of the interpretation to be placed on the critical words I have quoted where a posthumous child is concerned, although, of course, the English cases referred to by Clauson, J., and the Court of Appeal which did not reach this House are not of binding authority in Scotland.

The argument in favour of holding that the critical words were in the circumstances satisfied was presented in two ways. In the first place, it was argued that, as a mere matter of construing the English language and apart from any special fiction of law applicable to posthumous children, it was accurate and according to ordinary parlance to describe a deceased person as having died leaving issue him surviving although his only issue was a posthumous child, and, indeed, that it would not be true to say of such a person that he died without leaving issue him surviving. A deceased person, it was said, must either leave or not leave issue him surviving, and, if his only child be a posthumous one, then the case falls within the former rather than the latter category; in such a case, if anyone were to ask whether the deceased died leaving issue him surviving, the ordinary and true answer would be in the affirmative, and only a pedantic precision would answer that he died without leaving issue him surviving, but that he subsequently had issue in the shape of a posthumous child. This argument is attractive, but, in my opinion, it is unsound. The question whether Mr. Thomas William Henry Elliot left issue him surviving is a question which must be determined as at the date of his death. At the date of his death he had no issue. If common parlance is to be appealed to, the deceased's obituary notice would undoubtedly have stated that he died leaving no children. I do not think that it is justifiable to seek to alter what was the fact at his death by what subsequently happened. It may be accurate enough now to say that he died leaving issue him surviving, but it would not have been accurate to say so at the date of his death, and that is what matters. It may well be that if someone had said to the testatrix: "But what if your son has only a posthumous child?" she might have replied, "I mean to include that case," and appropriate language might have been used to do so. But the question presumably was not asked and the case of a posthumous child was not covered. I am, accordingly, against giving to the language of the testatrix a meaning which, according to the ordinary use of words, it does not bear.

The respondent's second argument invokes the special benevolence which the law has always shown towards posthumous children. The judgments below are mainly based on this principle, but with all respect I think that it has been misapplied.

From the earliest times the posthumous child has caused a certain embarrassment to the logic of the law which is naturally disposed to insist that at any given moment of time a child must either be born or not born, living or not living. This literal realism was felt to bear hardly on the interests of posthumous children and was surmounted in the civil law by the invention of the fiction that in all matters affecting its interests the unborn child in utero should be deemed to be already born. The classical statement is to be found in the words of Paulus: "Qui in utero est, perinde ac si in rebus humanis esset, custoditur, quoties de commodis ipsius partus quaeritur: quanquam alii, antequam nascatur, nequaquam prosit" (DIG. LIB. I, tit. V, DE STATU HOMINUM, s. 7), A thus rendered in MONRO's translation: "An unborn child is taken care of just as much as if it were in existence, in any case in which the child's own advantage comes in question; though no one else can derive any benefit through the child before its birth." "There is indeed," says CRAIG, commenting on this passage, "no reason in the case of a posthumous child to aggravate the calamity it suffers by the premature death of the father, nor to make that event a ground for diminishing its rights" (JUS FEUDALE, B Lib. II, tit. XIII, s. 15, LORD CLYDE'S TRANSLATION II, 643).

This fiction has, undoubtedly, been adopted in the law of Scotland. I have already quoted CRAIG's approval of it in the sixteenth century. Writing in 1681 STAIR in his INSTITUTIONS OF THE LAW OF SCOTLAND (bk. III, tit. V, s. 50) states that "in all things tending in favour of those unborn, they are accounted as born." BANKTON puts it thus: "A child in the mother's womb is esteemed as already born in all things that C concern its own interest, but is not reckoned among children in relation to questions to the advantage of parents from a certain number of children" (Inst., bk. I, tit. II, s. 7, and see also his OBSERVATIONS ON THE LAW OF ENGLAND thereon, Inst. I, tit. II, s. 1). ERSKINE in his INSTITUTE (bk. III, tit. VIII, s. 76) gives the maxim in the shorter form: "Qui in utero est pro jam nato habetur quoties de ejus commodo quæritur." A more recent and fuller statement of the Scots law on the subject is contained in the D treatise on WILLS AND SUCCESSION (3rd edit., vol. 1, p. 696) by the late LORD MCLAREN, who refers to "the doctrine of the Civil Law, which has long been received in our system of jurisprudence, that a child born after the period at which the vesting of a right falls to be determined but proved by the period of its birth to have been in utero at that time is entitled to the rights of an existing person from the period of its conception. The leading case in the law of Scotland is that of *Mountstewart* (14) where the question was E elaborately discussed with reference to the rights of a child in utero to take as heir of provision in preference to a collateral substitute and was decided in conformity with the rule of the Civil Law. The fiction of law, which treats the unborn child as actually born, applies only for the purpose of enabling the child to take a benefit to which, if born, it would be entitled; and therefore, where the right of a stranger is conditioned to take effect on the birth of a child within a certain time, the right will not accrue F unless the child be actually born within the time limited."

I have troubled your Lordships with these numerous authoritative citations in order to place it beyond doubt that according to the law of Scotland a child in utero is fictionally deemed to be already born only when the result of applying the fiction is to benefit the child when actually born, and that the fiction cannot be invoked in the interests of any third party. Your Lordships were, indeed, referred to one recent G Scottish decision where the Second Division of the Court of Session declined to apply the fiction, even although it was to the interest of the posthumous child to do so, because in the will there under consideration the testator had indicated with reiterated emphasis that only those children of his son who were born prior to the date of the testator's death were to participate in his bequest (*Burns's Trustees* v. *Burns* (3)). I confess that for myself I should not be disposed to approve this decision were it before your Lordships for review. H I cannot see why the operation of the fiction should be excluded to the detriment of the posthumous child by the fact that the testator has several times and emphatically used the very language which brings the fiction into operation.

It is satisfactory for the purposes of the present case to find that the law of England in this matter is to all intents and purposes the same as the law of Scotland. The same fiction, derived from the same source in the civil law, and qualified by the same condition, I is common to both systems. In the English case of *Villar* v. *Sir William Gilbey* (2) your Lordships' House had occasion to emphasise that the limitation, which the Court of Appeal had there discarded, was an essential part of "this peculiar rule of construction," which, accordingly, applies only where it is for the benefit of the unborn child to apply it.

Can it then be said that in the present case such benefit would result to the posthumous child from applying the fiction as to justify its application? It will be observed that, if the fiction be applied, the result is not to benefit the posthumous child, but to benefit the estate of its deceased father. In the courts below the benefit to the father's estate has been regarded as sufficient to justify the application of the fiction on the ground that a child naturally and normally benefits, albeit indirectly, by anything which enhances the assets left by its father. It is said that the posthumous child's interest as next of kin in his father's estate renders it to his interest that he should be treated as having been actually alive at his father's death. I may point out that the father having been domiciled in Scotland the posthumous son was in any case entitled in name of legitim to an indefeasible right in one-third of his father's movable estate, testate or intestate, unless this right was excluded by marriage contract or otherwise discharged. But I am clearly of opinion that it is not an indirect or problematical commodum such as this that is meant in the limitation of the fiction. The commodum must in my opinion be the direct commodum of the posthumous child itself. The result of the application of the fiction in the interpretation of a bequest must be to bring the posthumous child within the benefit of the bequest as itself a participator. Any other view would render the rule uncertain and haphazard. It may, no doubt, be to a child's benefit that his father should die wealthy, but in England at least he may find himself cut off with a shilling by his father's will and so take no benefit from a construction which benefits his father's estate but does not benefit him. Or the father may be insolvent and the application of the fiction may benefit only the father's creditors and confer nothing on the posthumous child. And it might be almost equally said, if the destination-over brought into operation by the fiction sent the money to an aunt or a grandfather, that it was to the advantage of the posthumous child to have a wealthy aunt or grandfather, especially if he had the expectation of being an object of their bounty.

The sound view, in my opinion, is that the application of the fiction ought not to be at the mercy of such adventitious circumstances and that the commodum to the posthumous child must be a direct commodum to itself, resulting from the instrument under construction by virtue of the application to that instrument of the benevolent fiction in question; as, for example, to take the simplest case, where a testamentary gift is made to the children of X. at the testator's death, and the result of the application of the fiction is to include a posthumous child among the beneficiaries.

I accordingly concur in the motion that this appeal be allowed, and an order made in the terms which my noble and learned friend Lord Russell of Killowen has proposed.

Appeal allowed.

Solicitors: *Coulson & Coulson*; *Walker, Martineau & Co.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

AITCHISON *v.* PAGE MOTORS, LTD.

[KING'S BENCH DIVISION (Macnaghten, J.), November 28, December 5, 1935]

[Reported 154 L.T. 128; 52 T.L.R. 137]

Master and Servant—Liability of master—Negligence of servant—Bailment—Destruction of property bailed—Scope of servant's authority—Motor car left with garage for repair by manufacturer—Damage while in wrongful use by garage servant.

The plaintiff sent her car for repair to the garage of the defendants, who were motor dealers and garage proprietors, and thereby the defendants became bailees of the car for reward. By arrangement with the plaintiff the defendants sent the car to the manufacturers' works for repair, and when the repairs were completed their service manager at the garage went to fetch it back. He signed a delivery book at the works and drove the car away, but, instead of driving it to the defendants' garage, drove it off elsewhere and the same night collided with an omnibus, with the result that the car was wrecked beyond repair and the service manager himself killed. The plaintiffs claimed damages from the defendants for loss of the car.

Held: (i) although it was no part of his ordinary duties, the service manager had actual authority to take delivery of cars belonging to the defendants, if he thought fit to do so, provided it did not interfere with the performance of his duties at the garage;

(ii) it was in the course of the service manager's employment to fetch the car from the works, and the defendants were answerable for the manner in which he conducted himself in performing that service; the plaintiff was, accordingly, entitled to recover, despite the fact that it was a breach of duty on the part of the manager to use the car as he did for a private purpose unconnected with the defendants' business.

Central Motors (*Glasgow*), *Ltd.* v. *Cessnock Garage and Motor Co.* (1), 1925 S.C. 796, followed; principle stated by LORD MACNAGHTEN in *Lloyd* v. *Grace, Smith, & Co.* (2), [1912] A.C. 716, 736, applied.

Notes. As to the liability of a bailee for damage due to the acts of his servants, see 2 HALSBURY'S LAWS (3rd Edn.) 116, para. 225, text and note (g), and 117, para. 226, and for cases on the subject, see 3 DIGEST 73, *135*, *137*, and 34 DIGEST 130, *993–996*.

Cases referred to:

(1) *Central Motors* (*Glasgow*), *Ltd.* v. *Cessnock Garage and Motor Co.*, 1925 S.C. 796; Digest Supp.

(2) *Lloyd* v. *Grace, Smith, & Co.*, [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 28 T.L.R. 547; 56 Sol. Jo. 723, H.L.; 34 Digest 129, *991*.

(3) *Coupé Co.* v. *Maddick*, [1891] 2 Q.B. 413; 60 L.J.Q.B. 676; 65 L.T. 489; 56 J.P. 39, D.C.; 34 Digest 140, *1094*.

(4) *Storey* v. *Ashton* (1869), L.R. 4 Q.B. 476; 10 B. & S. 337; 38 L.J.Q.B. 223; 33 J.P. 676; 17 W.R. 727; 34 Digest 140, *1093*.

(5) *Sanderson* v. *Collins*, [1904] 1 K.B. 628; 73 L.J.K.B. 358; 90 L.T. 243; 20 T.L.R. 249; 52 W.R. 354; 48 Sol. Jo. 259, C.A.; 34 Digest 140, *1110*.

(6) *Mackay* v. *Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394; 43 L.J.P.C. 31; 30 L.T. 180; 38 J.P. 296; 22 W.R. 473, P.C.; 34 Digest 129, *988*.

(7) *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex.Ch.; 34 Digest 129, *987*.

Action by plaintiff, Mrs. Kate Aitchison, claiming damages from the defendants, Page Motors, Ltd., for the destruction of her Rover saloon motor car through the negligence of the defendants' servant. On April 19, 1934, the plaintiff telephoned to the defendants asking them to fetch her car, which had some defect in the clutch, and the defendants did so. The defendants' service manager, one Quaglia, subsequently advised the plaintiff that the car ought to be sent for repairs to the Rover works at Fulham, and to this the plaintiff agreed. On being notified on the following day that the repairs had been executed, Quaglia himself went to Fulham to fetch the car. He signed a delivery book at the works and drove the car away; but, instead of driving it to the defendants' garage, drove it off elsewhere, and the same night collided with an omnibus, with the result that the car was wrecked beyond repair, and Quaglia himself killed. The defendants admitted the negligence of Quaglia, but contended that at the time of the accident he was not acting within the scope of his authority or in the course of his employment.

H. J. Wallington, K.C., and *G. T. Paull* for the plaintiff.
J. W. Morris, K.C., and *C. P. Harvey* for the defendants.

Cur. adv. vult.

Dec. 5.—The following judgment was read.

MACNAGHTEN, J.—In this action the plaintiff, Mrs. Aitchison, a widow residing at Beckenham, Kent, sued the defendants, Page Motors, Ltd., who carry on the business of motor dealers and garage proprietors at Epsom, Surrey, to recover the sum of £236 12s. 6d. as damages for the loss of her motor car, a 10 h.p. Rover saloon.

The plaintiff bought the car from the defendants in March, 1934, and it was a term of the contract of sale that the defendants would overhaul the car free of charge to the plaintiff on completion of the first 750 miles. When the car had run nearly 600 miles something went wrong with the clutch, and on Thursday, April 19, 1934, Miss Aitchison, a daughter of the plaintiff, telephoned to the garage at Epsom requesting the defendants to fetch the car for overhaul and repair. A Mr. Quaglia, the service manager of the defendants at their garage, on receiving this telephone message, sent one of their drivers for the car, and thus the defendants became bailees for reward of the car and were bound to take reasonable care of it until they re-delivered it to the plaintiff. After inspection of the car, Mr. Quaglia thought that it would be best to send the car to the works of the Rover Company at Fulham to be put right by them there, and, having obtained the consent of the plaintiff, he sent it to Fulham on the morning of Friday, April 20, 1934.

The driver who took the car from Epsom to the Fulham works of the Rover Company was told that the necessary repairs would be effected and the car would be ready for delivery by 11 a.m. the next day, but on the Friday afternoon Mr. Quaglia ascertained by telephone that the car would be ready that evening, and accordingly he himself went to Fulham for it. He arrived at the works about 7 p.m. The car had then been repaired and was ready for delivery, and Mr. Quaglia, after signing for it on behalf of the defendants in the "out book" of the Rover Company, took delivery of the car and drove it away. From Fulham he went to Walham Green. It is not known where he went after that, but four hours later, shortly after 11 p.m., he was driving the car along Nightingale-lane, Balham, in the direction of Wimbledon, where he resided. A Mr. and Mrs. Porch, who also resided in Wimbledon, were with him in the car. Taking a left-hand bend in Nightingale-lane at high speed, Mr. Quaglia collided violently with an omnibus coming in the opposite direction on its near side of the road. It was a head-on collision, and the force of the impact was so great that the plaintiff's car was wrecked beyond repair, and Mr. Quaglia and both his passengers were killed.

In these circumstances the plaintiff, alleging that the destruction of her car was due to the negligent driving of Mr. Quaglia, claims damages against the defendants on the ground that they are answerable for the negligence of their servant.

The defendants admit that the accident was caused by the negligence of Mr. Quaglia, but they dispute liability on the ground that at the time of the accident he was not acting within the scope of his authority or in the course of his employment. They say, in the first place, that he had no authority to take delivery of the plaintiff's car from the Rover Company, that he was the service manager at their garage, his duties lay there and nowhere else, he should have sent one of their drivers to fetch the car, and he had no business to fetch it himself. And, secondly, the defendants say that, even if it was within the scope of Mr. Quaglia's authority to fetch the car from Fulham, they are not answerable for his negligence because at the time of the accident he was using the plaintiff's car for some private purpose of his own unconnected with their business, and was not at that time driving the car in the course of his employment.

A As to the first point raised by the defendants, namely, that Mr. Quaglia had no authority to take delivery of the car from the Rover Company, the facts are as follows. Mr. Quaglia was the service manager at the defendants' garage at Epsom; he entered their service in November, 1933; his hours of attendance were from 8 a.m. to 6 p.m., and he received by way of remuneration £4 5s. a week and a commission. According to the answer to interrogatories filed by the defendants and put in evidence on behalf of the plaintiff, "he was in general charge of motor vehicles sent to the defendant company B for repair in the sense that it was his duty as service manager to receive such vehicles at the garage and to hand them over to the company's mechanics for repair, and to arrange for their re-delivery, when repaired, to the company's customers." On previous occasions, Mr. Quaglia had, to the knowledge of Mr. Page, one of the governing directors of the defendant company, taken delivery on behalf of the defendant company from the Rover Company of cars belonging to their customers, and no objection had been C taken by the defendants to his doing so.

In these circumstances it seems plain that Mr. Quaglia had at the very least ostensible authority to take delivery of the plaintiff's car and the defendants cannot be heard to complain that the Rover Company should have refused to give it to him. And, if the Rover Company had good warrant for delivering the car to Mr. Quaglia, the defendants cannot, I think, be heard to say as against the plaintiff that the delivery was unwarranted D and that Mr. Quaglia had no authority to fetch the plaintiff's car. But I think the proper inference from the facts proved before me is that, although it was no part of his ordinary duties to do so, Mr. Quaglia had actual authority to take delivery of cars belonging to the customers of the defendant company, if he thought fit to do so, provided it did not interfere with the performance of his duties at the garage. I therefore think that the first point taken on behalf of the defendants cannot be sustained. E

The second point put forward for the defendants—namely, that at the time of the accident, Mr. Quaglia was using the car for some private purpose of his own and that he was not then acting in the course of his employment—raises a question of some nicety. The speedometer on the plaintiff's car registered 604 miles when the car left the Rover Company's works; it registered 622 miles after the accident. The car had, therefore, apparently travelled about eighteen miles between 7 p.m. and 11 p.m. No one knows F where Mr. Quaglia went or what he did during those four hours or how it came about that Mr. and Mrs. Porch were with him in the car at the time of the accident; but, in view of the facts which are known, it seems fairly certain that Mr. Quaglia must have been using the car for some purpose of his own on that evening and that at the time of the accident he was on the way to Wimbledon, where he and his passengers all lived. He, no doubt, intended to take the car to Epsom in the morning, and Wimbledon is on G the way from Nightingale-lane to Epsom. Thus the question arises whether the defendants are responsible to the plaintiff for the destruction of her car by the negligence of their servant when in breach of his duty to them he was using it for some private purpose of his own unconnected with their business.

During the argument various authorities were referred to by counsel on the one side and on the other. For the plaintiff reliance was placed on the decision of the Divisional H Court (CAVE and CHARLES, JJ.) in *Coupé Co.* v. *Maddick* (3). In that case the defendant, a surgeon, had hired a horse and carriage from the plaintiff. Returning home one afternoon, the defendant ordered his coachman to take the carriage to his stable close by, but the coachman, instead of doing so, drove to a place about a mile and a half away. While he was returning to his master's stable the coachman, subsequently convicted of having been drunk at the time, met with an accident caused by his negligent I driving and the horse and carriage suffered injury. The plaintiff brought the action to recover damages for the injury to his property. The county court judge gave judgment for the defendant on the authority of *Storey* v. *Ashton* (4), but the Divisional Court reversed his decision and held that the defendant was responsible as a bailee for the damage caused by the negligence of the coachman to whom he had entrusted the horse and carriage.

The decision of *Coupé Co.* v. *Maddick* (3), however, came under the review of the Court of Appeal, consisting of the MASTER OF THE ROLLS, ROMER and MATHEW, L.JJ., in *Sanderson* v. *Collins* (5). In that case the plaintiff, a coachbuilder, to whom the defendant had sent a carriage for repairs, lent the defendant a dog-cart for his use while the repairs were being executed. Without the knowledge of the defendant, the coachman took the dog-cart out for his own purposes and while he was driving the dog-cart it was injured through his negligence. The plaintiff brought an action in the county court to recover the cost of repairing the dog-cart. The county court judge decided in favour of the defendant. A Divisional Court, consisting of Lord Alverstone, C.J., Wills and Channell, JJ., reversed that decision and gave judgment for the plaintiff on the authority of *Coupé Co.* v. *Maddick* (3). The Court of Appeal restored the decision of the county court judge. They held that, since the coachman at the time when the damage was done was not acting in the course of his employment or within the scope of his authority, the defendant was not responsible for his negligence. The decision of the Divisional Court in *Coupé Co.* v. *Maddick* (3) could only be supported, it was said, on the view that the defendant's coachman, though he disobeyed his master's orders, was nevertheless acting in the course of his employment at the time of the accident.

In the present case Mr. Quaglia was, as I hold, acting in the course of his employment and within the scope of his authority when he took delivery of the plaintiff's car from the Rover Company. Having taken delivery it was his duty to drive the car to the defendant's garage at Epsom, but in breach of his duty he used the car for some private purpose of his own and, while he was so using it, the accident happened. So the question arises whether at the time of the accident as between the plaintiff and the defendants he should be regarded as still acting in the course of his employment so as to render the defendants answerable to the plaintiff for the consequences of his negligence, or whether he had by his conduct severed for the time being the relationship of master and servant.

In one sense of the words he obviously was not acting within the scope of his authority or in the course of his employment when he used the car for his own private purpose, but, as was pointed out by Sir Montague Smith in *Mackay* v. *Commercial Bank of New Brunswick* (6); (L.R. 5 P.C. at p. 411), the expression "acting within the scope of his authority" must not be construed in a narrow sense, since in a narrow sense a wrongful act of a servant could hardly ever be within the scope of his authority. And in *Lloyd* v. *Grace, Smith, and Co.* (2); ([1912] A.C. at p. 736), Lord Macnaghten, after dealing with the question which was at issue in that case—whether a principal was responsible for the fraud committed by his agent in the course of his employment not for the benefit of his principal but for his own benefit—said this:

> "I think, too, that the expressions 'acting within his authority,' 'acting in the course of his employment,' and the expression 'acting within the scope of his agency' (which Story uses) as applied to an agent, speaking broadly, mean one and the same thing. What is meant by those expressions is not easy to define with exactitude. To the circumstances of a particular case one may be more appropriate than the other. Whichever expression is used it must be construed liberally, and probably, as Sir Montague Smith observed, the explanation given by Willes, J., is the best that can be given."

The reference there is to the judgment of Willes, J., in *Barwick* v. *English Joint Stock Bank* (7). In that case Willes, J., after referring to a number of cases in which a master is by law held responsible for a wrong done by his servant, said (L.R. 2 Exch. at p. 266):

> "In all these cases it may be said, as it was said here, that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

In this case Mr. Quaglia was, as I hold, authorised by the defendants to fetch the plaintiff's car from Fulham, it was in the course of his employment to do so, and I think that the defendants are answerable to the plaintiff for the manner in which he conducted himself in performing that service.

In a case in the Court of Session in Scotland, *Central Motors* (*Glasgow*), *Ltd.* v. *Cessnock Garage and Motor Co.* (1), the same question came up for decision as arises here. In that case a motor car was entrusted by its owner to a foreman of garage proprietors for safe custody overnight. During the night the night watchman in charge of the garage took the car out for his own purposes contrary to his employers' instructions and without their knowledge. While being driven by the night watchman the car collided with another car and was damaged. In defence to an action for damages by the owners of the car against the proprietors of the garage, the defendants pleaded that their servant had acted out of the scope of his employment and accordingly that they were not liable for the consequences of his conduct. It was held that "as the defenders had delegated their duty of keeping the car safely secured in the garage to their servant, they were liable to the pursuers for the servant's failure in performance." That was the opinion of the Lord President on appeal to the First Division of the Court of Session. Although the decision in that case is not binding on this court, it is, of course, entitled to the very greatest respect. In my opinion, it accords with the law of England. I therefore think that the plaintiff is entitled to recover in this action.

Since it is agreed that the amount claimed, £236 12s. 6d., is the amount of damages, I direct judgment to be entered for that amount for the plaintiff, with costs.

Judgment for plaintiff.

Solicitors: *William Easton & Sons*; *Tuck & Mann.*

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

COLES *v.* ODHAMS PRESS, LTD.

[KING'S BENCH DIVISION (Lord Hewart, C.J., Humphreys and Singleton, JJ.) November 7, 1935]

[Reported [1936] 1 K.B. 416; 105 L.J.K.B. 208; 154 L.T. 218; 100 J.P. 85; 52 T.L.R. 119; 79 Sol. Jo. 860; 34 L.G.R. 34; 30 Cox, C.C. 329]

Gaming—Lottery—Newspaper competition—Substantial degree of skill—Crossword puzzle—Correct words previously selected—Betting and Lotteries Act, 1934 (24 & 25 *Geo.* 5, *c.* 58), *s.* 22 (1) (c) (i), *s.* 26 (1) (*b*).

A newspaper published an offer of prizes for the correct solution of a crossword puzzle. The solutions sent in were not adjudicated on to determine which was the best, but were examined to see whether they coincided with a set of words chosen before the competition began by the competition editor of the newspaper as being the correct solution.

Held: there was nothing to suggest that the solution set up as the standard of correctness was the best solution or other than a solution arrived at by a person acting arbitrarily, capriciously, or even mischievously, nor what criterion had been adopted by reference to which the standard had been fixed, nor the method by which or the person by whom it would be decided whether a particular solution coincided with the standard solution; the only element of skill by a competitor lay in his guessing what the competition editor had already decided; and, therefore, the competition was not one in which success depended to a substantial degree upon the exercise of skill within s. 26 (1) (*b*) of the Betting and Lotteries Act, 1934, and the proprietors of the newspaper were guilty of an offence under s. 22 (1) (*c*) (1).

Notes. Distinguished: *Witty* v. *World Service, Ltd.*, [1936] Ch. 303; Referred to: *Moore* v. *Elphick*, [1945] 2 All E.R. 155.

As to what have been held to be lotteries, see 18 Halsbury's Laws (3rd Edn.), 238 et seq., and for cases, see 25 Digest 452 et seq. For Betting and Lotteries Act, 1934, see 10 Halsbury's Statutes (2nd Edn.) 785.

Cases referred to:

(1) *Scott* v. *Director of Public Prosecutions*, [1914] 2 K.B. 868; 83 L.J.K.B. 1025; 111 L.T. 59; 78 J.P. 267; 30 T.L.R. 396; 24 Cox, C.C. 194, D.C.; 25 Digest 465, *506*.

(2) *Barclay* v. *Pearson*, [1893] 2 Ch. 154; 62 L.J.Ch. 636; 42 W.R. 74; 3 R. 388; 68 L.T. 709; 9 T.L.R. 269; 37 Sol. Jo. 268; 25 Digest 464, *500*.

(3) *Hobbs* v. *Ward* (1929), 93 J.P. 163; 45 T.L.R. 373; 27 L.G.R. 410, D.C.; Digest Supp.

(4) *Caminada* v. *Hulton* (1891), 60 L.J.M.C. 116; 64 L.T. 572; 55 J.P. 727; 17 Cox, C.C. 307; sub nom. *R.* v. *Hulton*, 39 W.R. 540; 7 T.L.R. 491, D.C.; 25 Digest 463, *496*.

(5) *Hall* v. *Cox*, [1899] 1 Q.B. 198; 68 L.J.Q.B. 167; 79 L.T. 653; 47 W.R. 161; 15 T.L.R. 82; 43 Sol. Jo. 95, C.A.; 25 Digest 465, *505*.

Case Stated by a metropolitan police magistrate.

Four informations were preferred at Bow-street Magistrate's Court by the appellant, Coles, an inspector of the metropolitan police, against the respondents, Odhams Press, Ltd., proprietors of *The People* newspaper, and Mr. Antil Gray, the publisher, by which they were charged, respectively, with publishing, on Jan. 27, 1935, in *The People*, an advertisement of a lottery called "Great Crossword Offer, £2,000," contrary to s. 22 (1) (*c*) of the Betting and Lotteries Act, 1934, and with conducting a competition in which success did not depend to a substantial degree on the exercise of skill, contrary to s. 26 (1) (*b*) of the Act.

At the hearing of the summonses it was proved or admitted that on Jan. 27, 1935, *The People* published an offer of a prize of £2,000 and other prizes for the correct solution of a crossword puzzle. A number of correct words in the puzzle were not difficult to arrive at and had no alternatives. With regard to some spaces in the puzzle, two or more words would fill them, and in that sense the words were alternatives. The solutions sent in were not adjudicated on to determine which was (or were) the best, but before the competition began the competition editor of the newspaper had chosen a set of words as the solution of the puzzle. It was found as a fact that, where there were alternative words, the best was not always selected.

For the appellant it was contended that many of the alternative words were equally accurate and appropriate, and that, even though some skill might be exercised in arriving at the framework of the puzzle through the words which had no alternatives, if, in fact, there was no guide except a guess which would lead the competitor to determine which alternative word the editor of the newspaper would choose, then the scheme was a lottery because the prize was, in that event, allotted by chance. For the respondents it was contended that some element of skill was required to do the framework of the puzzle, and that, in addition, the ingenuity and skill required to complete the puzzle consisted in discovering the so-called alternatives and then looking carefully and critically at the words of the clue and rejecting the less appropriate word. It was further contended that the so-called alternatives were not really alternatives, but that one word was more appropriate than the other.

The magistrate found as a fact that in the greater number of cases the words chosen by the editor were the best and most appropriate words having regard to the clues, but that it was doubtful whether certain of the other words chosen were the most appropriate and had the best relation to the clues, and that in the case of some of them the alternative word was better. He was, however, of the opinion that the competition must be looked at as a whole and that he was not justified in dividing the question into what had been described as "easy words" and "difficult words." He found that a considerable element of skill was required to solve the puzzle and that the persons who had successfully solved the puzzle had exercised a substantial degree of skill. On those grounds he dismissed all the informations.

The appellant Coles appealed to the Divisional Court.

A

By the Betting and Lotteries Act, 1934, s. 22 (1):

> "... every person who in connection with any lottery promoted or proposed to be promoted either in Great Britain or elsewhere ... (*c*) prints, publishes or distributes, or has in his possession for the purpose of publication or distribution—(i) any advertisement of the lottery ... shall be guilty of an offence."

B

By s. 26 (1):

> "It shall be unlawful to conduct in or through any newspaper ... (*b*) any competition success in which does not depend to a substantial degree upon the exercise of skill...."

Roland Oliver, K.C., and *Eustace Fulton* for the appellant.
Sir William Jowitt, K.C., and *L. A. Byrne* for the respondents.

C

LORD HEWART, C.J. [after stating the facts of the case and the opinion of the magistrate:] Our attention has been directed, as it always is directed in cases of this kind, to *Scott* v. *Director of Public Prosecutions* (1), but the judgments in that case must obviously be read in close connection with the facts, and there seems to me to be not merely some difference, but, in the words of the ancient philosopher, "all the difference," between that case and the present case. In that case there was an advertisement of a D competition, the terms of which were that each competitor was to select one of a number of given words and compose a short sentence which defined or illustrated the word selected. The literary results so achieved were to be sent in to the editor of a newspaper, who undertook that all of them should receive careful consideration, and that then, having all of them before him, he would adjudicate finally and beyond the possibility of appeal on the question which was the best of them. In other words, it was, E within its modest limits, a kind of literary competition in which the editor was to be arbiter. There were many grounds on which it was suggested that the competition was a lottery. It was argued, on the other hand, that there was enough in the nature of skill to save the competition from that mischief, and the court so held, CHANNELL, J., concurring in the decision with some reluctance. It seems to me that there is all the difference in the world between a competition where persons engaged in a literary F enterprise allow somebody else to pick out the best and agree to abide by his decision and a case where persons undertake to make a series of shots at something already decided behind their backs on the terms, not that anybody shall exercise skill and judgment in deciding which is the best of the competitors' efforts, but that somebody shall perform the task of deciding which comes nearest to a secretly fixed standard. *Scott* v. *Director of Public Prosecutions* (1), therefore, seems to me to have no bearing on G the present case, except to illustrate the distinction which exists between that case and this. But it is to be observed that LUSH, J., said in his written judgment ([1914] 2 K.B. at p. 875):

> "Now, a scheme may either be on the face of it a lottery, that is a scheme for distributing money according to mere chance, or, if it is not, it may be shown by extraneous evidence that the parties concerned contemplated that it would be H conducted in that way."

The question which I ask myself is whether the inevitable conclusion on the materials before us now is not that this scheme is, on the face of it, a lottery.

What was the scheme? Certain words which, put together, might make a crossword puzzle were suggested by means of a series of clues. Acting on those clues, the competitor, who paid 3d. for one attempt or 1s. for four attempts, sent in his solution. I Then the question arose, when all the answers had been received and the appropriate date had been reached, which of those solutions coincided in the greatest number of particulars with the words selected beforehand by the competition editor. All that remained after the advertisement of the scheme was that the crossword solutions should be sent in, and then it was to be ascertained which came nearest to a solution to the puzzle already made, but hidden from the competitors. That seems to me to approach as nearly as possible, not indeed in all respects, but in most material respects, to *Barclay* v. *Pearson* (2).

The first summons charges the advertisement of a certain lottery. What is a lottery? A lottery is a distribution of prizes by lot or chance. The charge here is that the respondents on the day in question advertised a distribution of prizes by chance. What else was it? I have read the scheme again and again, and there is nothing in it to suggest, much less to undertake, that the solution adjudged to be correct will be intrinsically, or will be thought to be, the best solution. There is nothing to suggest, much less to undertake, that the competition editor will seek to find or to prescribe the best solution. There is no clue at all to the qualifications of the editor. There is no clue at all to the frame of mind in which he will act, or has already acted at the material time. There is no clue to the criterion, if any, by reference to which the standard has been fixed. The solution which is to be adjudged to be correct is not to be picked out of the efforts of the competitors in competition with each other. It is to be the solution which is found, on examination, to coincide most nearly with a set of words chosen beforehand by somebody not known, by a method, if any, not stated, that person being perfectly at liberty to act in an arbitrary, capricious, or mischievous spirit. In other words, the competitors are invited to pay a certain number of pence to have the opportunity of taking blind shots at a hidden target.

The magistrate has thought fit to find that this competition involved and contemplated a degree of skill. But skill about what? The element of skill, if any, is, in my opinion, to be directed, and directed only, to the lucky guessing of the details of a mysterious collection of unrelated words, selected beforehand by a person whose idiosyncrasies are as completely concealed as his methods, and whose ignorance may be co-extensive with the wisdom of Solomon. I see the word "lottery" written all over this scheme, and it passes my comprehension to understand how the magistrate could have come to the conclusion to which he came.

The case has been presented, or obscured, with a wealth of etymological, grammatical, and miscellaneous information, sufficient, one would think, to surprise and indeed to bewilder any competition editor. It has been a most interesting argument, but, in my opinion, almost wholly beside the mark. The question is: What was the nature of that which was being advertised? In my opinion, it comes within the words used by Lush, J., "a lottery upon the face of it." I think, therefore, that, on the material which the magistrate had before him, he came to a wrong conclusion, and that the only possible conclusion was that the offence had been committed.

I see from the shorthand note of the proceedings before the magistrate that, at the conclusion of the matter, the magistrate said to counsel who appeared for the respondents: "You must decide whether you will call your evidence. If you desire to call it, I will give you permission to do so now." And the answer was: "No, I think not." That is to say, being invited to offer what evidence was to be offered, then and there, counsel decided to refrain. He was perfectly within his rights in doing so, and it follows, therefore, that, when this case goes back to the magistrate with a direction that this is, upon the face of it, the advertisement of a lottery within the meaning of s. 22 (1) (*c*) (i) of the Act, the respondent will be entitled to offer such evidence as appears to them to be suitable. I cannot imagine what evidence can possibly be offered which could prevent the conclusion that the offence has been committed, but that will be for the magistrate to consider.

I think that this appeal should be allowed, and the case remitted in the manner which I have indicated.

HUMPHREYS, J.—I entirely agree with every word of the judgment which has been delivered by my Lord.

I only desire to add very few words. This is a case about an alleged lottery. There will never be any finality on the question of lotteries. It has been said more than once in judgments by members of this court that so soon as a particular scheme is declared by the court to be a lottery the skill and ingenuity of a number of extremely able persons will be exercised to try to discover some means of avoiding that judgment. On the other hand, it is not uninteresting to observe that the view taken by those who are the usual prosecutors in such cases may vary from time to time. As the result of a number of cases decided by this court, and some decided by magistrates, in which competitions

were held to be lotteries, in a year which I think I am correct in saying was 1921, a A
scheme was evolved which was believed to be prosecution-proof. On that scheme being tested at Bow-street Police Court, it was held to be a legal scheme. Much consideration was given to the matter in those days by the authorities, and it was decided not to contest the finding of the magistrate that the scheme was legal and did not amount to a lottery. In 1929, however, precisely that scheme came before this court in *Hobbs* v. *Ward* (3), and was held by the court, my Lord presiding, the other judges being Avory B
and Swift, JJ., without any doubt at all to be a lottery. I only make those observations with reference to the decision in *Scott* v. *Director of Public Prosecutions* (1). I desire to add nothing to what my Lord has said with regard to that case, except that it may be that if, with the knowledge gained from cases which have been decided since, those learned judges were able to deal with the matter again, they might come now to a different conclusion. C

Out of respect for the argument of counsel for the respondents I want to say with regard to the present case that more than once he claimed that the competition editor of this newspaper had found the only possible solution of this crossword puzzle. If that were true, it would mean that this was a case in which there was a fact to be ascertained which might have been ascertained already or might fall to be ascertained at a later date, and, if that were the truth of the matter, I cannot myself doubt that counsel's D
argument would be right, because the case would fall, as it seems to me, precisely within *Caminada* v. *Hulton* (4) and *Hall* v. *Cox* (5). But I think it is impossible to say, on the findings of the magistrate in this case, that the only possible solution, or, in other words, the necessarily correct solution, of this puzzle is that which the editor put forward as his solution and which was published in the newspaper as the correct solution. I think that it is quite obvious from the argument which has taken place before us to-day that E
there are alternative solutions which some people might think better, some people might think not so good, and some people might think equally good. When there are alternative solutions the difficulty arises that the person who is to be considered, the competitor, is invited to decide which of two alternative solutions will be selected by some person whom he does not know, and by some method which is not indicated, and, in my view, that means, as my Lord has said, that on the face of it an invitation to enter such F
a competition is an invitation to take part in a lottery.

I think that we have very little to do with the question what is our opinion or what was the magistrate's opinion as between one suggested solution and another suggested solution, one way or the other. It seems to me that this competition is one which, on the face of it, is a lottery. What we are dealing with in the first summons is the advertisement, and it seems to me that the advertisement is, on the face of it, an invitation to G
persons to guess—because it can only be done by guessing—what will be the view of some unknown person who is called the competition editor as to the correct answer to give to a question connected with a crossword puzzle. That seems to me to be plainly a lottery, and, in my view, it is a lottery.

SINGLETON, J.—I agree that the appeal must be allowed. I am satisfied that the H
magistrate was wrong in deciding that there was no case to answer.

Appeal allowed.

Solicitors: *Solicitor for Metropolitan Police*; *Lewis & Lewis.*

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

HAROLD WOOD BRICK CO., LTD. *v.* FERRIS

[COURT OF APPEAL (Greer, Slesser, and Roche, L.JJ.), May 22, 1935]

[Reported [1935] 2 K.B. 198; 104 L.J.K.B. 533; 153 L.T. 241; 79 Sol. Jo. 502]

Sale of Land—Contract—Time of the essence—Intention of parties—Land bearing plant of wasting kind used for trading purposes—Failure by purchaser to complete—Vendors' right to damages.

A contract for the sale of land comprising a brickfield with thereon plant connected with a brickmaker's trade contained a clause providing for completion of the purchase on three different dates, applicable in different sets of circumstances, which were specified, and continued: "but the purchase shall in any event actually be completed not later than" the latest of the three dates mentioned. The purchaser failed to complete on the agreed date, and the vendor, after giving notice that he proposed to treat the contract as repudiated, re-sold the property at a lower figure and claimed as damages the difference between the contract price and the price realised by the re-sale.

Held: the stipulation in the agreement as to the time of completion could not be disregarded without injustice to the parties because (i) on the true construction of the agreement the parties had stipulated that the time fixed should be essential, and (ii) the property sold included plant of a wasting kind to be used for trading purposes, and, therefore, time was of the essence of the contract and the vendor was entitled to re-sell the property and to damages the amount of which had been agreed between the parties.

Observations of LORD PARKER OF WADDINGTON in *Stickney* v. *Keeble* (1), [1915] A.C. at p. 416, applied.

Notes. Considered: *Barber* v. *Wolfe*, [1945] 1 All E.R. 399; *Thorpe* v. *Fasey*, [1949] 2 All E.R. 393.

As to date of completion of an agreement for sale of land, see 29 HALSBURY'S LAWS (2nd Edn.) 296 et seq., and as to remedies under an uncompleted contract, ibid. 374 et seq.; and as to cases, see 40 DIGEST 110 et seq., and 221 et seq.

Cases referred to:

(1) *Stickney* v. *Keeble*, [1915] A.C. 386; 84 L.J.Ch. 259; 112 L.T. 664, H.L.; 40 Digest 114, *912*.

(2) *Macbryde* v. *Weekes* (1856), 22 Beav. 533; 28 L.T.O.S. 135; 2 Jur. N.S. 918; 52 E.R. 1214; 12 Digest (Repl.) 351, *2720*.

Appeal from an order of SWIFT, J., in an action tried by him without a jury.

The plaintiffs, through their liquidator, claimed from the defendant damages for breach of an agreement dated Aug. 15, 1933, whereby the plaintiffs agreed to sell and the defendant agreed to buy certain freehold land and buildings, together with machinery, plant and utensils, situated at Church-road, Harold Wood, Essex. The agreed price was £9,500, and the date for completion was Sept. 15, 1933.

By cl. 15 of the agreement:

> "(1) Payment of the purchase-money of £9,500 and completion of the purchase shall take place on Aug. 31, 1933, at the offices of the vendors' solicitors, Messrs. Reynolds, Sons and Gorst, 7, Arundel-street, Strand, W.C.2, or the purchaser may at his option complete the purchase on Aug. 15, 1933, at the said offices, in which event the purchase price to be paid by him shall be £9,000 instead of £9,500.
>
> "(2) If the purchaser's solicitors give notice to the vendors' solicitors (not later than Aug. 15, 1933), and with such notice pay 20 per cent. of the purchase price of £9,500 to the vendors' solicitors as a deposit and on account of the purchase-money, the purchaser shall be let into possession of the property as tenant at will of the vendors, the purchaser paying from such date interest at 5 per cent. per annum on the balance of the purchase-money and paying and being responsible for all rates,

> taxes, assessments, duties, charges, rents, liabilities and out-goings whatsoever in respect of the property and keeping the property in as good a state of repair and condition as it was at the time of taking possession.
>
> "(3) If for any reason the actual completion of the purchase is delayed beyond Aug. 31, 1933, then nevertheless on that date the purchase-money of £9,500 (less the amount, if any, the purchaser may have paid on account thereof in respect of being given possession as a tenant at will as hereinbefore provided) shall be placed on deposit at the Westminster Bank, Ltd., Aldwych Branch, W.C.2, in the joint names of the vendors' solicitors and the purchaser's solicitors, but the purchase shall in any event actually be completed not later than Sept. 15, 1933. The purchaser shall also pay to the vendors interest at the rate of 5 per cent. per annum from Aug. 31, 1933, until actual completion on the said sum of £9,500, or lesser amount as aforesaid, any bank deposit interest received by the vendors to be credited as on account of such interest."

By cl. 16:

> "Should the purchaser fail to complete the said purchase in accordance with this agreement . . . any deposit paid by the purchaser shall be forfeited to the vendors, who may rescind the same and re-sell the property either by public auction or private contract subject to such stipulations as they may think fit."

The defendant failed to complete on the agreed date, or at all, and did not pay any part of the purchase price, and by letter dated Nov. 13, 1933, the plaintiffs gave notice to the defendant that they proposed to treat such failure as a repudiation and to re-sell the property pursuant to cl. 16. In February, 1934, the plaintiffs re-sold the property at the price of £4,510, and they claimed the difference between the sum and £9,500, namely £4,990, as damages. The defendants contended that the plaintiffs could either rescind the sale or claim damages, but they could not do both.

Swift, J., held that the plaintiffs were entitled to recover the damages claimed by them, notwithstanding that under the former practice in the Chancery Division a decree for rescission and an order for assessment of damages could not be obtained in the same proceedings. The defendant appealed.

Roxburgh, K.C., *Valentine Holmes* and *Roche* for the defendant.
Vaisey, K.C., and *W. E. P. Done* for the plaintiffs.

GREER, L.J.—What we have to determine in this case is whether Swift, J., was right in coming to the conclusion that the defendant was liable to pay the plaintiffs damages for his failure to perform an essential term of the contract, which was of the essence of the contract. Unfortunately, the argument, as I gather from the judgment and from what we have been told, which was presented to the learned judge for consideration, was not quite in the same form as the argument which has been presented to us on behalf of the defendant, and, therefore, the words used by the learned judge do not seem to be exactly those which he would have used in giving judgment if the argument put before him had been the same as the argument which has been put before us. That, however, is immaterial. What we have to determine is whether the judgment which was entered up in accordance with the learned judge's oral judgment was or was not right. If it was right, it does not matter whether the learned judge failed to deal with all the points that have been argued in the course of the appeal. In my judgment, the learned judge came to a right decision in holding that the defendant was liable to pay damages, and, as the damages had been agreed, that meant liable to pay the agreed damages for the breach of a term which went—to use an expression commonly used by common law lawyers—to the root of the contract. The term which the defendant broke, and which justified the plaintiffs in saying: "You have repudiated the contract, you have released me from any further performance of it, and I am entitled to recover damages from you by reason of your repudiation of the contract," was a repudiation consisting of a refusal to carry out a term which was of the essence of the contract.

The agreement with which we are concerned is an agreement dated Aug. 15, 1933, for the sale of a brickfield. A brickfield is a piece of land, like any other piece of land, but this land had upon it the tools of a brickmaker's trade, some of them obviously of very considerable value. I mention that because, in one view, it might have become necessary for us to determine whether that consideration was sufficient to justify an inference that, though in the ordinary course the date of completion is not meant to be of the essence of the contract, yet, having regard to the fact that in this case there was a sale, not merely of the land, but of the land as it had been developed for the purposes of a brickfield with the tools of the trade carried on there, the date of completion, if there had been only one date, Aug. 15, 1933, was of the essence of the contract, both in equity and at common law. There is a good deal of authority on the question, and before deciding on it one would have liked to look at those authorities which seem to have the effect that if, though in form the sale is a sale of land, it in reality is the sale of a business enterprise, the equitable rule about time not being of the essence of the contract will not apply, either in the courts of Chancery or those of common law. Fortunately, it is not necessary to go into those authorities or to decide that question.

The clauses of the agreement which we have to consider are cls. 15 and 16. I agree with the argument that has been put forward by counsel for the plaintiffs that the effect of cl. 15 of the agreement is: that, if there had been nothing to consider but the date of completion, fixed primarily as Aug. 31, 1933, there might have been some difficulty in saying that the time so fixed should be regarded in equity as well as at common law as of the essence of the contract, but there are two other dates fixed. The clause expressly gives to the purchaser a right to further time if, by his solicitors, he gives notice to the vendors' solicitors,

> "not later than Aug. 15, 1933, and with such notice pay 20 per cent. of the purchase price of £9,500 to the vendors' solicitors as a deposit and on account of the purchase money, the purchaser shall be let into possession of the property as tenant at will of the vendors, the purchaser paying from such date interest at 5 per cent. per annum on the balance of the purchase-money and paying and being responsible for all rates, taxes, assessments, duties, charges, rents, liabilities and outgoings whatsoever in respect of the property and keeping the property in as good a state of repair and condition as it was at the time of taking possession."

That would seem to indicate that, if that clause were complied with, completion on that date, Aug. 31, 1933, could not be deemed to be of the essence of the contract. Then sub-para. 3 of cl. 15 goes on to say this:

> "If for any reason the actual completion of the purchase is delayed beyond Aug. 31, 1933, then nevertheless on that date the purchase money of £9,500 (less the amount, if any, the purchaser may have paid on account thereof in respect of being given possession as a tenant at will as hereinbefore provided) shall be placed on deposit at the Westminster Bank, Ltd., Aldwych Branch, W.C.2, in the joint names of the vendors' solicitors and the purchaser's solicitors."

I should have been inclined to the view that that clause was peremptory, and that, if the money were not paid on that date, it would be a ground on which the vendor would be entitled to say: "You have not performed that which was an essential term of the contract." It is not, however, necessary to determine that by reason of the words which follow, which I think are quite clear: "But the purchase shall in any event actually be completed not later than Sept. 15, 1933." That is to say, even though the money has been paid into the joint names within the first part of the clause, nevertheless, in any event, whether it has or whether it has not, the purchase shall be completed not later than Sept. 15, 1933.

> "The purchaser shall also pay to the vendors interest at the rate of 5 per cent. per annum from Aug. 31, 1933, until actual completion on the said sum of £9,500, or lesser amount as aforesaid, any bank deposit interest received by the vendors to be credited as on account of such interest."

I agree with the contention that the only way in which effect can be given to the special words in this clause relating to completion on Sept. 15, is to make completion on that date a condition of the contract which is of the essence of the contract, and that it would A have been so held in a court of equity as well as in a court of common law.

That is quite sufficient to dispose of this case, because it is established beyond question that by Sept. 15, and for some little time thereafter, the purchaser had failed to comply with the obligation actually to complete the purchase not later than Sept. 15, that time being, according to the view that I take of cl. 15, made of the essence of the contract. Accordingly, the vendor is entitled at law to say: "You, the purchaser, have broken an B essential term of this contract; in consequence of that, I am entitled no longer to be bound by it, and the contract remains alone open for the purpose of my bringing an action for damages for the breach by you of that essential term of the contract."

But there are other reasons which would lead to the conclusion that the time of final completion was of the essence of the contract. Notwithstanding the fact that my brethren do not take the same view that I take of cl. 16, it seems to me that cl. 16 in C itself indicates that these parties intended that the time of final completion should be of the essence of the contract. You may say by words expressly in the contract to the effect that the time of completion shall be, notwithstanding any rule or law or equity to the contrary, of the essence of the contract, or the provision may be followed by words which in substance mean the same thing. If you say, as these parties did in cl. 16, that, if the purchaser fails to complete the purchase in accordance with the agreement at the D time fixed by the agreement, the vendor may rescind the same, you are thereby saying that that is a condition of the contract and the effect of non-performance is that there shall be, what there could not otherwise be, a recission by the other party to the contract. It is not necessary to consider, I think, the words of the clause which follow, except for the purpose of showing that there are agreed terms as to how the damages are to be estimated if the contract is rescinded by reason of a breach of an essential condi- E tion. The property may be re-sold either by public auction, by private contract, or subject to such stipulations as the vendor may think fit. The effect of that is that, if the vendor were measuring his damages by reason of the loss on a re-sale by auction, it could not be said: "If you had only waited a bit, and if, instead of selling by auction, you had sold by private contract, you would have got a larger figure"; and, also, it could not be said: "You cannot recover as the damages you are asking for, the difference F between what has been received and what you would have had under the contract, because you have put in stipulations which you ought not to have put in your particulars of sale, whether the sale be by contract or by auction." I think true effect is given to those words by assuming that they were put in for that purpose, and not for the purpose of emphasising or giving substance to the contention that the only rights of the vendor under that clause are to ask for the return of the deposit, if there has been one, and if G there has not been one, simply to rescind the sale and get his property back. That I think would be an unreasonable interpretation of cl. 16. I indicated in the course of the argument that that also was a clause which justified the argument that the time for completion was of the essence of the contract to succeed, but I do not find it necessary to rest my judgment upon that ground. What I have said with regard to that will be treated, I hope, not with contempt, but as part of the ratio decidendi of my judgment, H which I base mainly, if not solely, on the terms of cl. 15.

For these reasons, I think the learned judge was right in the conclusion he came to, and it is not necessary to go into the question whether in some other way, if time had not been of the essence of the contract, the conduct of the purchaser, when he was pressed to keep himself up to date would have been sufficient to show that, though time was not of the essence of the contract, by his conduct he had sufficiently indicated to I any reasonable mind that, if he had been allowed longer time, he would still not have been either willing or able to perform the contract. If that is a correct inference from the letters and correspondence that passed between the parties, it would not matter whether the term was of the essence of the contract or not; because, if one party indicates by his conduct that he is either unable or unwilling, whatever time may be given to him, to perform the contract, that would be sufficient to justify an acceptance of the repudiation and the suing of him for damages. I do not, however, think it necessary to determine that in this case. To determine it in favour of the defendant would, I think, be a little difficult, having regard to the nature of the correspondence, but it is not an impossible view to take in dealing with the facts. I base my judgment on the fact that a condition named in the agreement by the parties as of the essence of the contract has been broken by the appellant, and, therefore, the vendors were entitled to the damages awarded them by Swift, J. The appeal, therefore, will be dismissed with costs.

SLESSER, L.J.—I have come to the same conclusion. At common law, before the passing of the Supreme Court of Judicature Act, 1873, the time fixed for completion was of the essence of the contract, and, looking at the agreement in this case, the date fixed for completion clearly was, in my view, Sept. 15, 1933; but by s. 25 (7) of the Act of 1873, which now finds expression in s. 41 of the Law of Property Act, 1925, it is provided that:

> "Stipulations in a contract, as to time or otherwise, which according to rules of equity, are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules."

Sir John Romilly, M.R., said in *Macbryde* v. *Weekes* (2) (22 Beav., at p. 540):

> "The difference being very marked between law and equity, so far as regards this question; law only considering time as of the essence of the contract, when it is expressly specified, whatever may be the condition of the parties and the property, but equity considering time essential in those cases only, in which injury would be inflicted upon one party by disregarding it."

Therefore, after the passing of the Judicature Act, the mere fact that a date of completion is mentioned in the agreement is not of itself any longer decisive of the question (as it might have been at common law) whether time is of the essence of the contract. But the mere fact that in equity that is not decisive does not lead necessarily to the conclusion that in a particular case the date mentioned for completion is not of the essence of the contract; and Lord Parker of Waddington said in *Stickney* v. *Keeble* (1) ([1915] A.C. at p. 416) that the equitable maxim that time was not of the essence of the contract:

> "never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract."

In my opinion, both conditions which make the term as of the essence of the contract mentioned by Lord Parker are here fulfilled. To begin with, I think that the stipulation as to time could not be disregarded without injustice to the parties. The purchaser in this case is given very considerable latitude. In cl. 15 (1) of the agreement he has primarily contracted to complete on Aug. 15, 1933. If he completes not later than Aug. 15, 1933, he gets certain benefits, and an abatement of the price which he would otherwise have to pay. Sub-cl. (3) contemplates that he will not complete upon the stated date, for it says:

> "If for any reason the actual completion of the purchase is delayed beyond Aug. 31, 1933, then, nevertheless on that date the purchase-money of £9,500 (less the amount, if any, the purchaser may have paid on account thereof in respect of being given possession as a tenant at will as hereinbefore provided) shall be placed on deposit at the Westminster Bank, Ltd., Aldwych Branch, W.C.2, in the joint names of the vendors' solicitors and the purchaser's solicitors, but the purchase shall in any event actually be completed not later than Sept. 15."

and he is to pay certain interest. That concession which is given to the purchaser to delay beyond Aug. 31 by making the deposit and paying interest seems to me to make it clear that the intention of the parties was that, in return for that concession given to him, he should in any event finally complete by Sept. 15, 1933; and I think in the

language of LORD PARKER that, the vendor having accepted that delay under the terms A
of the contract, it would work an injustice to him if Sept. 15 were not to be regarded as the final day for the completion of the contract.

That is enough, in my opinion, to decide this point as regards time in favour of the plaintiffs, but I think also that there is sufficient evidence in the agreement itself and the schedule annexed to it, and in the original offer of May 23, 1933, when the property was described, to show that this property is a property of manifold qualities; it is not B
merely freehold land, but it includes a kiln, one artificial dryer, modern machinery of up-to-date construction and arrangements for making wire-cut bricks, and electric power and the like. Taking it, therefore, as a whole, it is clear to me that it is property of a wasting kind, to be used for trading purposes, where surrounding circumstances would make it inequitable to treat time otherwise than as an essential term of the contract. Therefore, it follows that for these reasons time must be taken to be of the essence of C
the contract. If that be so, the letters clearly show, to my mind, and the learned judge has so found, that the defendant repudiated the contract, and from that circumstance would follow the damages, the amount of which need not here be discussed because they have been agreed between the parties.

I agree with my Lord that those reasons are not entirely those which were given by the learned judge. As I read the learned judge's decision, no argument was ever D
addressed to him on any basis but that time was of the essence of the contract. The argument went rather on the basis that cl. 16 provided the only method, and that the vendor had elected to proceed by that method, and that method gave no more than the right to recover the deposit—there being here no deposit—and to re-sell the property. For myself, I do not find it necessary to found any reason upon cl. 16. My difficulty in dealing with cl. 16 is that it was apparent from the first time I looked at it, that it E
is a very difficult clause to construe and is capable of very varying interpretations. In certain points of view, I should have found support for the conclusion at which I have arrived that time is of the essence of the contract; but, if another interpretation were given to it, and it had the limited nature which is contended for on the one hand, then it would not afford me that support. I find it unnecessary to express any concluded opinion regarding the very difficult question of the construction of this clause, more F
particularly as I find cl. 15, both in itself and in the circumstances in the schedule annexed to the agreement, sufficient to say that in equity it would work injustice were the time stated in the document not to be treated as of the essence of the contract; and, that being so, and the principles of equity now applying to the consideration of such a case under the Judicature Act, all that is required for the vendor to recover his damages on repudiation has been established by him. G

ROCHE, L.J.—I agree that this appeal should be dismissed, and I have very little to add. I agree with the opinion of my Lords that it was established that completion on Sept. 15—I see the agreement of sale describes it as being the date of the "actual" completion—was of the essence of the contract. I agree also that the purchaser, the defendant, had, by Nov. 13, failed to complete the purchase on that day; that he had H
also made it plain that he was unable or unwilling to complete upon that day or at all. In those circumstances, the vendors were entitled, as they purported to do, to treat the contract as broken in an essential term by the defendant and to bring and sustain an action for damages. The amount of damages for the total breach of contract which had taken place was agreed between the parties, and that sum the plaintiffs recovered, and the judgment for that amount they are entitled to retain. I

I have stated my reasons for arriving at my conclusion thus compendiously because I wish, as did SLESSER, L.J., to make it plain that I should desire to reserve for future consideration, and if necessary for decision, all questions arising out of cl. 16 of this contract. In my judgment, the plaintiffs did not require to, and did not in fact, avail themselves of the stipulations contained in that clause. They proceeded, and succeeded, by way of their common law right, irrespective of that term of the agreement. I make that reservation, not merely because of the difficulties which arise out of the construction of that clause, but because of its obvious similarity to certain provisions in what has been described as the Lord Chancellor's rule in connection with contracts for the sale of land provided for under s. 46 of the Law of Property Act, 1925. The very interesting discussion which has taken place in the arguments of counsel in this case has touched those points, and it is apparent that all writers do not agree upon the matter, and that one very eminent writer has modified, if not changed, his view from time to time on the questions arising on this cl. 16 and some of the conditions of the Lord Chancellor's rule. All those matters, therefore, I think it is unnecessary to deal with, and they form no part of my reasons for my conclusion in the present case.

Appeal dismissed.

Solicitors: *Andrew, Purves, Sutton, & Creery*; *Reynolds, Sons, & Gorst.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

KIMBER & CO. *v.* INLAND REVENUE COMMISSIONERS

[KING'S BENCH DIVISION (Finlay, J.), April 11, 1935]

[Reported [1936] 1 K.B. 132; 105 L.J.K.B. 97; 154 L.T. 305; 51 T.L.R. 421; 79 Sol. Jo. 402]

Stamp Duty—Conveyance on sale—Contract, conditional on conveyance, vendor to build house on land—Stamp Act, 1891 (54 *&* 55 *Vict., c.* 39), *Sched. I, as amended by Finance* (1909–10) *Act,* 1910, (10 *Edw.* 7, *c.* 8) s. 73.

On Jan. 28, 1935, the A. company entered into a contract with B. whereby it was agreed that the A. company should sell to B. a piece of land for £500. On the same date the A. company entered into a second contract with B. whereby it was agreed that the A. company should erect on the land a house for £1,350 to be paid by B. The second contract was a conditional contract, to become absolute and binding on completion of the purchase of the land. On Mar. 4, 1935, an instrument of conveyance on sale of the piece of land for £500 was executed, containing a statement certifying that the transaction thereby effected did not form part of a larger transaction or of a series of transactions in respect of which the value exceeded £500.

Held: the test was whether the substance of the transactions between the parties was the sale and purchase of a house and land; looking at the matter as a whole, that was not so; there were two distinct contracts, one for the sale of the land and one for the erection of the house, the latter being conditional on the former; and, therefore, the stamp duty payable on the instrument of conveyance under Sched. I to the Stamp Act, 1891, and the Finance Act, 1910, s. 73, was the duty on the £500 and not on £1,850 (the aggregate of £500 and £1,350).

M'Innes v. *Inland Revenue* (1), 1934 S.C. 424, distinguished.

Notes. Considered: *A.-G.* v. *Cohen*, [1937] 1 All E.R. 27.

As to stamp duty on conveyances, see 28 HALSBURY'S LAWS (2nd Edn.) 457 et seq., and for cases, see 39 DIGEST 278 et seq. For Stamp Act, 1891, and Finance (1909–10 Act, 1910, see 21 HALSBURY'S STATUTES (2nd Edn.) 610 and 762.

Case referred to:

(1) *M'Innes* v. *Inland Revenue*, 1934 S.C. 424; 1934 S.N. 44; 1934 S.L.T. 365.

Case Stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

1. On April 1, 1935, an instrument was presented by the appellants, Kimber & Co., to the Commissioners of Inland Revenue under the provisions of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

2. The instrument was a deed of conveyance bearing date March 4, 1935, and made A between vendors, of the one part, and a purchaser of the other part and purported to be a conveyance on sale of a piece of land for £500. It contained in the last paragraph a statement certifying that the transaction thereby effected did not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeded the sum of £500.

3. With the said conveyance the appellants also submitted for the information of B the commissioners three contracts between the same parties, each bearing the date Jan. 28, 1935. They purported to be: (1) A contract for sale of the plot of land referred to in the said conveyance for £500. (2) A contract for the building of a house thereon by the vendors for £1,350 payable by instalments. (3) A deed of charge whereby the vendors agreed to advance to the purchaser the last £900 payable by the purchaser under the said building contract, and the purchaser covenanted to repay the money so advanced C with interest as soon as the house was certified as fit for occupation and charged by way of legal mortgage in favour of the vendors the premises agreed to be sold to the purchaser by the said contract for sale and all buildings to be erected thereon.

4. At the date of the said conveyance the house was partly erected on the said land, work to the value of about £300 having been carried out.

5. On the date of the said conveyance the purchaser paid to the vendors the sum of D £450, being the balance of the consideration for the sale of the land (£50 deposit having been paid on the signing of the contract) and £250 in respect of the erection of the house.

6. The appellants stated that after it had been stamped the conveyance would be handed back to the vendors in accordance with the provision to that effect contained in the contract for the building of the house.

7. The Commissioners of Inland Revenue were of opinion that the instrument was a E conveyance on sale of property, that there was a single transaction between the vendors and the purchaser for the sale of a plot of land and a house thereon, and that under the relevant statutory provisions the £1,350 payable under the building contract must be deemed part of the consideration in respect whereof the said conveyance was chargeable with ad valorem duty. The commissioners, accordingly, assessed the duty payable in respect of the said conveyance at £18 10s. being 10s. for every £50 of £1,850 (the aggre- F gate of the sums of £500 and £1,350 referred to in the said contract for sale and building contract), as representing the amount or value of the consideration for the sale in accordance with the head of charge "Conveyance or transfer on sale of any property" in Sched. I to Stamp Act, 1891, s. 73 of the Finance (1909–10) Act, 1910, and other statutory provisions.

8. The appellants contended that the said conveyance was a conveyance on sale of G the land only, and that the amount of the consideration was the amount stated therein, namely, £500. They also contended that the said conveyance was a conveyance where the amount or value of the consideration for the sale did not exceed £500, and that the transaction thereby effected did not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeded £500. The appellants accordingly submitted that the duty H payable in respect of the said conveyance was £2 10s. only by virtue of the said statutory provisions. They further contended that, if they were wrong in the above contention, the duty payable should be assessed, not on the purchase price for the land and completed house, but on the price for the land and the price or value of the building thereon at the date of the conveyance, not exceeding £300, making a total of £800, the duty whereon is £8. I

9. The appellants, being dissatisfied with the assessment, in pursuance of s. 13 of the Stamp Act, 1891, required the commissioners to state and sign a Case setting forth the question on which their opinion was required and the assessment made by them, and the commissioners stated and signed this Case accordingly.

10. The questions for the opinion of the court were: (i) Whether the conveyance dated March 4, 1935, was chargeable with the duty of £18 10s. in accordance with the assessment of the commissioners; (ii) whether the said conveyance was chargeable with the duty of £2 10s., as contended by the appellants; (iii) whether the said conveyance was

chargeable with the duty of £8, as contended alternatively by the appellants; (iv) if with none of these duties, with what duty the instrument was chargeable.

J. M. Gover, K.C.; and *W. E. Vernon* for the appellants.
The Solicitor-General (*Sir Thomas Inskip, K.C.*) and *J. H. Stamp* for the Crown.

FINLAY, J.—This case, like most cases under the Stamp Act, is troublesome, but I have arrived at the conclusion that the arguments which were urged upon me by Mr. Gover and Mr. Vernon ought to prevail.

The matter appears to depend to a substantial extent upon what is the proper inference to draw from the facts. What happened was this. An instrument was presented by the appellants to the commissioners for the opinion of the commissioners. That instrument was a deed of conveyance of March 4, 1935. It was a deed of conveyance of a plot of land, and the purchase price was £500. So far the matter would appear to be perfectly simple, but it is not so simple as it looks, because it is necessary to examine a little the earlier history. Three other contracts were, for the information of the commissioners, produced to them. The first was a contract for the sale of the plot of land. The second was a contract for the building of a house on the plot by the vendors for a sum of £1,350. The third contract, a deed of charge, does not appear to be important.

The question which arises is: What was the consideration for the conveyance? Here is a conveyance of land which at first sight looks quite simple, a conveyance of land for £500. But the substance of the transaction has got to be looked at, and the question is: What was the real consideration? Was it, as it is expressed to be £500 or was it something else?

The argument for the Crown is of this nature. It is said that, if you look at the documents as a whole, you will see that in substance the consideration here was not merely the £500, but was also the building of a house of a value of £1,350. The Crown say that these two contracts are completely interlaced; the contracts are two, but the transaction is really one. On the other hand, it is said that that is not right, that these are two separate and distinct contracts, and that that is shown by the fact that the one is expressed to be conditional upon the other. In order to see which argument is right it becomes necessary to look at the documents. First of all one takes the contract, dated Jan. 28, 1935, for the sale and purchase of the plot of land. With regard to that there is no contest that the consideration expressed, a quite genuine consideration, was a sum of £500. The purchase was to be completed on Feb. 21. It was in fact completed on March 4. I mention these dates because I think they are a little material when one comes to look at a Scottish case upon which, quite rightly, great reliance was placed by the Crown. It is material, I think, to observe that here it is perfectly plain that the parties could not have contemplated that by any possibility the house would be completed at the date fixed for the completion of the contract. That, I think, when one looks at the Scottish case, will be seen to be of importance. Clause 7 of the contract, which was relied on by both parties and was admittedly of great importance provided:

> "Contemporaneously with the exchange of this contract the parties hereto have entered into a separate contract whereby the vendor undertakes to erect a house upon the plot for the purchaser upon the terms and at the price therein mentioned. It is hereby agreed that the building contract is a conditional contract and that the same shall become absolute and binding upon the parties hereto upon completion of the purchase of the plot provided always that if the purchaser shall be under a duty to but shall neglect or fail to complete her purchase of the plot according to this agreement then (for the purposes of assessing any damages to which the vendor may be entitled by reason of such neglect or failure) the building contract shall at all times be deemed to be an absolute contract."

What that means, I think, is plain. It refers to the other contract, and says that that other contract is a conditional contract to become absolute and binding upon completion of the purchase of the plot. The importance of that seems to me to be that it makes it quite clear, as I think, that there are two distinct contracts—one absolute, and the other conditional, and it shows that what was contemplated and intended by the parties was that there should be, first of all, a sale of the plot of land for the price agreed upon between them, and then, when that sale was completed, there was to be a house built upon the site by the vendor. Of course the case could not have been argued if there had been simply a sale of the plot and then a contract with some outside builder to build the house. The matter would have been perfectly clear. The difficulty, such as it is, in the case, arises from the circumstance that the vendor is not only vendor but also the builder who was to erect the house.

That leads me to the other material contract. It is an agreement of the same date, Jan. 28, 1935. It begins by saying in the second paragraph:

> "A. B. shall forthwith give the company vacant possession of the said premises, and the company shall complete the said dwelling-house in a good and workmanlike manner to the reasonable satisfaction of A. B. on or before the 31st August, 1935."

I agree with the view that was presented by counsel for the appellants with regard to that. It appears to me to show that what was contemplated was that this agreement should come into operation when completion occurred; that is to say, that when completion occurred there was to be built this house. Then there are provisions for payment at various dates, and I may mention, though I do not myself think it is material, that the vendor builder did start building before completion, and at the date of completion something like an expense of £300 had been incurred. Clause 14 of the contract provides:

> "A. B. as beneficial owner hereby charges by way of legal mortgage all and singular the property mentioned in the schedule hereto with the payment to the company of all moneys due or to become due by her under this contract."

Clause 16 provides that until the moneys due have been paid the conveyance from the company to A. B. shall remain deposited with the company. I cannot see that those clauses have any great bearing on the question which I have to decide. They show, no doubt, that it was contemplated that the purchaser should be beneficial owner at the time when this contract operated, and to that extent they no doubt favour the argument which was urged upon me by counsel for the appellants. Beyond that they do not seem to me to help very much.

It is really not necessary to refer in any detail to the provisions of the Stamp Act. The provisions dealing with conveyances are to be found in the schedule, and s. 54 defines the meaning of the word "conveyance." I do not think that much assistance is to be got from the terms of the Act. It is clear that what one has got to ascertain is what is the consideration. Section 10 of the Finance Act, 1900, does to some extent assist the argument of counsel for the appellants, particularly when regard is had to the manner in which that section was dealt with by the Inner House in the case (to which I refer later) which has caused me most difficulty in deciding the present case.

Dealing with the matter apart from that authority, I should have thought that it was reasonably clear. I was instructed by counsel on both sides as to the position between a contract for sale of land and the conveyance. It must always be interesting to a common law judge to learn from these high authorities that in the interval between the dates of those instruments the purchaser is equitable owner of the property, and the vendor, though not what is called, I think, a bare trustee, is a trustee for the purchaser. So there is no doubt that from the date of this contract the purchaser was in equity the owner of the plot of land. I should have thought that it was reasonably plain that the proper view to take in this case was that there were two separate contracts, the one a contract for the sale of the land, and the other a separate contract, and shown to be separate by reason of the fact that it was conditional upon the first, for the erection of the building, and while, of course, there is a perfectly obvious connection by reason of the fact that the vendor is also the builder, I should have thought that we might test it by considering what would be the position if the purchaser had bought the land and gone to another builder. The thing would have been clear, and I cannot help thinking that it is the circumstance, to some extent accidental, that the vendor is also the builder that has caused the difficulty which has arisen here and has made it necessary for me to deal carefully and fully with the argument that it is one transaction. All I can say is that surveying the matter as carefully as I can—and I have listened with attention to a very able argument by which I was much assisted—I think it is not all one transaction. I think it is two transactions expressed in two different documents, one being conditional upon the other. There is a contract for the sale of the land, and there is a contract to build the house.

Some difficulty is caused by the decision of the First Division in *M‘Innes* v. *Inland Revenue* (1). That case does bear some resemblance to the present, and it is desirable that I should say how I regard it. It is not, of course, technically binding upon me, but I think that it is well settled that where there is an Act applicable both to England and to Scotland a judge of first instance sitting in England should follow a decision of the Inner House in the Court of Session where he is satisfied that that decision applies, and if I were satisfied that this case of *M‘Innes* (1) would, if it had been a decision of the Court of Appeal in England instead of the Court of Session in Scotland, have bound me, I should have thought it my duty to follow it, leaving it, I should have thought proper, to the Court of Appeal here to consider it. I, therefore, have to look at this Scottish decision to see whether it covers the point before me.

While, undoubtedly, the case bears some resemblance to the present, I have arrived at the conclusion that it can be, and ought to be, distinguished. What happened there was this. There was a gentleman who was desirous of entering into a feu contract with reference to a plot of land in Scotland and having a bungalow built upon it. Thereupon he entered into two contracts, one with a gentleman Mr. Keanie, who was the owner, and the other with a company in which Mr. Keanie was the controlling shareholder, who were builders. Later on—and this is important, I think—at a date when the house was either completed, as it is stated in the headnote, or on the point of completion, as it is stated in another place, the feu contract was entered into. In those circumstances the Inner House arrived at the conclusion that the assessment made by the commissioners was right, that assessment covering both the duty capitalised and also the price of the house. There is an elaborate judgment by the Lord President, LORD CLYDE, but I think the gist of the decision can be got from the judgment of LORD MORISON. What he says is this:

> "Now in this case there are two sets of documents, namely, the missives which are dated contemporaneously and which are part and parcel, in my opinion, of one transaction. It seems to me that the effect of the missives is that the appellant bought a house and a site for it. That is the substance of the transaction, and a consideration of both sets of missives was necessary to ascertain the true consideration of the transaction. The value of the ground was £84, and that was the consideration which the appellant gave for it. The value of the house was £630. It seems to me, therefore, that it is impossible to hold this conveyance, which carries right both to the site and to the house, is properly stamped with a stamp which covers only the price of the site. I think that the production of the missives is also a conclusive answer to the argument that was based on s. 10 of the 1900 Act. If it was a house on the site that was bought by the appellant, it seems quite clear that s. 10 has no application."

That seems to me to show the distinction which exists between this case and the Scottish case. That the Scottish case was one of some difficulty I do not think can be doubted. A complication arose by reason of the fact that the company, Keanie, Ltd., and the individual Mr. Keanie were separate entities. I do not need to go into that, but I think that the judgment of LORD MORISON makes it reasonably clear that the court there, attaching weight to the circumstance that the house was on the site when the feu contract was entered into, felt able to take the view on a survey of the whole thing that the substance of it was that it was a sale, not of a site, but a sale of a house or bungalow, with, of course, the site upon which it was placed. That, I think, distinguishes the case. I may add that, in my view, the passage which I have read from LORD MORISON's judgment justifies the observation which I made earlier that s. 10 of the Act of 1900 does seem to me to support the argument of counsel for the appellants. No doubt, it directly relates to the ordinary case where the purchaser has, so to speak, gone elsewhere for the contract to improve the land, but I am not satisfied that it could not apply to such a case as the present, and I observe that the Inner House in disposing, as they did to their own satisfaction, of s. 10 in that case, relied upon the circumstance that the sale was a sale of a house, and, therefore, s. 10 could have no application. Here there is on the facts room for the application of s. 10, and I think that that, particularly when the judgments in Scotland are looked at, does reinforce counsel's argument. The substance of the view taken by the Inner House seems to me to be that there you could regard the whole as one transaction, and, so regarding it, it became apparent that the reality of the matter was that it was the sale of a house. I am not going back over the ground which I have covered somewhat fully, but it does seem to me that when one looks at the facts here it is impossible to say that the reality here was that this transaction was for the sale of a house. It was not, if for no other reason than that the house, as a house, did not exist at the date of the conveyance.

An alternative view was suggested, the effect of which would be that the conveyance would be stampable in respect of the £500, and the value of what in fact was on the ground at the time. I do not think that that can be right. It depends upon the accidental circumstance that the builder, no doubt having confidence in his client, had gone in and begun before it was contemplated that he should. I think it clear upon the document that what was contemplated and intended was the sale of the site, and then the erection of a building upon it, and I cannot think that the fact that by a sort of accident there was a partially built erection upon the site at the date when, in fact, completion took place, can affect the matter. I was told that this was in the nature of a test case. The difficulty about that is that these cases must, to a considerable extent, depend upon their facts, and the facts in one case are not likely to be exactly the same as the facts in another. All I can say is that I think that one has got to look at the substance of the thing. I think one has got to see whether the transaction is really all one transaction, so that, to adopt substantially the language of the First Division, one can see that the reality of the thing is that it was a contract for the sale of a house. If one sees that, then, as I think, the Crown would be right. If one takes, as I take in this case, the other view, that there were two distinct contracts and two distinct transactions, one conditional upon the other, then I think the conveyance representing one of these transactions is stampable only by reference to the consideration, in this case £500, which has reference to that separate transaction, namely, the sale of the plot of land.

I arrive at the conclusion that the contention of the appellants is right, and the result will be that I answer the second question in favour of the appellants.

Solicitors: *Kimbers, Williams, Sweetland, & Stinson*; *Solicitor of Inland Revenue.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

Re DEBTOR (No. 11 of 1935)

[Chancery Division (Clauson and Luxmoore, JJ.), October 28, 29, 1935]

[Reported [1936] Ch. 165; 105 L.J.Ch. 146; 154 L.T. 397; [1934–5] B. & C.R. 322]

Bankruptcy—Act of bankruptcy—Deed of assignment—Participation by petitioning creditor in bringing deed into existence.

One of the petitioning creditors attended a meeting of the debtors' creditors at which a resolution was passed that the debtors be called on to execute a deed of assignment of their joint and separate estates to C. A. J. as trustee. The petitioning creditor proposed as an amendment of the resolution that one W. be appointed joint trustee with C. A. J., but that amendment was lost. The petitioning creditor did not vote for the original resolution. He allowed his name to be put forward as a member of the committee of inspection, but he refused to sign the deed and later declined to attend a meeting of the committee, saying that he did not regard himself as a member of it.

Held: to preclude the petitioning creditor from subsequently relying on the deed as an act of bankruptcy on the part of the debtors it was not necessary that he should have taken advantage of the deed in some way; participation by him in bringing the deed into existence was sufficient; and, therefore, a receiving order which had been granted against the debtors in the county court must be discharged.

Re Stray, Ex parte Stray (1) (1867), 2 Ch. App. 374, applied.

Notes. Approved and applied: *Re Debtor* (382 *of* 1938), [1938] 3 All E.R. 744.

As to Acts of bankruptcy, see 2 Halsbury's Laws (3rd Edn.) 259 et seq., and for cases, see 4 Digest 48 et seq.

Cases referred to:

(1) *Re Stray, Ex parte Stray* (1867), 2 Ch. App. 374; 37 L.J.Bcy. 7; 16 L.T. 250; 15 W.R. 600, L.JJ.; 4 Digest 128, *1178*.

(2) *Re Rees, Ex parte Alsop* (1859), 1 De G.F. & J. 289; 29 L.J.Bcy. 7; 1 L.T. 285; 6 Jur. N.S. 282; 8 W.R. 106; 45 E.R. 370, L.JJ.; 4 Digest 129, *1180*.

Appeal by the debtors from a receiving order made at Oxford County Court.

The following statement of facts is taken from the judgment of the registrar of the county court.

"On June 27, 1935, a meeting of the creditors of the debtors was held, and among those present was a Mr. T. H. Tombs, a member of the firm of T. H. Tombs and Son, plumbers, who were creditors for the sum of £733 12s. 2d. in respect of which they had already, on June 19, 1935, issued a writ, but—at the date of the meeting—had not obtained judgment. A Mr. E. R. White, chartered accountant, was also present, and at the opening of the meeting Mr. Tombs proposed him as chairman and he was duly elected. Mr. White explained to those present at the meeting the difference between and the advantages and disadvantages of a deed of arrangement and bankruptcy. A statement of affairs prepared by a firm of chartered accountants of Oxford was read to the meeting by a Mr. C. A. Jakeman, a member of the firm, and, after questions had been asked, a resolution was proposed and seconded in the following terms: 'That the debtors be called upon to execute a deed of assignment of their joint and separate estates to Mr. C. A. Jakeman, incorporated accountant, . . . as trustee with a committee of inspection.' Mr. Tombs proposed as an amendment that Mr. White be appointed a joint trustee with Mr. Jakeman. This was seconded and put to the meeting and lost, and the original resolution was then put to the meeting and carried. There was no evidence whether any one was given an opportunity to vote against the original resolution when put to the meeting. Mr. Tombs said that he did not vote against it, but, in my opinion, it may fairly be assumed that he did not vote for it. The following were then proposed as members of the committee of inspection, namely, Mr. T. H. Tombs, Mr. E. J. Hughes and Mr. E. Basson, and they were appointed as such members. It was stated in evidence that Mr. White said: 'If there is to be a committee of inspection, Mr. Tombs, as the largest creditor, should be on it.' There is no evidence to show that Mr. Tombs made any objection to his name being put forward as a member of the committee of inspection. At the conclusion of the meeting, Mr. Jakeman spoke to Mr. Tombs as he was about to leave the room and asked him to sign the deed. I have no evidence whether before this the deed had been executed by the debtors or not. Mr. Jakeman's evidence was that Mr. Tombs replied that he was not going to sign the deed then, but would take further advice. Mr. Tombs's evidence was that his reply was: 'I haven't signed the deed, neither do I intend to,' and that he may have mentioned at a later time something about taking further advice. Two days after the meeting, Mr. Tombs went away for a holiday. On July 17 Mr. Jakeman telephoned Mr. Tombs, who had then returned home, and asked him to attend a meeting of the committee of inspection, and Mr. Tombs's reply was that he was not coming, as he did not regard himself as a member of the committee. At the hearing of the petition before me, Mr. Tombs, in reply to a question put by me whether he had any preference as between a deed of assignment and bankruptcy, said that he preferred bankruptcy in any event. On July 31, 1935, judgment was signed in default of appearance upon the writ issued by the creditors, Messrs. Tombs and Son, against the debtors, and on Aug. 11 a bankruptcy petition was filed by the creditors alleging as the act of bankruptcy the execution by the debtors of the deed of assignment on June 27, 1935. This deed has been duly registered, the requisite number of consents has been obtained, and as a deed of assignment it is valid. It has never been signed nor has any assent been given to the deed by the creditors, Messrs. T. H. Tombs and Son. Notice of opposition to the making of receiving orders has been given on the ground that the petitioning creditors are estopped from relying on the act of bankruptcy named in the petition and the point for decision is whether, by his conduct at the meeting of creditors, Mr. T. H. Tombs, as agent for the petitioning creditors, must be taken to have acquiesced in or assented or been privy to the deed."

The registrar held that the "objectors" had failed to discharge the onus of proving that the petitioning creditors intentionally took advantage of the deed having been executed or were otherwise privy to or acquiesced in the deed, and he, therefore, made the receiving order. The debtors appealed to the Divisional Court in Bankruptcy.

C. Tindale Davis for the debtors.
P. A. Devlin for the petitioning creditors.

CLAUSON, J.—This is an appeal from the decision of the registrar of the county court of Oxfordshire holden at Oxford. The registrar made a receiving order on Aug. 22, 1935, having held that there was nothing to preclude the petitioning creditors from relying upon the act of bankruptcy which they alleged, namely, that the two debtors had executed a deed of assignment. The debtors now ask that we should reverse that order and that the petition should be dismissed on the ground that, notwithstanding the execution of the deed, the petitioning creditors ought not to be allowed to rely upon that execution as giving them the right to obtain relief in bankruptcy against the debtors.

The facts are contained in a very careful judgment by the registrar, and I do not wish to criticise his presentation of them, but he appears to me to have misdirected himself in point of law. He has taken the view that the objectors—I am using his own language—did not discharge the onus placed upon them of proving that the petitioning creditors intentionally took advantage of the deed having been executed or were otherwise privy to or acquiesced in the deed. He, therefore, held that a receiving order should be made, while on the facts (as he finds them) it appears to me that the petitioning creditors were sufficiently privy, if not to the deed, at all events to all the circumstances which led up to its execution, to preclude them from relying upon its execution as being an act of bankruptcy.

It will be convenient, before I refer briefly to the facts, that I should read a passage from the judgment of LORD CAIRNS, L.C., in *Ex parte Stray* (1). LORD CAIRNS says:

"It is well settled by a series of authorities, of which the case of *Ex parte Alsop* (2)

> may be mentioned as the last, that a creditor who is a party or privy to a deed of the description mentioned in the statute, or who has acted in any way which would be equivalent to an assent, recognition, or approval of the deed, cannot allege that the execution of the deed is an act of bankruptcy. I apprehend that the principle upon which those cases (the authority of which cannot now be questioned) have gone is this, that inasmuch as, under the statute, the petitioning creditor is obliged to allege that the act in question is a fraudulent act, any person who has been a participator or sharer in the fraud cannot be heard to claim any benefit or advantage from the act."

Assuming that the petitioning creditor has been a participator or sharer in what LORD CAIRNS speaks of as the fraud—which I understand means the bringing into being of the deed of arrangement—the difficulty in which he is, when he relies upon the execution of that deed as a ground for a receiving order, is that the court is bound to say that it is contrary to principle that a person who has been a participator in what the legislature regards as a fraud should, in order to obtain relief for himself, set up that somebody else has been guilty of the very fraud in which he participated. Counsel for the debtors suggested that this was the correct way of putting it. I should put the matter differently, and rely on s. 5 (3) of the Bankruptcy Act, 1914, which enables the court to dismiss the petition if it is satisfied that for some sufficient cause no order ought to be made, and hold that, having regard to the well-settled practice during the last seventy years since *Ex parte Stray* (1), it is sufficient cause for refusing to make an order granting the petitioning creditor relief on the ground of the deed having been executed, that it appears that the petitioning creditor was himself a participator or sharer in bringing the deed into existence.

That being my view of the law, I now turn to the facts. It appears that at a meeting of creditors called to consider the position the project was put forward of having a deed of arrangement. One of the petitioning creditors, Mr. T. H. Tombs, suggested that a nominee of his own should be a joint-trustee with the trustee who was being suggested on behalf of other persons interested. That proposal did not receive acceptance from the other creditors and was dropped, but the more important and what seems to me to be the crucial fact is this. The question arose who should serve on the committee of inspection. The name of Mr. T. H. Tombs was proposed, and, in his presence and quite plainly with his acquiescence, it was resolved that the committee should consist of certain persons, one of whom was himself. He did not in fact sign the deed, but, in my view, that does not matter, for it is impossible to hold that he did not take a part in the procedure which led up to the execution of the deed. It was, in fact, executed by the debtors practically simultaneously; it is dated the same day and was executed as the result of what occurred at the meeting.

Where the registrar has gone wrong seems to be this that, after stating all these facts, he holds that this petitioning creditor is not precluded from relying on the execution of the deed as an act of bankruptcy unless he has taken advantage of the deed having been executed, though it is true that the registrar adds the words: "or [was] otherwise privy to or acquiesced in the deed." He seems to have thought that participation in the proceedings was not enough, that there must be something to show that some kind of advantage was taken of the deed by the petitioning creditor.

It is, no doubt, the case that in *Ex parte Stray* (1) there were facts upon which the judges might have relied as showing that the petitioning creditor had taken advantage of the execution of the deed and so on that ground would be precluded from relying upon its execution. But, in my view, we in this court are bound to follow the statement of the law which I have read from *Ex parte Stray* (1). This statement has been a guide to the court ever since, and, in my view, we ought to consider it a sufficient cause for refusing to make the receiving order that this petitioning creditor—relying as he does upon the execution of the deed as an act of bankruptcy—took part in the proceedings which led up to it. It is on that ground that I feel unable to agree with the judgment of the registrar, and, in my view, we must allow the appeal and discharge the receiving order, with the usual result as to costs.

LUXMOORE, J.—I find myself in complete agreement with what has fallen from my brother Clauson.

Solicitors: *Church, Adams, Tatham, & Co.*, for *Challenor & Son*, Oxford; *Clifford-Turner & Co.*, for *Linnell* and *Murphy*, Oxford.

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

HOGG *v.* TOYE & CO., LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Romer and Maugham, L.JJ.), February 18, 19, 1935]

[Reported [1935] Ch. 497; 104 L.J.Ch. 232; 152 L.T. 495; 51 T.L.R. 301; 79 Sol. Jo. 270]

Copyright—Infringement—Action by publisher—Undisclosed author—Rights of plaintiff—Copyright Act, 1911 (1 *& 2 Geo. 5, c.* 46), *s.* 6 (3) (*b*).

In 1896 an edition of a book entitled THE PERFECT CEREMONIES OF CRAFT MASONRY was published, being sufficiently different from earlier editions to constitute that edition a new work for the purposes of the Copyright Act, 1911. From 1896 onwards the editions were published without the name of an author, but on the books it was stated that they were "privately printed for A. Lewis." J. H. carried on a business of publishing masonic rituals under the name of A. Lewis, down to 1909, when he died and bequeathed his business and goodwill, including the masonic rituals and books issued by him under the name "A. Lewis," to G. H., who carried on the business until he died in 1922. G. H.'s wife, the plaintiff, then continued to carry it on under the name "A. Lewis," and published amended editions of the work in question, none of which, however, constituted a new literary work which could be the subject-matter of copyright. The plaintiff claimed an injunction to restrain infringement of the copyright in the work by the defendants, who put in issue the existence of copyright and also that she was the owner of it. The plaintiff then relied on s. 6 (3) (*b*) of the Act of 1911 which provided that in any action for infringement of copyright in a work, if the author's name was not printed on the work and the name of the publisher or proprietor of the work was printed thereon, the person whose name was so printed should, unless the contrary was proved, be presumed to be the owner of the copyright for the purpose of the proceedings in respect of the infringement of copyright therein.

Held: under s. 6 (3) (*b*) the publisher sued on behalf of the owner of the copyright, none of whose rights was divested by the operation of para. (*b*); that paragraph dealt only with procedure and did not enure to confer any copyright on a publisher suing under it; the plaintiff was not the publisher of the 1896 edition, the last edition capable of being regarded as a new work for the purpose of copyright, and J. H. had no rights which he could transmit through G. H. to the plaintiff; and, therefore, the action must fail.

Notes. The Copyright Act, 1911, was repealed by the Copyright Act, 1956, of which s. 20 (4) is equivalent to s. 6 (3) (*b*) of the Act of 1911.

As to remedies for infringement of copyright, see 8 HALSBURY'S LAWS (3rd Edn.) 442 et seq., and for cases, see 13 DIGEST 219 et seq. For Copyright Act, 1956, see 36 HALSBURY'S STATUTES (2nd Edn.) 67.

Cases referred to:

(1) *R.* v. *Wilson* (1877), 3 Q.B.D. 42; 48 L.J.M.C. 37; 37 L.T. 354; 41 J.P. 708; 26 W.R. 44; 13 Cox, C.C. 630, D.C.; 24 Digest 869, *9*.

(2) *Black* v. *Murray & Son*, 1870, 9 M. 341; 43 J. 160; 8 S.L.R. 261.

A **Appeal** by the plaintiff from an order of CLAUSON, J.

The facts are set out in the judgment of the MASTER OF THE ROLLS.

Schiller, K.C., and *E. J. Macgillivray* for the plaintiff.

Morton, K.C., and *G. H. B. Streatfield* for the defendants.

LORD HANWORTH, M.R.—This appeal fails. It is an appeal from CLAUSON, J., B who had to give his judgment upon a Special Case submitted for the decision of the court by an arbitrator. A number of questions were submitted by the arbitrator, but CLAUSON, J., came to the conclusion that the plaintiff was not entitled to the relief claimed in the action, whereupon the award directed that

> "the plaintiff do pay to the defendants their costs of the action and reference and also do pay the costs of this my award."

C The action was brought to establish the plaintiff's right against the defendants for infringing a copyright which it was claimed belonged to the plaintiff. The plaintiff claimed the usual relief in an action based upon copyright, namely, an injunction to restrain the defendants from publishing, printing, and so on a book published by them entitled EMULATION WORKING, or any part or parts thereof which had been copied or colourably altered from the plaintiff's literary work entitled THE PERFECT CEREMONIES D OF CRAFT MASONRY, and she also made a claim for damages and so on. These cases of copyright involve, as this one does, some rather difficult questions.

It is, I think, extremely important before I go to the structure of the action and the law applicable to it that I should state what I conceive to be the facts presented to the court by the findings of the arbitrator in the Special Case. They are that there was in the year 1874 a book or compilation which was entitled THE PERFECT CEREMONIES OF E CRAFT MASONRY. Who was the original compiler or author of the book in 1874 does not appear. There were a number of editions of that compilation, but in 1896 it appears that there was a new compilation and that that 1896 edition was sufficiently different from anything that had been published in the previous twenty-two years to constitute that edition of 1896 a new work for the purpose of the Copyright Act. So the arbitrator finds:

F

> "I find that the 1896 edition was a new work for the purposes of the Copyright Act, but there is no evidence upon which I can determine who was the author or compiler of the said edition, nor whether such author or compiler is or was at the date of the issue of the writ in the action still alive or not."

The editions which have been issued from 1896 subsequently declare on the title page G that they are "Privately printed for A. Lewis." I read from the 1896 book. Again in 1899 there appears the same imprint, "Privately printed for A. Lewis, London, 1899." We have evidence which the learned arbitrator accepted that, at any rate, from 1896 down to 1909 a man named John Hogg was carrying on a business of publishing masonic rituals at Paternoster Row under the name of A. Lewis. The arbitrator says:

> "It is proved that from about 1906 until his death on Aug. 2, 1909, John Hogg was H carrying on a business of publishing masonic rituals at 13, Paternoster-row, London, under the name of A. Lewis. During that time the said business was managed for him by his nephew Godfrey James Hogg as a paid servant."

The arbitrator finds that down to 1909 when he died any copyright which could then exist in any part of the said book or any edition thereof was legally vested in John Hogg. I am, therefore, going to take it, for the purpose of considering the plaintiff's rights, that I there was some copyright in an edition which is rooted in 1896, of which reprints were published from time to time down to 1899, and that John Hogg was the person in whom was the copyright of this edition of 1896 on which the reprints were founded down to his death in August, 1909. When he died he left a will, and by his will he bequeathed his business, his goodwill, his stock-in-trade including the masonic rituals and books issued by him under the name of A. Lewis, and his interest in the lease of the premises to Godfrey James Hogg absolutely, but upon two conditions, one of which I will treat as a condition subsequent, namely, that he should pay a certain person by equal quarterly payments a certain sum per annum, and subject to another condition that he should execute within six months of the death a certain deed containing a covenant and so on. The arbitrator finds that there was no evidence sufficient to satisfy him that the second condition had been complied with. He says:

> "I find, therefore, there is no evidence whether or not Godfrey James Hogg either complied with the said condition or executed the deed in accordance with the proviso."

It is also to be observed that it is not recorded or stated in the Special Case that there was any evidence that among the personal property of John Hogg there was at the time of his death remaining and vesting in him a copyright in the book of 1896.

After the death of John, Godfrey James Hogg carried on his business and died on Nov. 7, 1922. He had married his wife previously in 1890, and upon his death in 1922 she continued to carry on the business as it had been carried on by her husband under the name of A. Lewis, and she is the plaintiff in this action. It seems that after her husband had died she employed two persons, a Mr. London and a Major Wodehouse, and it was by them that certain alterations and improvements were made in various reprints of this book which were issued. But it is expressly found by the arbitrator that these amendments were not sufficient to constitute any of these reprints a new literary work which could stand upon its own feet as the subject-matter of, and attracting the right of, copyright.

Those are, I think, all the facts I need state, and I will, first of all, deal with the matter quite apart from a scrutiny of the Act of Parliament. The plaintiff claims that she is entitled to restrain the infringement of copyright said to have been committed by the defendants. The defendants have put in issue, first, the question whether there is any copyright at all, and, secondly, whether there is any copyright vested in the plaintiff. Let me assume in the plaintiff's favour that the edition of 1896 was properly the subject of copyright and that the subsequent reprints, if not actual reprints, were substantially reproducing the work of 1896. Has it been proved that that personal property of John Hogg has passed to the plaintiff? I find myself in accord with those who have gone before and have considered this question. It appears to me that there is no sufficient proof that this copyright formed a part of the personal property of John Hogg in 1909 or that it was taken by Godfrey James Hogg upon his succession or that it has passed to the present plaintiff. I think it is difficult to establish that that successional legal right—I will call it a successional legal right—is vested in the plaintiff.

I come now to consider what is the claim that is made in the action. I can leave out the matters that were dealt with by a previous action which came to an end by a settlement in June, 1932, and I take the amended statement of claim which states that the plaintiff is the owner of the copyright in a book called The Perfect Ceremonies of Craft Masonry, and in the successive editions thereof issued from 1874 to 1929, and then alleges that from and after June 2, 1932, the defendants published a book which is copied directly in whole or in part from the 1929 edition of the plaintiff's book, and, therefore, is an infringement of her copyright. When particulars were asked for in order to ascertain with greater accuracy what is the actual claim of the plaintiff, which had been put at large from 1874 to 1929, these particulars were given:

> "The copyright in the 1926 and 1929 editions was acquired by the plaintiff . . . under s. 5 (1) (*b*) of the Copyright Act, 1911, the same being compiled by Edmund Neville London and Arthur Hugh Wodehouse in the course of their employment by the plaintiff under a contract of service."

That is a definite statement that the plaintiff will rely upon s. 5 (1) (*b*) of the Copyright Act, 1911, whereby the ownership of a copyright is given to the employer of the person who is the author, but who made the literary product under a contract of service or apprenticeship and the work was made in the course of the employment by that person. It will be seen, therefore, that the plaintiff claims the two editions of 1926 and 1929 as having been made for her by these persons under a contract of service, she being the employer, but upon the facts as found in the Case that work or the services rendered by those two persons did not enure to give the result of their work a separate and independent copyright. The copyright originated and stood upon the work of 1896, and these later editions, successively issued from time to time, whether in 1926 or 1929, derived their copyright from the original work and did not stand by themselves so as to be new products in either of those years to which s. 5 (1) (*b*) would apply.

It, therefore, appears upon the facts that the plaintiff cannot declare that she was the owner of a new copyright which dated either from 1926 or from 1929, and so she relies upon a presumption which is given under s. 6 (3). That section was put in, no doubt, to facilitate the enforcement of rights against infringers in cases where works have been published anonymously, but have the authorisation that they are published by a publisher whose name appears as an imprint at the outset of the work. Section 6 deals with civil remedies. First of all, in sub-s. (1), it says that the owner of the copyright shall be entitled to an injunction and remedies and so on. Then it says in sub-s. (3):

> "In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner of the copyright, unless the defendants put in issue the existence of the copyright or, as the case may be, the title of the plaintiff."

Both those things are put in issue in the present proceedings, and we have to deal with the particular case which is met by cl. (*b*) of sub-s. (3) of s. 6, which says:

> "If no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein."

I am going to take it that these words "privately printed for A. Lewis" are sufficient to satisfy the words that there is the name of a publisher "indicated thereon in the usual manner." What does the section then provide? A person whose name is so indicated "shall be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein." That seems to me in comparatively clear terms to indicate that for the purposes of the proceedings the person who can say that he has the name indicated upon the work is to have a locus standi as the plaintiff to enforce his rights against an infringer. He can without disclosing the true author's name stop the infringement, but does it go beyond that? Is it intended to enure for the benefit of persons whose names are not so printed or indicated and cannot prove a derivative title from an antecedent copyright? Is it intended to give to such persons a derivative title enforceable in the existing action? I cannot think that the clause is intended to have so far-reaching an effect: It appears to me that it was to give a proper start to proceedings against an infringer, and that, until the contrary was proved, the action could be treated as properly constituted. I think that counsel for the defendants is right and the learned judge is right in saying that the words are "to be" and ought not to be interpreted as being "to have been"—that they are, so to speak, of present force and validity, and are not retrospective in their effect. Then we have these other words "unless the contrary is proved, be presumed to be the owner of the copyright in the work."

In the present case we have got something more than that. If it be accepted on the hypothesis I propose that John Hogg was the owner of the copyright down to 1909, there is difficulty in tracing that copyright to the plaintiff, and, indeed, the arbitrator says that it was left open as to what had happened to the copyright at a later date. In other words, the mere presumption that was given was qualified by reason of the fact that it was shown upon the hypothesis which I have proposed that John Hogg had had a copyright, but what has happened to that is not certain except that there is no proof that it has derivatively come into the possession of the plaintiff. It has now been shown that there was, upon a hypothesis favourable to the plaintiff, an original copyright in 1896, but it has not been shown that that has become vested in the plaintiff. Having regard to the view I take of sub-s. (3), sub-cl. (*b*), and which the learned judge took, I think the presumption that the plaintiff asks us to accept on the words of the section goes beyond the words of the section, and does not enure to establish the plaintiff's right in the present case, a right which is contested both as to whether there is a copyright and whether it is vested in the plaintiff. A

For these reasons it appears to me that this appeal must be dismissed with costs.

ROMER, L.J.—I have, I confess with considerable hesitation, arrived at the same conclusion. Let me refer, first of all, to two findings of the learned arbitrator which go to the root of the matter that we have to decide. He says: B

> "I find as a fact that the differences between the 1874 and the 1896 editions . . . would, if wholly or mainly due to changes made for the first time in the 1896 edition, be sufficiently substantial to constitute that edition a new work for the purposes of the Copyright Act."

He finds as follows: C

> "Since 1896 there have not been in any edition . . . alterations sufficiently substantial . . . to constitute any such edition a new work for the purposes of the Copyright Act."

Having regard to his finding that the 1896 edition was a new work for the purposes of the Copyright Act, it follows that in that year there became vested in the author of that work a statutory copyright under the Act of 1842, and that on the coming into operation of the Act of 1911 there was substituted for that copyright a new statutory copyright created by the Act of 1911, and that new statutory copyright would vest in the author or those claiming under him. It follows from that that when the plaintiff in this case issued her writ on Aug. 10, 1932, apart from the provisions of s. 6 (3) (b) of the Act of 1911, she could not have succeeded in her action unless she proved that she was the author of the work or an assignee of the author or was constituted the owner of the copyright by virtue of proviso (b) to s. 5 (1) of the Act of 1911 or the statutory provisions in the earlier statute which those provisos reproduced. The learned arbitrator infers as a fact that any copyright which at the date of the death of John Hogg could then have existed in any part of the said book or any edition thereof was at the date of his death legally vested in him. I have not the least idea how it comes about that the learned arbitrator finds himself justified in inferring that as a fact, but I do not think we have to consider whether any such inference could be properly drawn or not, for the reason that the plaintiff, by her particulars, has confined her right to sue to the rights which were given her by s. 6 (3) (*b*) of the Act. Further, I agree with what the MASTER OF THE ROLLS has said, that, even assuming that copyright in the work was vested in John Hogg at the time of his death, there is no proper proof that that right has passed to the plaintiff. Assuming that it did pass under his will to Godfrey James Hogg, I can find no evidence that it passed from Godfrey James Hogg to the plaintiff. The plaintiff, therefore, is both by her pleadings and by the facts confined to the provisions of the subsection if she is to succeed in her action. D E F G

In order to understand that proviso I will refer shortly to the sections of the Act which lead up to it. Section 1 of the Act provides that copyright shall subsist for the term thereinafter mentioned in every original literary work if (*a*) in the case of a published work, the work was first published within such parts of His Majesty's Dominions to which the Act extends, and (*b*) in the case of an unpublished work the author at the date of the making of the work was a British subject. Then s. 1 (2) defines what is meant for the purposes of the Act by the word "copyright." I can pass over s. 2, which explains what is meant by infringement of copyright: it states the circumstances in which a work shall be deemed to be infringed. Section 3 deals with the term for which copyright is to subsist under the Act. I can pass over s. 4 and turn to s. 5, which states who is to be the owner of the copyright in various cases. The general provision, in s. 5 (1), is that the author of the work shall be the first owner of the copyright therein. Then there is the proviso to which I have already referred which enacts that in certain circumstances the copyright shall be vested not in the author, but in his employer. Sub-s. (2) provides that the owner may assign his copyright. Then we come to s. 6 which is dealing with remedies for infringement of the copyright. Sub-s. (1) says: H I

> "Where copy in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, [and so on] as are or may be conferred by law for the infringement of a right."

Pausing there, the owner of a copyright under the Act who complains that it has been infringed, in order to succeed in any action that he may bring would have to prove two things—first, he would have to prove that he has copyright and that copyright exists in the work in question, and, secondly, he would have to prove that he is the owner of the copyright, which he could prove either by showing that he himself was the author or that the work was executed in one of the ways mentioned in the provisos to s. 5 (1), or that he is the assignee of the author or other true owner of the copyright. All that, of course, in many cases might be expensive, and, if there was no real issue about it, unnecessary expense would be involved in proving those things.

So we come to sub-s. (3), which, in my opinion, is merely dealing with procedure in any such action as is contemplated in sub-s. (1), that is to say, an action brought for the purpose of restraining infringement and recovering damages, and so on, in respect of infringement of copyright. It says this:

> "In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists, and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff."

Where, therefore, the defendant does not put either of those matters in issue, the plaintiff will not have to prove that the work has copyright, and he will not have to prove that he is the owner of the copyright; that will be assumed in his favour. Where the title of the plaintiff is put in issue, then it is provided as follows:

> "If a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work."

So that, even where his title is put in issue, if he produces a book or pamphlet which contains a print of the literary work, and that book or pamphlet has printed on it his name as purporting to be the author of the work, then, unless the contrary is proved, he will be presumed to be the author of the work. Sub-cl. (*b*) is the important one in this case and that is dealing with the case where no name is so printed or indicated or where the name printed or indicated is not the author's true name or the name by which he is commonly known. It provides that if

> "a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein."

It will be observed that the subsection in no way purports to divest the author or other true owner of the copyright of his rights. It is not confined to the case of an author whose whereabouts cannot be ascertained. Such a case is not, indeed, in terms mentioned in the section. What it does contemplate is that there is an author whose name is well known to the public, but who for reasons of his own does not desire his name to appear on the published work, who desires to remain anonymous or who has published it under a nom de plume. In that case the person whose name is printed on the work as publisher is to be presumed for the purposes of the proceedings, and only for those purposes, to be the owner of the copyright. The words "for the purposes of proceedings" mean, in my opinion, for the purposes of proceedings which are contemplated by the subsection itself, the subsection which begins, as I have already pointed out, with the words: "In any action for infringement of copyright." I think that the reason why such a provision is to be found in the Act is that it would be very hard on an author who wished his name to be concealed from the public if he was not able to prevent piracy of his work except at the cost and risk of having his connection with the work made public, and, therefore, there is put into the hands of the publishers, in those circumstances, a right to sue, but to sue, as I understand it, on behalf of the real owner of the copyright whose rights, as I have already stated, are in no way divested by the subsection. Then there are the words "unless the contrary is proved." The contrary can, of course, be proved by the defendant if he is in a position to prove it by showing that somebody else other than the publisher is the true owner of the copyright. I do not think the contrary would be proved by showing that the publisher was not the owner of the copyright because the whole subsection is based on the hypothesis, as I read it, that the publisher is not the owner of the copyright, but for the purposes of the proceedings in question is deemed to be the owner of the copyright.

If that is, as I think it is, the true construction of the subsection, and it is the construction which the learned judge in the court below has put upon it, what, then, is the position of the plaintiff in so far as she relies upon the book produced by her, published in the year 1896? On it there appear the words: "Printed for A. Lewis." I am prepared to assume, as the Master of the Rolls has assumed, that those words sufficiently indicate that A. Lewis was the publisher in 1896 of the work. Who was A. Lewis? It certainly was not the plaintiff. We know, if it was anybody connected with the plaintiff, it was John Hogg. There is no proof that it was John Hogg in 1896, but I am willing to assume that John Hogg was carrying on business as a publisher in that year under the name of A. Lewis. It will not help the plaintiff for the court to presume that John Hogg is the owner of the copyright for the purposes of these proceedings. So far, therefore, as the plaintiff founds herself upon the 1896 book I am entirely in agreement with what the learned judge has said, and what has been said by the Master of the Rolls. Where my doubt arises is when the plaintiff relies, not upon the 1896 edition, but upon that of 1929. It is quite plain, I think, that in the subsection the words "the work" do not mean the same as the words "the work" in s. 1, for instance, of the Act. "The work" in which copyright exists is the expression of his ideas on the part of the author. That is plain, I think, from the fact that copyright exists in published and unpublished works. An author who expresses his ideas in a manuscript which he keeps to himself has copyright in that work—that is to say, in the expression of his ideas in the manuscript—and when he subsequently causes it to be published he does not obtain a new copyright; his copyright still is the same as before, though the expression of his ideas is now to be found, not only in the manuscript, but in a printed book or a printed pamphlet. Section 6 (3) (*b*), however, by the words "the work" is referring to something on which the name of the author can be printed or indicated or the name of the publisher can be printed or indicated. That must mean a book or pamphlet in which is printed the expression of ideas for the composition of which the author is entitled to copyright.

Supposing an author desiring to remain anonymous causes his work to be published in the year 1920 by A. B. While A. B. is alive, if anyone commits infringement of the author's copyright in the work, an action can be brought in the name of A. B., the edition published by A. B. will be produced, the subsection will come into operation, and for the purposes of those proceedings A. B. will be deemed to be the owner of the copyright. But supposing A. B. dies, the author of the work, still desiring to remain anonymous and to be able to protect his work if necessary, causes it to be published now by C. D. Why should not the proviso operate in favour of C. D. when an action is brought by him on behalf of the anonymous author? I cannot see for myself why it should not. I should have thought that the work, that is to say, the printed document on which the publisher's name appears, is a publication of the work in which copyright exists, and none the less that the second edition does not contain any new matter so as to constitute the composition which is published in the second edition a new composition conferring a new copyright upon the author. If, therefore, the plaintiff in this case had confined herself to suing in respect of the 1929 book, that is to say, had confined herself to proving her right to the copyright in the composition by producing the print of the composition which was effected in the year 1929, and which contains the name under which she was trading as the publisher, I should have thought, speaking entirely for myself, that the subsection would have operated in her favour. Unfortunately, that is not what the plaintiff did. She puts forward to the court at least three books, copies of the composition in which copyright is claimed. She puts forward one published in 1896; she puts forward one published in 1917; and she puts forward a third one which was published in 1929. The first one I assume, shows that John Hogg was the publisher. Therefore, the court presumes that John Hogg was the person entitled to copyright in respect of that book. Then, looking at 1920, the court finds another A. Lewis—that is the pseudonym of Godfrey James Hogg. It must be presumed that Godfrey James Hogg, for the purposes of these proceedings, is the owner of the copyright. When it comes to 1929 the court has to make a third presumption—that the present plaintiff is the owner of the copyright. In these circumstances I do not see how the court can choose between the three presumptions, all of which arise by the action of the plaintiff, and that being so I am not prepared to differ from the decision of CLAUSON, J., which has received the approval of the MASTER OF THE ROLLS.

MAUGHAM, L.J.—I am of the same opinion, and having regard to what my brethren have said in reference to the facts I shall confine myself to certain observations on the rather difficult section which we have to construe, namely, s. 6 of the Copyright Act, 1911. Apart from the actual language in which it is expressed, I think one may say with confidence that the whole section, or nearly all of it, is intended to give effect to art. 11 of the Berne Convention of 1886, substantially reproduced in art. 15 of the Berlin Convention of 1908. Under our own law there was great difficulty in protecting in any way productions of an anonymous or pseudonymous character, but as early as the first Berne Convention, to which this country was a party, it was agreed in art. 11 as follows:

> "For anonymous or pseudonymous works the publisher whose name is indicated on the work shall be entitled to protect the rights belonging to the author; he shall be without other proof deemed to be the legal representative of the anonymous or pseudonymous author."

That such conventions can be referred to for the purpose of construing the Act appears, I think, from a judgment of MANSFIELD, C.J., in *R.* v. *Wilson* (1).

Having regard to that fact, and to the language of the section, I think it is manifest that s. 6 (3) (*b*) was intended to enable the publisher to protect the rights of the anonymous or pseudonymous author without giving his true name away. It is a section designed, not for the benefit of publishers in any sense, because, in my opinion, if a publisher, relying on such a presumption, brings an action and recovers damages, he recovers them on behalf of the author if the author has remained the owner of the copyright. It deals merely with procedure and the procedure in an action for infringement. It is a mistake to suppose that it transfers any legal rights to the publisher, or that immediately the action is over, and I may add before the action is begun, there is any presumption of law whatever.

In my opinion, it follows that the presumption being one only for the purposes of proceedings for infringement, there is no ground for presuming under the subsection that some publisher who published a work long ago, but is now dead and never was concerned in an infringement action, was the owner of the copyright in the work. The presumption does not apply to him, because it can only apply for the purposes of an infringement action, which that deceased publisher was never concerned with. The difficulty in giving the wide construction to the subsection for which counsel for the plaintiff contends does not rest, I think, simply on the use of the tense in the sentence "whose name is so printed shall be presumed to be the owner of the copyright," but is also to be gathered from the words "presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement," and, accordingly, in my view, it is wrong to suppose that any presumption can be made with regard to ownership of a past publisher since he cannot be presumed "to be" the owner for the purposes of these infringement proceedings. As CLAUSON, J., observed, it may seem a narrow interpretation of the section, but we are not entitled, as it seems to me, in a

A section relating to proof of certain evidential facts in an infringement action to go beyond the language of the section, and I do not think it is very surprising that a section introduced for the purpose of giving effect to the rights of anonymous authors was not framed so as to apply, it may be, long after the anonymous author is dead or the original publisher is dead. Accordingly, in my opinion, the judgment of the learned judge on this point was perfectly right. I would only observe that there are a number of other B difficulties in putting the construction upon the subsection that counsel for the plaintiff contends for, one difficulty being that already pointed out—that there is a difficulty in making the subsection apply to a copyright originally gained under the Act of 1842, or, indeed, under any preceding Act, since "copyright" in the Act of 1911 has a different meaning from that which it originally possessed and such copyright enures for a different term.

C There remains another matter on which I must also say a word, and that is with reference to the point that the plaintiff was entitled to bring to court the edition of, say, 1931, to point to that book as containing the name of the publisher of the work printed thereon in the usual manner, and to ask the court to presume that the person whose name was so printed, namely, the plaintiff, must be presumed to be the owner of the copyright in the work. If the work of 1931 had been the subject of a new copyright D and capable of a new copyright, in my opinion, that contention would have succeeded, but where I, speaking for myself, am unable to follow it is that I find there was no copyright properly so called in the editions of 1926, 1929, and 1931. The position with regard to reprints has not, I think, altered since the Act of 1911 was passed. An edition which contains no substantial alteration, and, therefore, is a mere reprint in substance of an old edition was not entitled under the old law to any copyright whatsoever, so far as that edition was concerned. As was observed in the Scottish case of E *Black* v. *Murray* (2) by the Lord President:

> "A new edition of a work may be a mere reprint of an old edition, and plainly that would not entitle the author to a new term of copyright running from the date of the new edition."

F

In my opinion, under that Act the publisher of the reprint had no copyright whatever. The author who, without any act of authorship, authorised the reprinting of a work did not gain any copyright in it, and, in my opinion, under the present Act the position is the same. The owner of an original copyright in general does not say anything about later editions; if he proves that he published a work at a particular date he gets a copyright in that literary work under s. 1 of the Copyright Act, 1911, and he gets no further G right whatsoever if the work is reprinted from time to time. I see an objection to a ground for thinking that a mere reprint ought to be entitled to the benefit of sub-s. (*b*), because the reprint might be a reprint purely ad hoc for the purposes of the action by some not very reputable person who might say, having put in a document of this kind:

> "Although it is a reprint and the work was published forty years ago, here it is, and my name being on the document I am to be deemed, unless the contrary is proved, to be the owner of the copyright." H

So that, in my opinion, there being no originality in the reprint—and you do not get a copyright in a literary work unless it is an original literary work under s. 1—the plaintiff in the present case would have gained no advantage by putting in either the last two or three editions and claiming to protect those. I would only add that, if the plaintiff I had come into court with the reprints alone, and not, as my brother ROMER has pointed out, with a number of editions, she cannot, in my opinion, be presumed to be the owner of the copyright since from the production of the previous or original edition it would be established that she was not the owner of the copyright—you cannot be the owner of a copyright merely by copying somebody else's work. It follows, in my opinion, that the plaintiff was unable to rely upon the reprints or upon the substantial reprints involved in those later editions, and that, accordingly, she was not entitled to take advantage of s. 6, (3) (*b*) of the Act. In other respects she fails to establish her title to the copyright in question for the reasons given by my brethren, to which I find that I can add nothing useful. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Peronne & Co.*; *T. J. Robinson & Son.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

BRITISH HOMOPHONE, LTD. *v.* KUNZ & CRYSTALLATE GRAMOPHONE RECORD MANUFACTURING CO., LTD.

[KING'S BENCH DIVISION (du Parcq, J.), March 6, 7, 8, 15, 1935]

[Reported 152 L.T. 589]

Contract—Option for further contract—Option void for uncertainty—Further contract entered into in belief that option valid—Validity of further contract.

By a contract in writing dated March 15, 1934, and made between the plaintiff company and the defendant K. it was agreed that the plaintiff company should have the exclusive right to the services of K. and his band for the purposes of making gramophone records. By cl. 1 of the agreement: "This agreement shall be in force for a period of twelve months with an option on the part of the company or the principal [K.] to extend the same for a further period of twelve months on terms to be hereinafter agreed." By a further contract in writing, dated Feb. 1, 1935, and made between the plaintiff company and the defendant K., it was agreed that the plaintiff company should have the exclusive right to the services of K. and his band for the purposes of making gramophone records for twelve months on the terms and conditions set out in the contract. When making the contract both K. and the representative of the plaintiff company each believed that the other was bound to enter into it in view of the terms of cl. 1 of the contract of March 15, 1934.

Held: (i) it was impossible to imply in the "option" in the contract of March 15, 1934, any terms which would make it effective as a contract; the only term which might be implied was that for a further period of twelve months K. was to continue to render and procure to be rendered by his band services similar to those which were the subject-matter of the contract of March 15, but beyond that everything was left to the imagination; and, therefore, the "option" had no binding effect, but

(ii) there was no authority for the proposition that, if two parties entered into what was on the face of it a binding contract in ignorance of their legal rights, each believing the other to be bound to enter into such a contract when in fact he was not so bound, the contract so entered into was not enforceable; to hold otherwise would be to decide that a common mistake of law vitiated a contract; and, therefore, the contract of Feb. 1, 1935, was enforceable by the plaintiffs.

Notes. As to the requirements for the formation of a valid contract, see 8 HALSBURY'S LAWS (3rd Edn.) 69 et seq., and for cases, see 12 DIGEST (Repl.) 53 et seq.

Cases referred to:

(1) *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37; 70 L.J.Ch. 468; 84 L.T. 436; 49 W.R. 418; 17 T.L.R. 410; 45 Sol. Jo. 394, C.A.; 12 Digest (Repl.) 669, *5177*.

(2) *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (1932), 147 L.T. 503; 38 Com. Cas. 23, H.L.; Digest Supp.

(3) *May and Butcher, Ltd.* v. *R.*, [1934] 2 K.B. 17, n.; 103 L.J.K.B. 556, n.; 151 L.T. 24 6, n.; Digest Supp.

(4) *Loftus* v. *Roberts* (1902), 18 T.L.R. 532, C.A.; 12 Digest (Repl.) 58, *320*. A

(5) *Foley* v. *Classique Coaches, Ltd.*, [1934] 2 K.B. 1; 103 L.J.K.B. 550; 151 L.T. 242, C.A.; Digest Supp.

(6) *South Wales Miners Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 53 W.R. 593; 21 T.L.R. 441, H.L.; 34 Digest 169, *1322*.

(7) *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland, and Wales*, [1902] 2 K.B. 732; 71 L.J.K.B. 994; 87 L.T. 493; 66 J.P. 822; 51 W.R. 115; B
19 T.L.R. 20; 47 Sol. Jo. 29, C.A.; 34 Digest 190, *1556*.

(8) *Galloway* v. *Galloway* (1914), 30 T.L.R. 531, D.C.; 35 Digest 103, *101*.

Action tried by du Parcq, J., without a jury.

The plaintiffs claimed (i) a declaration that, pursuant to agreements between them and the defendant, Kunz, dated March 15, 1934, Jan. 11, and Feb. 1, 1935, they were C
entitled to the exclusive services of the defendant and the Casani Club band as therein mentioned until Feb. 1, 1936; (ii) an injunction to restrain the defendants and each of them, their servants and agents, and each and all of them, from hindering, preventing or interfering in any way with the plaintiffs' enjoyment of such exclusive services of the defendant Kunz and the Casani Club band until Feb. 1, 1936, in accordance with the agreements between the plaintiffs and the defendant Kunz, dated March 15, 1934, and D
Jan. 11, and Feb. 1, 1935; and (iii) damages.

Fortune for the plaintiff company.

Macaskie, K.C., and *Blanco White* for the defendant Kunz.

Harold Murphy for the defendants, the Crystallate Gramophone Record Manufacturing Co., Ltd.

Cur. adv. vult. E

March 15.—**DU PARCQ, J.**, read a judgment in which he set out the claims of the plaintiffs and continued: the defendant, Kunz, is a pianist, who, in the year 1933, was gaining popularity for himself and for his band, which played dance music at an establishment known as the Casani Club. On Sept. 14, 1933, he entered into an agreement with the plaintiffs, a company engaged in the making of gramophone records, which provided F
that he and his band were "to record items of music for the company." The company was to have the exclusive right to their services for the period of the agreement. Clause 1 of the agreement was in these terms:

> "This agreement shall be in force for a period of six months with an option on the part of the company or the principal [the defendant Kunz] to extend same for a further period of six months on terms to be hereafter agreed." G

On Jan. 31, 1934, the plaintiffs' manager wrote a letter to the defendant Kunz "confirming the renewal of the existing agreement . . . by extending same for a further period of twelve months from March 14, 1934, and also piano solo recordings by yourself during the same period." "My company agrees," the letter added, "to pay you £20 per session of one double-sided record, minimum one session per month." A formal H
agreement was entered into, dated March 15, 1934, which gave effect to the terms of the letter. It also contained an option clause in precisely the same words as cl. 1 of the agreement of Sept. 14, 1933, except that the words "twelve months" were substituted for the words "six months," where the latter words occurred in the earlier agreement, and the word "hereafter" was inadvertently changed to "hereinafter."

The defendant Kunz and his band became more and more popular as time went on, I
and there is no doubt that the plaintiffs were anxious to retain, and the defendant company, who were their competitors in business, not less anxious to secure, the exclusive right to his services. I see no reason to doubt that the conversation sworn to by the plaintiff's manager, Mr. Fletcher, took place on a day in December, 1934. Mr. Fletcher says that he said to the defendant Kunz: "I shall want to renew your agreement after Christmas." Kunz said: "Oh, well, what are you going to pay me?" Mr. Fletcher replied: "You can have your own terms, provided they are reasonable." The answer was: "That is O.K.: we shall not fall out." No more was said on the subject

between the defendant Kunz and Mr. Fletcher or any other representative of the plaintiffs until Jan. 11, 1935.

Meanwhile, the defendant company had become active. They knew that the defendant Kunz was recording for the plaintiffs, but did not know when his contract would come to an end, or that there was an option clause in it. On Jan. 7, 1935, Mr. Kunz was fulfilling an engagement at Hull, and Mr. Warnford-Davis, a director of the defendant company, telephoned to him and made an appointment, which was kept, to meet him on the following day at Leeds. I accept Mr. Warnford-Davis's evidence as to what took place at Leeds, and I may say at once that I am unable to place much reliance on Mr. Kunz's evidence on any point, not because I think he is an untruthful man, but first, because he is admittedly unbusinesslike, and secondly, because, partly, I think, through ill health, his memory is obviously very defective. At the interview Mr. Kunz told Mr. Warnford-Davis definitely that his contract with the plaintiffs would come to an end towards the end of February. He said nothing of any option clause in his contract with the plaintiffs. Mr. Warnford-Davis made him an offer which, after some hesitation, Mr. Kunz was persuaded to accept then and there. Mr. Warnford-Davis drew up a contract at once in the form of a letter which Mr. Kunz signed. It was in these terms:

> "Dear Sirs, I confirm the terms agreed upon this afternoon as follows: (1) It is understood you have the exclusive name Charlie Kunz and Charlie Kunz and his Casani Club orchestra, for a period of one year from March 1, 1935, to March 1, 1936, with the Crystallate company's option of renewal for a further period of twelve months from March 1, 1936, to March 1, 1937, on the same terms, subject to notice being given me in writing by Jan. 1, 1936. (2) The terms agreed upon are as follows: (i) On Feb. 1, 1935, the Crystallate company will hand me a cheque for £1,000, representing (*a*) £600 for the exclusive use of the Casani Dance orchestra for a minimum of twelve sessions, at which four dance records with suitable orchestrations and vocalists provided by me will be recorded at the company's studios. For any excess sessions over the minimum the sum of £50 will be paid by the company at the time of recording. The company will have the right to issue such records on any of their brands; (*b*) £400 on account of one-eighth of a penny royalty per side, that is one farthing royalty per double-sided record for piano solos to be played by Charlie Kunz or otherwise as required by the company for a minimum of twelve double-sided records to be issued in the twelve months; (ii) any further payments due will be paid quarterly. A statement of sales will be supplied me each quarter by the company; (iii) I agree to the following public performance notice to be supplied me in due course."

Mr. Kunz seems to have felt some doubt whether he was free to enter into this contract with the defendant company. He had no copy of his contract with the plaintiffs by him, and says that he did not remember its terms or the date when it was to expire. He, therefore, said something to Mr. Warnford-Davis to the effect that, if there was anything wrong with the contract, he, Mr. Warnford-Davis, was to fix it or put it right. He said under cross-examination: "I wanted to cover myself, because it was done with such a rush, and if anything went wrong I wanted to cover myself." In examination-in-chief he had said that his reason for making the remark was that he did not know anything about contracts. Mr. Warnford-Davis's recollection, which I believe to be substantially accurate, is that Mr. Kunz said: "If there is anything wrong with that contract will you have it put right?" to which Mr. Warnford-Davis answered: "Certainly I will, although you must understand that the conditions and terms in this agreement are absolutely binding. I hope you have that absolutely clear."

Mr. Warnford-Davis returned to London with the contract in his pocket. He had handed to Mr. Kunz a counterpart of it, signed by himself, and written, like the first, on notepaper with a printed heading and a picture upon it of the Palais de Danse at which the interview had taken place. Mr. Kunz is not now able to produce this counterpart. On Jan. 10, Mr. Warnford-Davis sent to Mr. Kunz a typewritten copy of the agreement of Jan. 8, in which the public performance clause was written out in extenso.

A The letter of Jan. 10, in which this typewritten copy was enclosed, contained a paragraph which is consistent with Mr. Warnford-Davis's statement that Mr. Kunz had led him to believe that the contract with the plaintiffs was to expire towards the end of February. It is as follows: "You might advise us of the exact date of the expiration of your present contract with the Homochord [sic] Company, for if it is possible to issue your first record prior to the 1st March we shall catch the late winter season, which would be of value to both of us. B We are also thinking of making one or two prior announcements to the trade and possibly the press, for which purpose we must have this information."

On Jan. 11, there was a conversation over the telephone between Mr. Warnford-Davis and Mr. Fletcher as to which there is a conflict of evidence. I do not take the view that either of those gentlemen wilfully misrepresented the effect of the conversation in his evidence before me. C It is notorious that words spoken on the telephone are not always accurately heard, and it may sometimes happen that their significance is not fully appreciated even if they are correctly heard. According to Mr. Warnford-Davis, he told Mr. Fletcher in plain terms that the defendant company had "signed up" the defendant Kunz. Mr. Fletcher's recollection is that Mr. Warnford-Davis told him that the defendant company "were going to take Kunz from the plaintiff company at all costs." D I cannot doubt that, whatever the precise words used by Mr. Warnford-Davis may have been, Mr. Fletcher was left with at least a strong suspicion that the defendant Kunz had already entered into an agreement with the defendant company. It is certain, at any rate, that Mr. Fletcher thought it wise to see Mr. Kunz at once, and soon after the telephone communication he interviewed him at the Casani Club. Mrs. Kunz says that Mr. Fletcher first called at the defendant Kunz's house and spoke to her. E Mr. Fletcher says that he visited her on the previous day to inquire whether her husband had done anything in the way of "changing companies." It is not necessary to decide between those conflicting accounts of an interview which seems to me to be immaterial on either view. Mr. Kunz may well be right as to the date of the interview.

When Mr. Fletcher arrived at the Casani Club, Mr. Kunz had with him both the contract which he had concluded with the defendant company, and also his existing agreement with the plaintiff company. F A copy of the contract with the defendants was on a table in the room. This was the manuscript counterpart signed by Mr. Warnford-Davis, with the printed heading. Mr. Fletcher at once asked Mr. Kunz whether he had signed any agreement with the defendant company. Mr. Kunz replied that he had signed what he called a "provisional agreement" only, and that he had signed it at Leeds in order "to get rid of" Mr. Warnford-Davis. Mr. Fletcher does not profess to remember Mr. Kunz's exact words; G his recollection is that Mr. Kunz said: "Providing there is nothing in your contract that holds me then I shall go through," or words to that effect. Mr. Kunz's recollection is, as usual, vague; asked by his counsel whether he explained how he had signed provisionally, he replied: "No, sir, I do not suppose so." I think that some assistance is to be obtained from a letter written by the plaintiffs' solicitor on Jan. 21, 1935, when, referring to the date with which I am now dealing, he says this: H "I do not deny that my clients at this time knew that your clients had some form of agreement with Mr. Kunz, but I place on record that my clients were informed by Mr. Kunz that he had signed a provisional agreement with your clients only on a scrap of paper and he informed my clients that before signing this provisional agreement with your clients he made it a condition that, if he was bound to my clients' company, what purports to be an agreement was not to operate." I I infer this version of the interview was written upon instructions obtained from Mr. Fletcher, and, therefore, represents Mr. Fletcher's recollection at that time. I am not satisfied that Mr. Fletcher read the agreement with the defendant company, though I think it probable that Mr. Kunz gave him some indication of what its terms were, so far as remuneration was concerned. It is clear that Mr. Fletcher and Mr. Kunz proceeded to discuss the existing agreement with the plaintiff company. They were in complete agreement that the first clause (the so-called option clause) bound Mr. Kunz to the plaintiff company; indeed, Mr. Kunz was the first to point this out. Mr. Fletcher made a tempting offer to Mr. Kunz in terms which are set out in a letter signed by the managing director of the company. Mr. Fletcher, no doubt, showed some anxiety as to the position, and Mr. Kunz said: "What have you got to worry about? There is the option. I have signed a provisional agreement only. Let me have your terms back by six o'clock and I will sign them." So they parted, and later that evening Mr. Kunz signed an acceptance of the offer contained in the letter, which purported to be an exercise of the option contained in the current agreement.

On the same evening Mr. Warnford-Davis visited Mr. Kunz at the Casani Club. Mr. Kunz showed him the contract of March 15, 1934, with the plaintiff company and said: "They have informed me that I have an option." Mr. Warnford-Davis looked at the document, formed the impression that cl. 1 might be enforceable, and told Mr. Kunz that he thought it "might be an option." He asked Mr. Kunz to discuss the matter with his, Mr. Warnford-Davis's, brother, who is, it seems, a man of much business experience.

Later the defendant company were advised by their solicitor that, in so far as cl. 1 purported to grant an option, it was not legally enforceable, and the plaintiffs were informed of this by a letter dated Jan. 18, 1935. The plaintiffs, and at this time Mr. Kunz also, took a different view, and on Feb. 1 a formal agreement was entered into between the plaintiff company and the defendant Kunz. This agreement contained the terms which had already been agreed, and its first clause was in the same words as those of the first clause of the contract of March 15, 1934, except that the inapt word "hereinafter" was omitted. The new agreement was made operative from Feb. 1 at Mr. Kunz's request, in order that he might get the benefit of the improved terms as early as possible.

Later, Mr. Kunz who, I understand, took payment of the sum of £1,000 on Feb. 1 of this year, under his agreement with the defendant company, decided that he would not carry out his agreement with the plaintiffs and refused to be bound by it. The writ in the action was issued on Feb. 11. On Feb. 15 Hilbery, J., sitting in chambers, ordered a speedy trial of the action, any question of damages to stand over pending the decision as to liability. The action was tried before me on March 6, 7, and 8. The defendants contended that the option clause contained in the contracts of March 15, 1934, and of Feb. 1, 1935, was no more than a promissory expression leaving a discretion as to performance to the promisors, and was consequently unenforceable.

It was argued on behalf of the plaintiffs that the clause was effective to bind the defendant Kunz. Their counsel put his point in two ways. First, he said that, if such implied terms were read into the clause as were necessary in order to give it business efficacy, it could be read as importing a promise on the part of Mr. Kunz to give the plaintiffs the first refusal of his services, in the sense in which that expression was construed in *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (1). I find it impossible to read cl. 1 in this sense. If the parties intended to give each other the first refusal of a new contract, it would have been easy for them to say so, and I am not entitled to re-write the contract for them.

Secondly, counsel submitted that, whatever may have been the law before the decision of the House of Lords in *W. N. Hillas & Co., Ltd.* v. *Arcos, Ltd.* (2), it was now established that a promise might be enforced as a contract, although it left many important matters open for subsequent negotiation between the parties. It is, I think, plain that the decision in the case cited did nothing to shake the long-established view of the law on which the House of Lords had previously acted in *May and Butcher, Ltd.* v. *R.* (3) ([1934] 2 K.B. at p. 17). In his speech in *W. N. Hillas & Co.* v. *Arcos, Ltd.* (147 L.T. at p. 51), Lord Wright referred to *Loftus* v. *Roberts* (4) in the Court of Appeal,

> "where, the rule was summed up as being 'promissory expressions reserving an option as to performance do not create a contract.' [and he added,] no one would dispute such a rule, and its application to the instrument before the House in *May and Butcher, Ltd.* v. *R.* (3) has been finally determined in that case; but, in my judgment, the Court of Appeal were not justified in thinking that this House intended to lay down universal principles of construction or to negative the rule that it must be in each case a question of the true construction of the particular instrument."

A In the case then before the House of Lords it was held that there was a contract which contained all necessary stipulations. This does not mean that every detail of the contract was expressed, but that when such terms had to be implied in the agreement as to reasonable price, date, mode of delivery, and the like, as the law permitted, there was no essential stipulation left out. Similarly in the recent decision of the Court of Appeal in *Foley* v. *Classique Coaches, Ltd.* (5), it was held, as a matter of construction, B that an agreement to deliver petrol at a price to be agreed by the parties from time to time was enforceable because (i) there was to be implied in the contract a term that petrol should be delivered at a reasonable price, and (ii) there was an arbitration clause in the agreement which applied to any failure to agree as to price.

In the present case it is, in my view, impossible to read into cl. 1 of the agreement any implied terms which would make it effective as a contract. A term may be implied C that for the further period of twelve months the principal is to continue to record and procure to be rendered to the company services similar to those which are the subject-matter of the existing agreement, but beyond that everything is left to the imagination. In *Loftus* v. *Roberts* (4) which, as has been seen, was recently referred to by LORD WRIGHT in the House of Lords without any hint of disapproval, the Court of Appeal held that a promise to engage an actress to act a part in a play "in the event of the D piece coming to town, at a West End salary to be mutually agreed between us," was unenforceable. In that case, VAUGHAN WILLIAMS, L.J., said (18 T.L.R. at p. 534):

> "There were cross promissory words, but a clear option was given, on the one side to refuse to engage, and on the other side to refuse to play, unless what was proposed by one side as to the amount of salary was satisfactory to the other side."

E The only modification which need be introduced into this citation from the judgment of VAUGHAN WILLIAMS, L.J., in *Loftus* v. *Roberts* (4), in order to make it exactly applicable here, is the substitution for the words "as to the amount of salary," of the words "as to every essential term of the proposed contract except its duration."

I hold, therefore, that the so-called option clause has no binding effect. On this view, the conversation which took place between Mr. Kunz and Mr. Fletcher in December, F 1934, was nothing but a step in the negotiations, and in no way strengthens the plaintiffs' case. The consequences of this finding were much discussed at the Bar. Counsel for the defendant company says, with justice, that his clients have done no wrong. It is true that the defendant Kunz could not keep his contract with them without breaking his existing contract with the plaintiffs so far as concerned the period between March 1 and 15. But the defendant company had no knowledge of this fact and, as soon as G they discovered it, disclaimed any desire to demand any services from Mr. Kunz which he could not render without a breach of contract. Counsel asked me not to grant an injunction to restrain the defendant Kunz from keeping his contract with the defendant company, even if I came to the conclusion that the defendant Kunz ought to pay damages to the plaintiffs for his breach of his contract with them.

Counsel for the defendant Kunz submitted that the plaintiffs were not entitled to H recover damages against his client, first, because they had wrongfully induced him to break his contract with the defendant company and were in pari delicto with him; secondly, because both parties entered into the agreement of Feb. 1, 1935, in the mistaken belief that the option clause in the earlier contract was legally binding upon them, and this belief was, as he put it, "a condition of the contract." I do not propose to deal at any length with the question of law raised by the first of these submissions. Counsel I was unable to produce any authority for the proposition that a service agreement made between two parties, both of whom know that it cannot be performed without the breach by one of them of another pre-existing service agreement, and one of whom is inducing the other to break the pre-existing contract, is itself capable of being enforced. I do not say, however, that the contention can be lightly dismissed. It is an unlawful act or, in other words, a legal wrong, to break a contract, as it is to induce another person to break a contract without lawful excuse: see per LORD LINDLEY, *South Wales Miners Federation* v. *Glamorgan Coal Co.* (6) ([1905] A.C. at p. 253).

It seems to be consistent with principle that an agreement to do a legal wrong to a third party should be unenforceable by reason of its illegality. I find it unnecessary to come to a decision on this question because the evidence has not satisfied me that Mr. Fletcher knowingly and wilfully induced the defendant Kunz to break his contract with the defendant company. I was referred by counsel for Mr. Kunz to the statement of the law by Darling, J., in *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland, and Wales* (7) ([1902] 2 K.B. at p. 96). The learned judge, speaking of persons who had interfered with the contractual rights of another, said: "I think their sufficient justification for interference with plaintiff's right must be an equal or superior right in themselves, and that no one can legally excuse himself to a man, of whose contract he has procured the breach, on the ground that he acted on a wrong understanding of his own rights, or without malice, or bona fide, or in the best interests of himself, nor even that he acted as an altruist, seeking only the good of another and careless of his own advantage." I could not, with proper regard to that statement of the law, excuse Mr. Fletcher if he had induced the defendant Kunz to make a contract, merely because he acted honestly in the belief that the option clause was enforceable. But, upon the facts, as I have found them, I do not think that it can be said with justice that Mr. Fletcher knew that Mr. Kunz had entered into a binding contract with the defendant company. He did not know the terms of the document which he saw lying on the table. He was told that it was only provisional. I have no doubt that, if he had thought that the option clause in his company's contract was unenforceable, he would have inquired anxiously whether the provision to which it was subject was to the effect that the agreement was not to be enforced if Mr. Kunz turned out to be legally bound to the plaintiff company or was of wider scope. He did not make, and was not, in my opinion, under any legal or moral duty to make, that inquiry. I ought not to find that he committed an unlawful act unless I am satisfied by evidence that he did commit it, and there is no evidence to satisfy me that he knew that there was in existence an agreement which bound the defendant Kunz to the defendant company on the assumption that the option clause in the plaintiffs' contract was unenforceable. The exact language that the defendant Kunz used to him cannot be precisely ascertained, but I think it may well have been consistent with the view that Mr. Kunz had entered into no binding contract at all with the defendant company, but only into a bargain analogous to those pacts, familiar in another commercial sphere, which are expressed to be "subject to contract."

There is another possible view which cannot be omitted from consideration. In *Loftus* v. *Roberts* (4), already cited, there is a passage in the judgment of Vaughan Williams, L.J. (18 T.L.R. at p. 535), in these words:

> "In one sense it might be said that the arrangement between the parties was illusory. But, on the other hand, he had no doubt that persons in the position of the parties were glad to get a statement of an intention to engage on the one side and of willingness to play on the other. Persons connected with the theatrical profession were very sensitive in matters of honour of this kind, and they considered it of great advantage to have the benefit of any arrangement of this kind, though it did not amount to an enforceable contract."

Mr. Kunz said in his evidence, that he did not think of the option when he made the arrangement with the defendant company, and that, if he had thought of it, he would have looked upon it as dishonourable to enter into that arrangement. This piece of evidence indicates that the same high standard of honour which Vaughan Williams, L.J., attributed to the theatrical profession, prevails, as one would hope and expect, in that branch of the musical profession to which Mr. Kunz belongs. It may well be, therefore, that, even if he had applied his mind more clearly to the question than he did, Mr. Fletcher would have inferred from Mr. Kunz's statement that the arrangement with the defendant company was to be of no more effect, if it turned out that Mr. Kunz was bound in honour to the plaintiffs, than it would be if he were legally bound to them.

There is one other aspect of the case which should be mentioned. The plaintiffs cannot be in a worse position than they would have been if Mr. Fletcher had known the contents of the agreement with the defendant company and correctly construed his own company's agreements. In that case he would have seen that Mr. Kunz had entered into an agreement which he could not observe without a partial breach of his existing contract with the plaintiffs. I am disposed to think that Mr. Fletcher might then have said: "By entering into this agreement with the Crystallate company you have in part repudiated your obligation to my company. I do not accept that repudiation, but require you to perform your contract with my company. It follows that you cannot perform your contract with the Crystallate company, and you have, therefore, put yourself in such a position that you are liable to them in damages and cannot give them your services or demand employment from them unless you and they make fresh terms. In these circumstances, my company has, in the words of Darling, J., in *Read's Case* (7), 'an equal or superior right' to that of the Crystallate company." I do not decide the case on this ground, as it is enough to say that I am not satisfied that the plaintiffs knowingly interfered with the defendant company's contractual rights. I mention the point, because it is still open to counsel for the plaintiffs if the case should go further.

I can deal shortly with the second contention of counsel for the defendant, Kunz. I know of no authority for the proposition that if two parties enter into what is on the face of it a binding contract, in ignorance of their legal rights, each believing the other to be legally bound to enter into such a contract when he is not so bound, the contract so entered into is not enforceable. So to hold would be to decide that a common mistake of law vitiated a contract, and I believe that such a decision would be unsound in principle. Mr. Fletcher is innocent of any deceit. He did not induce the defendant Kunz to make an agreement with him by any misrepresentation, even an innocent misrepresentation, of law. On the contrary, Mr. Kunz needed no such inducement, because without it he put on the option clause the same construction which commended itself to Mr. Fletcher. In these circumstances, neither party, in my judgment, can successfully plead his ignorance of law as a ground of release from his contractual obligations. Counsel referred me to *Galloway* v. *Galloway* (8), but, in my judgment, the fundamental mistake which was there held to vitiate the agreement was one of fact, namely, the mistaken belief that a spouse was dead.

Upon these findings of fact and law which I have set out, I think that it is reasonably clear that I ought not to grant an injunction either in the form of the prayer (which would certainly be objectionable) or in the modified form which was suggested in the course of the argument. I feel some sympathy with both the companies concerned, and I do not think that the court ought to interfere in this dispute, except by saying that the defendant Kunz must pay such damages to the plaintiffs as will reasonably compensate them for his breach of the agreement dated Feb. 1, 1935, of course, on the footing that the option clause contained in it is not enforceable. There must be an inquiry as to the amount of damages. They will be assessed by an official referee. The plaintiffs are left with no cause of action or of complaint against the defendant company, and the claim against them must be dismissed.

Judgment for plaintiffs against first defendant.
Judgment for second defendants.

Solicitors: *B. Ashley Hill*; *Hutchison & Cuff*; *Allen & Overy.*

[*Reported by* T. R. F. Butler, Esq., *Barrister-at-Law.*]

THE TOWER BRIDGE

[Probate, Divorce and Admiralty Division (Sir Boyd Merriman, P., with Trinity Masters), November 26, 27, 1935]

[Reported [1936] P. 30; 105 L.J.P. 33; 154 L.T. 565; 52 T.L.R. 153; 18 Asp. M.L.C. 594]

Shipping—Salvage—Service—Matters to be considered—Moral support—Advice to save vessel from local danger—Merchant Shipping (Safety and Load Line Conventions) Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 9), *s.* 26.

Whilst bound for St. John, N.B., and steering a south-west course, the defendants' steamship, *Tower Bridge*, ran into an extensive icefield. To work her way out, she altered her course to south-east, but, having got deeper into the ice for some fifty or sixty miles, she found herself surrounded by pack ice, and so seriously damaged as to be thought in danger of sinking. An S O S message sent out was picked up by the plaintiffs' steamship, *Newfoundland*, then thirty miles away in clear water to the southward and eastward, there being no other vessel nearer than 200 miles. The *Newfoundland*, which was also making for St. John, had previously encountered the icefield, but had found her way out of it. On receiving the S O S message from the *Tower Bridge*, the *Newfoundland* turned back to go to her assistance, and remained in wireless communication with her until, having at considerable risk re-entered the icefield, she arrived at a position about seven miles from the *Tower Bridge* and within sighting distance of her. The *Tower Bridge* requested the *Newfoundland* to stand by and see her safely into St. John, but the master of the *Newfoundland*, having ascertained after a discussion by wireless with the *Tower Bridge*, that that vessel was now in a clear patch of water and that the situation was not as dangerous as had at first been feared, sent the following message to the *Tower Bridge*: "Recommend you steer due east to clear water about twelve miles which I am doing, and then south to about 46 N. 47 W." The *Tower Bridge* replied as follows: "Will carry out course you suggest." The *Tower Bridge* then altered course, and, following the course taken by the *Newfoundland*, got clear of the icefield. The plaintiffs' case in a salvage action brought by them was that the defendants had acted on their advice, and that thereby the *Tower Bridge* was able to and did reach clear water by travelling twelve miles only through the ice, whereas, had she continued on her course, she would have had to plough her way for fifty or sixty miles before emerging from the icefield. In performing the said service, the *Newfoundland* sustained damage which the plaintiffs alleged amounted to £4,000. The total value of the *Newfoundland*, including cargo, was, according to the plaintiffs' evidence, £225,566. The value of the *Tower Bridge* was agreed at £10,000.

Held: (i) that, in considering whether there was or was not a salvage service, the whole of the circumstances must be taken into consideration; each separate stage could not be isolated and regarded by itself; (ii) that, without quantifying the moral support afforded to the *Tower Bridge* by the knowledge that the *Newfoundland* was making her way towards her through the ice at a time when the *Tower Bridge* was in the gravest danger, the advice given by the *Newfoundland*, and acted upon by the *Tower Bridge* with the result that she reached clear water within twelve miles, was a very material service; (iii) that, considering all the circumstances, including the danger to the salvors, the great responsibility taken by the captain of the *Newfoundland* in going back into the icefield, and the serious damage which the *Newfoundland*, in fact, sustained thereby, the proper award was £2,000, of which £1,500 would go to the owners of the *Newfoundland* in view of the damage the ship had sustained, £200 to the master, and £300 to the crew.

Notes. As to salvage, see 30 Halsbury's Laws (2nd Edn.) 880 et seq., and for cases, see 41 Digest 823 et seq.

Action for salvage.

The plaintiffs, the Warren Line (Liverpool), Ltd., owners of the steamship *Newfoundland* (6,791 tons gross), her master and crew, claimed from the Tower Steamship Company, Ltd., owners of the steamship *Tower Bridge* (5,161 tons gross), her cargo and freight, remuneration for salvage services which the plaintiffs alleged they rendered to the defendants on April 9, 1935, in the North Atlantic. The defendants denied that any salvage services had been rendered by the *Newfoundland*, which, they said, had done no more than perform a statutory duty imposed upon vessels picking up an S O S message by the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, s. 26 (1); that the damage sustained by the *Newfoundland* was incurred while performing the said duty; that the only assistance requested by the *Tower Bridge* was that the *Newfoundland* should stand by, and that the *Newfoundland* had failed to render that assistance; that when the *Newfoundland* advised the *Tower Bridge* to alter course to the eastward to clear the icefield those on board the *Tower Bridge* were already aware that the course recommended by the *Newfoundland* was the best for them to pursue.

F. A. Sellers, K.C., and *E. W. Brightman* for the plaintiffs.
K. S. Carpmael, K.C., and *H. G. Willmer* for the defendants.

SIR BOYD MERRIMAN, P.—This is a salvage claim by the owners, master, and crew of the steamship *Newfoundland* against the owners of the steamship *Tower Bridge*. The services which it is alleged were rendered were given on April 9, 1935, in these circumstances. Both ships were westward bound in the North Atlantic and both were making for St. John, N.B. There was a very extensive icefield in the neighbourhood of the Labrador coast, and the *Tower Bridge* had got into this field, steering in a south-west direction, in the afternoon or evening of April 8. She had been on her course possibly, I think, for a great deal longer than otherwise would have been the case owing to the illness of her master. Be that as it may, she had gone deeper and deeper into this icefield, with the result that by the morning of April 9 she was surrounded by heavy pack ice and was in a very dangerous position. Her No. 1 hold was making water, which could not be kept down. She had a 10 degree list to port and, generally speaking, was in a very bad way.

It is not necessary to go into any detail about this condition. The condition in the early morning of April 9 is set out in a protest which her chief officer, acting as master, says correctly represents the situation. He said that at 6.45 a.m. water was entering No. 1 hold rapidly through a hole in the starboard side. "Commenced pumping ballast out of forepeak and No. 1 tanks." At 7.35 a.m. he gets the ship's position. "At 9.10 the ship listed 10 degrees to port, closely surrounded by pack ice and large growlers. Forehold rapidly filling. No. 2 bilges full. Sent S O S message, as vessel appeared to be in danger of sinking."

As it happened, the only ship at all near was the *Newfoundland*. No other vessel was within 200 miles or more, so that for all practical purposes she was the only vessel which could render assistance. The *Newfoundland* also had struck this icefield, and her captain, realising what the situation was, had contrived to get out of the icefield and was heading due south in clear water to the east of the field, and intended to continue on a southerly course until he was satisfied that he had got round the south-east corner of this icefield, where, of course, he would have turned west again and right for St. John.

In response to this S O S, and in acknowledgment of his duty under s. 26 (1) of the Merchant Shipping (Safety & Load Line Conventions) Act, 1932—which, after all, does not change the long-established practice of seamen in answering calls of urgency—he at once put his vessel into the icefield and, seeing that what he had received was an S O S and not a mere ordinary signal of distress, he regarded himself as under a duty to go as hard as he could put his ship through this icefield to the assistance of the *Tower Bridge*.

I am not going into the detail of wireless messages received and exchanged between these two ships, but it is impossible to ignore that the one vessel was eagerly expecting, and the other vessel was doing her very utmost to render, assistance which was most urgently required.

The *Newfoundland* was a valuable ship. Figures are given in the statement of claim that have not been challenged. She had recently undergone repairs and a thorough overhaul and, it is said, though it must not be taken that I assume these figures are absolutely correct, but it is sufficient to say that it is pleaded—that her own value was £115,000 odd and, taken with her freight, passage money, and so forth and the value of the cargo, £225,000 odd, so that it was a big thing for her master to decide to drive her as hard as he could, crushing her way through this icefield in the hope of being in time to save property certainly and, it might be, even life, because, to use his own phrase, he was not sure that the ship might not be down and they might not be on the ice themselves.

Counsel for the defendants says that all that must be disregarded, because it was his mere duty to do it under the statute. If all that he does is in response to the statute and nothing results—he never in fact renders any salvage service—I should agree with that argument, but I do not think that would be because he obeyed the statute, but because there was no salvage service rendered. The Act of 1932 provides, to quote the words of s. 26 (7):

> "Nothing in this section shall affect the provisions of s. 6 of the Maritime Conventions Act, 1911 [which impose upon the master or person in charge of the vessel the obligation 'so far as he can do so without serious danger to his own vessel or her cargo and passengers (if any) to render assistance to every person . . . he has found at sea in danger of being lost'], and compliance by the master of a ship with the provisions of this section shall not affect his right, or the right of any other person, to salvage."

But, as things turned out, the *Tower Bridge* was not in quite so desperate a situation as she had been, or as it was thought she was, and she gradually began to get things under control. When eventually somewhere between 12 and 1—perhaps nearer 1 o'clock than 12, though the exact time has never been precisely fixed—having worked towards her, edging here and there through the ice on a series of zig-zag courses, the *Newfoundland* came in sight, the *Tower Bridge* was found in comparatively clear water. At that time, again without reading the messages in detail, the request which was made to the *Newfoundland*, and the only request, was that she should stand by and see the *Tower Bridge* into St. John.

It is quite clear—counsel for the defendants does not dispute it—that if in response to that request the *Newfoundland* had stood by, a very definite and important salvage service would have been rendered, and it would have been impossible to dispute it. But the master of the *Newfoundland* took the view, after discussion over the wireless with the *Tower Bridge* and having seen her, that the situation was not such as to require him to stand by, and he made it plain that he was not prepared to stand by indefinitely. Therefore, that element, the element of standing by for two or three days, from that time, which would otherwise have been involved, disappears from the case, and counsel for the defendants says that that is the beginning and end of the matter—that that request having been made and not complied with (it was not insisted on), there could not be any salvage service at all and there is none.

That is the point which has given me the most trouble in this case. I do not take that view. I think there was a definite service here. I think that you have, in considering whether there was a service or not, to take the whole of the circumstances into consideration. I do not think that you can isolate each separate stage and say, "This must be regarded by itself, and that must be regarded by itself." One has to look at the thing as a whole and see whether there was a salvage service. Of course, it goes without saying that one has to be able to say that it was one particular thing, or that thing coupled with others, which was the service in question.

When these two ships were in contact, visible to each other—though, as a matter of fact, those on board the *Tower Bridge* never saw the *Newfoundland*, a discrepancy which is simply explained by the fact that the *Newfoundland* had a much more exact direction-finding equipment, and knew exactly where to look for the *Tower Bridge*—when the moment had come when it was decided that the *Newfoundland* was not going to stand by to see the *Tower Bridge* into St. John, these messages were exchanged from the *Newfoundland* to the *Tower Bridge*—two consecutive messages came at intervals of five minutes: "As you have ship well under control, I consider there is no necessity to stand by you. Suggest you ask patrol boat to accompany you. Reply immediately whether." Before the reply came the following further message was sent: "Recommend you steer due east to clear water, about twelve miles, which I am doing, and then south to about 46 N. 47 W." To which the answer was: "Will carry out course you suggest."

Observe that this gave perfectly definite information which was based on the experience of the *Newfoundland* herself. It gave the information that from the point where this ship was she could get into clear water in twelve miles by going in an easterly direction. That is what the *Newfoundland* was able to tell her, precisely because she had come through this twelve miles from the clear water to her assistance and had been engaged in going on a clear course south in the clear water at the time when she received the S O S.

The chief officer of the *Tower Bridge*, giving evidence before me, said: "Yes, I got that information and I acknowledged it in those terms, but that was out of the merest politeness. After all, that is exactly what I was going to do in any case. And I was merely thanking him for something which I knew already." I do not accept that. I am quite satisfied that that is not the case. Of these two ships, one (three or four hours before) had been in this clear water and had gone, as I have already said, through this twelve miles of ice to assist the other. The other had been blundering about in the ice for something like twenty-four hours, and I do not accept that he knew perfectly well which was the shortest way to clear water. On the contrary, his own log showed that he did not.

I am not going to examine in meticulous detail entries of courses—which are only at best occasional notings-down of a series of courses, when he himself admits he was zigzagging here and there—but this, I think, is indisputable, that having gone into this ice on a generally south-westerly course, and having become embedded in pack ice, he had then tried to work his way out by going on a south-easterly course, more or less. He had proceeded in that sort of direction for some fifty or sixty miles at the time when he sent this S O S, but he did not get out of the ice. He sends this S O S, and at that time he sends out to the world that he is trying to get free by going, not in an easterly, but in a southerly, direction. He advertises that he is proceeding on a course of south true. I come to the conclusion that, so far from knowing all about getting out of the ice to the east, he thought that, having been going southerly and easterly for some time and not getting out of the ice, he would be more likely to strike the southern edge of the ice than the eastern. He, therefore, tried to get out that way, and, speaking generally, that was the way he had been working all the morning until the *Newfoundland* actually came up to him. When he tells me that this was merely a polite acknowledgment of information with which he was perfectly acquainted, I see what happened after it and I find recorded in his log that in fact he turned through 60 degrees, and in fact, though not visually, followed the *Newfoundland* out of the icefield.

I am now going to read the last four messages which passed between these two ships. At 8.2 p.m. the master of the *Newfoundland* sent this message to the *Tower Bridge*: "We are now clear of the icefield and steering S. true 47.08 N. 46.30 W." The answer said: "Heading towards your position making slow progress. Propeller damaged. Vessel down by head. Bulkhead between forward holds bulging. Pumps keeping down water in hold. Hope to keep going." At 10.5 p.m. there was a further message from the *Newfoundland*: "Suggest you keep in constant touch with ice patrol, giving your movements. Apart from three icebergs, well out of our track, we have had clear water since our last message." At 10.44 p.m. the last reply of the *Tower Bridge* is sent: "Now clearing ice. Thanks for messages. Will inform patrol."

I think that that not merely justifies me in finding, but compels me, to find that, so far from this being a polite exchange of compliments, what was actually happening was that the *Tower Bridge* was following the *Newfoundland* out into clear water and did by that means reach it.

I am advised by those who are qualified to advise me in this matter that there is not the slightest doubt that a very material service was rendered to the *Tower Bridge* by the *Newfoundland*. It is not necessary to define the precise moment at which the service began, but I think the substance of the matter is—although I am not prepared to quantify the moral support afforded her—that the only available ship in the North Atlantic came at a time when the salved vessel thought she was in the very greatest possible danger, came ploughing her way through the ice to her assistance, and that must have afforded some help and encouragement to those on board a vessel which was believed to be sinking. The substance of the thing is that having got there, and having been asked to go there, I am satisfied that the *Newfoundland* did give most valuable assistance in showing the *Tower Bridge* how to get out of this icefield, because, in fact, if the *Tower Bridge* had been left to herself, and had gone on to the southward, as she was doing at the time when this S O S was sent, she had got something like fifty or sixty miles of icefield ahead of her instead of twelve miles to the eastward, and nobody can tell what might have been the result of her trying to blunder through that unaided.

I do not think it is in the least to the purpose to say that at the moment when she advised the *Tower Bridge* to go to the east, the *Newfoundland* herself did not know how many miles the ice extended to the south. I do not think that is the point. The point is that they knew there was a short way into the clear water by going to the east, and that having got clear of the ice to the east, they could get round it to the south, whereas in fact, as I say, if she had stayed on the general course which she was trying to make before this advice was given and before the *Newfoundland* came up, the *Tower Bridge* would have had to encounter some sixty miles of icefield before she got clear. That, in her then damaged condition, would have been a very dangerous state of things indeed.

In those circumstances I have to make up my mind what is the proper award to make. I have looked at p. 133 of Kennedy on the Law of Civil Salvage, where is set out the various heads of things to be taken into account in awarding salvage. As regards the ship salved, there is no doubt that there was considerable danger both to human life and property, and there is no doubt what the salved value is, because that is agreed at £10,000. As regards the salvors, I think that there was danger to them, too. I think the captain was asked to take a very great responsibility, and did take a very great responsibility, in going back into that icefield in the way in which he did. In fact they damaged their propeller very considerably, and if they had disabled themselves their situation would have been very difficult and awkward. They might have been holed just as the other ship was; they did undoubtedly take some actual risk.

I think that the conduct and skill of the master of the *Newfoundland* were most praiseworthy. I am not going to say whether he could have exonerated himself from obeying this signal, but he never hesitated for a second, and as counsel for the defendants has most justly said, he could not dispute for a moment that his conduct was entirely praiseworthy. He was employing a valuable ship. As I have said, he was exposing it to danger, and in fact the danger has resulted in a definite expenditure in replacing damage which may or may not amount to the £4,000 which is actually claimed. The only thing that can be said, it seems to me, and it is an important thing, is that the reward would obviously have had to be very much greater if they had expended the time and labour which would have been involved in standing by until the *Tower Bridge* actually got into St. John. That they did not do.

That being so, as I have said, that element of award comes out altogether. It might have amounted to another two or three days of time and labour expended. Taking one thing with another and giving the best and fairest estimate which I can make, I think that the award ought to be £2,000, of which £1,500 goes to the owners, and of the remaining £500, £200 to the master who incurred this considerable responsibility, and the remaining £300 between the officers and crew, according to their ratings. The salvors will be awarded £2,000 with costs.

Solicitors: *Middleton, Lewis & Clarke*, for *Middleton & Co.*, Sunderland; *Constant & Constant.*

[*Reported by* J. A. Petrie, Esq., *Barrister-at-Law.*]

NORTH AND SOUTH INSURANCE CORPORATION, LTD. *v.* NATIONAL PROVINCIAL BANK, LTD.

[King's Bench Division (Branson, J.), November 6, 1935]

[Reported [1936] 1 K.B. 328; 105 L.J.K.B. 163; 154 L.T. 255; 52 T.L.R. 71; 80 Sol. Jo. 111; 41 Com. Cas. 80]

Bill of Exchange—Requirements of form—Document in form of cheque—"Pay cash or order"—No endorsement on document—Payment by bank to bearer—Whether document a cheque—Right of bank to act on drawer's mandate—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *s.* 3 (1), (2), *s.* 7 (1), (3), *s.* 73.

A customer of a bank filled in an ordinary order cheque form by writing the word "cash" in the space intended for the name of the payee, so that it read "Pay cash or order." The document was never endorsed by anyone, but was paid by the bank to the person presenting it.

Held: (i) the document was not made payable to or to the order of a specified person, or to bearer; it was, therefore, not a bill of exchange as defined by s. 3 of the Bills of Exchange Act, 1882, and so was not a cheque as defined by s. 73 of the Act; *Grant* v. *Vaughan* (1) (1764), 3 Burr. 1516, and principle stated by Lord Halsbury in *Glynn* v. *Margetson & Co.* (2), [1893] A.C. 351, 357, applied. *Chamberlain* v. *Young* (3), [1893] 2 Q.B. 206, considered; (ii) the document, therefore, did not require endorsement; (iii) the document was a direction to pay cash; (iv) the words "or order" were meaningless and so must be neglected, and the document was, therefore, a good direction to the bank to pay the sum named therein to the bearer of the document; (v) even if the document was not such a direction, it was designed by its maker to procure the bank to pay the sum named therein to its bearer, and was so understood and acted upon by the bank, and in these circumstances the court would not allow the maker to complain of the bank's action.

Notes. The same form of words was considered, with the same result but in slightly different circumstances, in *Cole* v. *Milsome*, [1951] 1 All E.R. 311.

As to the definitions of bill of exchange and cheque, see 3 Halsbury's Laws (3rd Edn.) 144, para. 222. As to instruments in which no payee is named, see 3 Halsbury's Laws (3rd Edn.) 155, para. 245, and 2 Halsbury's Laws (3rd Edn.) 198, para. 368, text and notes (g) and (h); for cases on the subject, see 6 Digest 28, *173–175*. For the Bills of Exchange Act, 1882, ss. 3 (1), (2), 7 (1), (3), 73, see 2 Halsbury's Statutes (2nd Edn.) 508, 511, 544.

Cases referred to:

(1) *Grant* v. *Vaughan* (1764), 3 Burr. 1516; 1 Wm. Bl. 485; 96 E.R. 281; 6 Digest 32, *213*.

(2) *Glynn* v. *Margetson & Co.*, [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; 9 T.L.R. 437; 1 Asp. M.L.C. 366; 1 R. 193, H.L.; 17 Digest (Repl.) 357, *1632*.

(3) *Chamberlain* v. *Young*, [1893] 2 Q.B. 206; 63 L.J.Q.B. 28; 69 L.T. 332; 42 W.R. 72; 9 T.L.R. 527; 39 Sol. Jo. 580; 4 R. 497, C.A.; 6 Digest 33, *218*.

(4) *R.* v. *Randall* (1811), Russ. & Ry. 195; 6 Digest 33, *217*.

(5) *Robertson* v. *French* (1803), 4 East, 130; 102 E.R. 779; 17 Digest (Repl.) 43, *511*.

Action by the plaintiff customers who claimed £250, and interest thereon, which they alleged the defendant bank had wrongly debited to their account. On Nov. 29, 1933, the customers were desirous of making a payment of £250 to the L. and W. Debenture Corpn., Ltd., of which one Black, was a director. In order to do so they drew a cheque for that amount on their account with the bank and delivered it to Black. The cheque was an ordinary order cheque, and the customers filled in the space for the name of the payee with the word "cash," so that the cheque read "Pay cash or order." The cheque was not crossed and was never endorsed by anyone. Black paid the cheque into his own bank, which collected the amount thereof from the defendant bank and credited it to Black's account.

The customers subsequently went into liquidation, and the liquidator brought this action in their name, claiming repayment of the £250 and interest thereon. He contended that the document was a cheque drawn to order, and therefore required endorsement, and as it had never been endorsed there was no proper authority for its payment. The bank contended that the document was a bill of exchange payable to a non-existent or fictitious person, and therefore must be treated as payable to bearer, pursuant to s. 7 (3) of the Bills of Exchange Act, 1882. Alternatively, they said that if the document was not a bill of exchange it was an order given to a bank and acted on by them in accordance with the directions of their customer.

Section 7 (1) of the Bills of Exchange Act, 1882, provides:

> "Where a bill is not payable to bearer, the payee must be named or otherwise indicated with reasonable certainty . . . (3) Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer."

F. J. Tucker, K.C., and *James Wylie* for the customers.
Schiller, K.C., and *P. B. Morle* for the bank.

BRANSON, J.—In this case the plaintiff customers, the North and South Insurance Corpn., Ltd. (in Liquidation), sue the National Provincial Bank, Ltd., and the relief which they ask is a declaration that the bank are bound to repay to them or to credit in account with them a sum of £250 wrongfully debited against them and any interest charged or debited in respect thereof by the bank—in the following circumstances.

The customers were an insurance company, and in 1933 they had fallen upon evil days, and in order to try to get some further capital they had entered into an agreement on Nov. 16 of that year with a company called the L. and W. Debenture Corpn., Ltd., under which on certain conditions the L. and W. Debenture Corpn., Ltd., were to find further capital and to receive certain remuneration for doing so. Part of the terms of that arrangement was that certain persons who were directors of the L. and W. Debenture Corpn. should be put upon the board of the North and South Insurance Corpn., the customer.

Before anything substantial could be done by way of finding capital for the customer, the Board of Trade, on Nov. 22, presented a petition for the compulsory liquidation of the customer company.

In those circumstances, on Nov. 29 the directors of the customer company were minded to pay to the L. and W. Debenture Corpn. a sum of £250, and in order to procure such a payment out of the funds at their credit with the bank, they brought into existence a document. I use a neutral term. The document is partly printed and partly in writing, and when one looks at it one sees quite plainly that the printed form is a form suitable for being filled in to make a cheque payable to order. It contained the blanks which one would naturally expect to be filled in with the name of the payee, and then appear the words "or order," which I will refer to in detail in a moment.

That document was handed to Mr. Black, who was the chairman of both the customer company and the L. and W. Debenture Corpn., and Mr. Black paid it into his own account with Lloyds Bank, and Lloyds Bank presented it to the defendant bank in the ordinary way of bank accounting. The result of the transaction was that the money passed from the account of the customer in the bank through the hands of Mr. Black to the L. and W. Debenture Corpn.

On Dec. 18, 1933, a compulsory winding-up order was made upon the customer, and a liquidator was appointed who, acting under s. 173 of the Companies Act, attempted in the first place to recover the sum of £250 from the L. and W. Debenture Corpn. But, by that time, the L. and W. Debenture Corpn. had itself gone into liquidation, and the liquidator ascertained that any attempt to recover the money from that company would probably be fruitless, and he is now seeking to recover it from the bank.

The ground upon which the case for the customer is put, is that the document in question was a cheque drawn to order and, therefore, required endorsing. It was not endorsed, and upon that ground it is said that there was no proper mandate given to the bank entitling them to pay out the £250 in the way in which they paid it.

The defence is put upon two grounds. It is said first of all, if this document is a cheque at all, it is, upon the true construction of it, a bill of exchange payable to a fictitious or non-existent person, or if it is not that, then it is not a cheque at all, but merely an order directed to the bank which the bank understood and acted upon, and the bank having understood it in the sense in which it was intended by the customer acting through its properly constituted officials that they should deal with it, the customer had no claim to the reimbursement of the money which the bank paid out in pursuance of that mandate. So that the first question with which I have to deal is the question whether this document was a cheque and, if it was a cheque, was it a cheque drawn to a fictitious or non-existent person so as not to require endorsement and so as to enable it to be treated as a cheque to bearer.

Now, in my view, the document cannot properly be called a cheque at all. It is true it appears upon a form intended to be filled up so as to be a cheque, but it was not so filled up.

My reasons for saying that it is not a cheque are the following. Under s. 73 of the Bills of Exchange Act, 1882, a cheque is defined as "a bill of exchange drawn on a banker payable on demand." Therefore the first essential is that it should be a bill of exchange. Now, a bill of exchange is defined by s. 3 of the Bills of Exchange Act. The section is very familiar, but perhaps I had better read it in so far as it is material to the present case. It says:

> "(1) A bill of exchange is an unconditional order in writing, addressed by one person to another, requiring the person to whom it is addressed to pay a sum certain in money to or to the order of a specified person, or to bearer. (2) An instrument which does not comply with these conditions is not a bill of exchange."

The words "or to the order of a specified person" mean that in order to constitute a document a bill of exchange it must contain in it an order directing the person upon whom it is drawn to pay to a specified person. The present document in the material part reads, "Pay Cash or Order £250." "Cash" cannot be and never can be in this view of the case described as a "specified person." If authority is wanted for that, it is to be found in the old case of *Grant* v. *Vaughan* (1), where a draft on a banker was worded "Pay to ship *Fortune*, or bearer," and Lord Mansfield said (3 Burr. at p. 1524): "There is no person originally named as a payee," and Wilmot, J., said (ibid., at p. 1528): "No person at all is named; it is 'Pay to ship *Fortune* or bearer.'" However, the point which I have to deal with does not arise in that case, because the words "or bearer" are there and not the words "or order."

Counsel for the customers contends, however, that, whilst that is no doubt the case, I ought to construe the language used in this document as meaning "Pay Cash to my order," or "to me or my order," and as affording some assistance towards arriving at that conclusion he referred to *Chamberlain* v. *Young* (3). In my view *Chamberlain* v. *Young* (3) does not assist the customers. There the bill was drawn payable to blank order, without the word "or." In answer to an argument put forward that that was not a bill of exchange, it was pointed out by the Court of Appeal that the word "or" did not appear in the document under consideration, and Lord Esher said that the bill is a perfect bill in every respect, because it says "Pay to order," not "Pay to or order." In other words, it says "Pay to order," and by the most common rule of construction that must mean Pay to my order. Here I have got the word "or," "the absence of which enabled the Court of Appeal in *Chamberlain* v. *Young* (3) to decide that the document which they were considering was a bill of exchange. Certain remarks were made by Lord Esher in that case ([1893] 2 Q.B. at p. 209), as to what view he might have taken had the word "or" appeared in the document. However, as it was not necessary in that case to express any judicial opinion upon the point, His Lordship said: "We think it wiser not to determine the point judicially." So that, except in so far as it appears that the presence of the word "or" might have made all the difference to the position in that case had it appeared, the case does not assist me in the construction of the document before me, because, had the document been "Pay blank or order" different considerations might have arisen. I should then have had to decide whether the old case of *R.* v. *Randall* (4) still expressed the law, or whether the suggestion made by LORD ESHER in *Chamberlain* v. *Young* (3), that the mere absence of the name of a payee did not prevent the document being a bill of exchange when in all other respects it appeared to have been intended to be used as a bill of exchange.

As matters stand, I think I have got to approach the construction in this way. I have already referred to *Grant* v. *Vaughan* (1). The first thing that one has to do in the construction of a document is to look at the language of it. It may sound a truism, but there is no doubt that that is the way to approach the matter. What is meant by the words "Pay cash or order?" I have already said that "cash" cannot be treated as a payee at all, and that may deal, in a way, with the point suggested that this is a cheque drawn to a fictitious or non-existent person. I do not think that it is drawn to any person at all and, therefore, as it is not payable to bearer, and s. 1 (1) says that the payee must be named or otherwise indicated with reasonable certainty, I think it fails in what is an essential part of a bill of exchange. To come within the meaning of s. 7 (3), I think you must have a payee, and this cheque has got no payee. I find it difficult to say that the payee is in blank, so that one could read it "Pay blank or order," and fill in the blank, as counsel for the customers would have me do, by putting in the word "me" instead of "cash." I am driven back to the position that I have got to look at the words of the document, and put upon them such construction as appears to have been intended by the parties in this case who brought it into being. I think there is authority for putting a construction upon it according to principles which have been applied many times, and for many years, to cases where you have written words inserted in printed forms. There is the classic passage contained in the judgment of LORD HALSBURY in *Glynn* v. *Margetson & Co.* (2) which seems to me to apply with the greatest force to the problem before me. His Lordship says ([1893] A.C. at p. 357):

> "Looking at the whole of the instrument, and seeing what one must regard, for a reason which I will give in a moment, as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract."

Then he quotes from LORD ELLENBOROUGH's judgment in *Robertson* v. *French* (5), and points out that if you have written words and printed words which are mutually inconsistent you must reject the print in favour of the writing.

With that in mind I again turn to the document in question. It says: "Pay cash or order." Now, it cannot have been intended, if anybody had given it a moment's thought, that "cash," which is a purely impersonal collection of letters, should endorse this draft. That being so, I think that you cannot read those four words "Pay cash or order," so as to give any sensible meaning to the whole four, and the result of it is that you have got a direction to pay cash.

Now, I have heard in the course of the evidence, and it is in accordance with one's own general knowledge of these matters, that the word "cash," which appears in this document may often appear in other documents of this kind as "wages," or "office," or some other impersonal thing, and I, therefore, do not read the word "cash" in this document as directing the medium in which the payment is to be made, but I do read it as an order to pay some impersonal account which cannot endorse the cheque.

Now, that being so, I think that I must neglect the words "or order" and hold that this is a perfectly good direction to the bank to pay £250. Now, to whom? Surely to the bearer of the document. If it had been intended that a specified person should be the recipient of the money, that should have been put upon it; but according to both sides no person has been specified, and I think, for the same reasons, that the statute has enacted that where a payee is fictitious or non-existent, the bill of exchange may be treated as payable to bearer, and here, where there is simply an order in a bill of exchange to pay a sum of money, it follows by necessary implication that the payment must be made, and is intended to be made, to the person presenting the document.

If that is correct, then this action fails; but even if it is not correct, and even if it would be right to say that this document does not contain a sufficiently clear mandate to justify its being acted upon in that way, I then find the following position. This document came into being because the customer, acting through its properly constituted officials, desired to procure that the bank should pay to the person presenting this document the sum named therein. The bank have understood it as it was intended to be understood, and have paid the money in accordance with the direction that the customer intended to give and, that being so, it seems to me that it would be a blot upon our legal system if the court had to hold that, notwithstanding that the order was interpreted in the sense in which it was intended to be acted upon, the giver of that order could now turn round and say: "You have not properly fulfilled my mandate, and, therefore, pay me back the money which in pursuance of my direction you have paid away."

For those reasons I think that this action fails.

Judgment for the bank.

Solicitors: *Hill, Dickinson, & Co.*; *Wilde, Sapte, & Co.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

JUTSON *v.* BARROW

[KING'S BENCH DIVISION (Lord Hewart, C.J., Humphreys and Singleton, JJ.), October 24, 25, 1935]

[Reported [1936] 1 K.B. 236; 105 L.J.K.B. 106; 154 L.T. 185; 100 J.P. 4; 52 T.L.R. 49; 79 Sol. Jo. 965; 33 L.G.R. 503; 30 Cox, C.C. 305]

Medical Practitioner—Unregistered person—Description of "*manipulative surgeon*"—*Medical Act*, 1858 (21 *&* 22 *Vict. c.* 90), *s.* 40.

By the Medical Act, 1858, s. 40: "Any person who shall wilfully and falsely pretend to be or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary, or any name, title, addition or description implying that he is registered under this Act or that he is recognised by law as a physician, or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence, pay a sum not exceeding £20."

A person who uses the title of "manipulative surgeon" when he does not hold any medical degree, and is not registered or qualified as a medical practitioner under the Act, is guilty of an offence under the above section even if he does not thereby intend to deceive.

Per LORD HEWART, C.J.—No adjective added to the title "surgeon" can excuse the use of the word "surgeon" by a person who is not registered or recognised as a surgeon under the Act, unless he is expressly protected by statute.

Whitwell v. *Shakesby* (1) (1932), 147 L.T. 157, followed.

Notes. The decision in this case, and the dicta as to mens rea and as to the meaning of the words "wilfully and falsely," must now be read in the light of *Younghusband* v. *Luftig*, [1949] 2 All E.R. 72 (in which all the authorities on this point were considered) as explained in *Wilson* v. *Inyang*, [1951] 2 All E.R. 237. The law appears to be that a person is not guilty of an offence under s. 40, because he does not act 'wilfully and falsely,' if he has an honest, even though unreasonable, belief that he is entitled to use the prohibited title or description. Whether the accused has such a belief is a question of fact to be determined by the magistrates' court. In *Jutson* v. *Barrow* there was no express finding by the justices that the accused had such a belief.

A Distinguished: *Younghusband* v. *Luftig*, [1949] 2 All E.R. 72.

As to the unlawful use of medical names and titles, see 22 HALSBURY'S LAWS (2nd Edn.) 314–315, para. 593, and for cases on the subject, see 34 DIGEST 554–555, *112–132*. For the Medical Act, 1858, s. 40, see 15 HALSBURY'S STATUTES (2nd Edn.) 87.

Cases referred to:

B (1) *Whitwell* v. *Shakesby* (1932), 147 L.T. 157; 96 J.P. 307; 48 T.L.R. 489; 76 Sol. Jo. 360; 30 L.G.R. 327; 29 Cox, C.C. 487; Digest Supp.

(2) *Ladd* v. *Gould* (1860), 1 L.T. 325; 24 J.P. 357; 34 Digest 555, *130*.

(3) *Ellis* v. *Kelly* (1860), 6 H. & N. 222; 30 L.J.M.C. 35; 3 L.T. 331; 25 J.P. 279; 6 Jur. N.S. 1119; 9 W.R. 56; 158 E.R. 92; 34 Digest 554, *113*.

(4) *Andrews* v. *Styrap* (1872), 26 L.T. 704; 34 Digest 546, *43*.

C **Case Stated** by Devonshire justices.

Three informations were preferred by the appellant, William Ewart Jutson, under s. 40 of the Medical Act, 1858, against the respondent, Captain Horace Barrow. The informations alleged that the respondent unlawfully, wilfully and falsely used the title of "surgeon," contrary to the above section; that he wilfully and falsely used the title of "surgeon" implying that he was recognised by law as a surgeon; and that he unlaw-
D fully and falsely used a title implying that he was registered under the above Act.

On the hearing of the informations before Devonshire justices the following facts were proved or admitted:

On Aug. 30, 1934, and for some time before, the respondent had been the occupier of Denby House, Belle Vue Road, Paignton. Outside the premises was a plate bearing the words "Captain H. Barrow, M.M., Manipulative Surgeon." The plate was affixed
E on the instructions of the respondent at some time before Aug. 30, 1934, and was still displayed on that date.

The respondent allowed himself to be described in the telephone directory as "manipulative surgeon." Affixed to his motor car there was a plate similar to the one displayed outside his premises.

The respondent was not registered under the Medical Act, 1858. His name had never
F appeared in the medical register, nor was he a legally qualified medical practitioner within the meaning of the Act. He did not hold and had never held any medical degree.

On Dec. 22, 1933, a letter was written to the respondent by the general secretary of the Medical Defence Union pointing out that, in the opinion of the council of the union, the use by the respondent of the title "surgeon" was an infringement of the Act, and
G asking for an assurance that he would discontinue such use. The respondent replied by letter on Dec. 28, 1933, saying that he was not using the title "surgeon," and added: "Prove that I am not a manipulative surgeon and I will remove the title 'manipulative surgeon' from my plate." On Dec. 29, 1933, the secretary replied, saying that the council had no alternative but to place the matter in the hands of their solicitors.

The respondent, by manual operation, treated fractures, deformations, injuries and
H disorders of the bones and joints. For the past fifteen years he had used the word "surgeon," always preceded by the word "manipulative," as describing his occupation. He had used those words in Sheffield, Cardiff and later in Paignton and in other places in the counties of Devon and Cornwall which he regularly visited.

On the part of the appellant it was contended (a) that the Act contained an absolute prohibition against the use of the title "surgeon" by an unregistered person; (b) that
I the use of the word "manipulative" could not justify or legalise the use by the respondent of the word "surgeon"; and (c) that the authority of *Whitwell* v. *Shakesby* (1) was conclusive against the respondent.

On the part of the respondent it was contended that the words "manipulative surgeon" had been for upwards of twenty years publicly and generally used to mean, and were generally understood to mean, a person not registered under the Medical Act, 1858, and not recognised by law as a surgeon; that the word "surgeon," being used in conjunction with the word "manipulative," qualified and defined the word "manipulative"; that the respondent did not use the word "surgeon" by itself, and that the use of the word "surgeon" coupled with the word "manipulative" was neither an A unlawful or false use of the word nor the unlawful or false use of a name, title or addition within the meaning of the Act; that the use of the title "manipulative surgeon" did not imply that the respondent was registered under the Medical Act, 1858; and that *Whitwell* v. *Shakesby* (1) was clearly distinguishable on the facts.

The justices held that the respondent used the title wilfully within the meaning of the Act, but that such use was not unlawful in that it was used in order to describe the work B or craft which he practised. They accordingly dismissed all three informations and allowed the respondent fifty guineas costs.

The appellant Jutson appealed.

The Medical Act, 1858, s. 40, provides:

> "Any person who shall wilfully and falsely pretend to be or take or use the name C or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary, or any name, title, addition, or description implying that he is registered under this Act, or that he is recognised by law as a physician, or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence, pay a sum not exceeding £20."

D

R. P. Croom-Johnson, K.C., and *G. D. Roberts* for the appellant.

Norman Birkett, K.C., and *J. D. Casswell* for the respondent.

LORD HEWART, C.J.—This is a case stated by seven justices of the county of Devon, sitting at Paignton. It arises out of the hearing of three informations preferred against the present respondent under s. 40 of the Medical Act, 1858. The first of those E informations alleged that on a day in August, 1934, the respondent did unlawfully, wilfully, and falsely use the title "surgeon," contrary to s. 40 of that statute. The justices, having heard the case, dismissed all the informations and awarded fifty guineas costs to the respondent.

The facts of the case are simple enough. It was proved or admitted, inter alia, that on the day referred to and for some time before, the respondent, being the occupier of a certain house in Paignton, kept outside his premises a plate bearing the name F "Capt. H. Barrow, M.M., Manipulative Surgeon." That plate was affixed upon the instructions of the respondent himself. He allowed himself to be described in the telephone directory as "manipulative surgeon" and upon his motor car he carried a plate similar to the plate displayed outside his premises. He was not registered under the Medical Act, 1858, his name had never appeared in the Medical Register, nor was he a legally qualified medical practitioner within the meaning of that Act. He does not G hold nor has he ever held any medical degree. More than that, it was proved that in December, 1933, a letter had been written to the respondent by the general secretary of the Medical Defence Union, stating that in the view of the council of the union his use of the title "surgeon" amounted to an infringement of the Act. The latter requested an assurance that the respondent would discontinue the use of that title. The respondent, however, replied that he was not using the title of "surgeon" and he added these H words: "prove that I am not a manipulative surgeon and I will remove the title 'manipulative surgeon' from my plate." Proceedings followed. The case further finds that the respondent by manual operation treated fractures, deformations, injuries and disorders of the bones and joints, and that for a period of fifteen years he had been using the word "surgeon" preceded by the epithet "manipulative" as describing his occupation. He had used those words in many places and in different counties. I

It was contended on behalf of the respondent that, as he alleged, and the allegation depended upon his sole testimony, the words "manipulative surgeon" and "manipulative surgery" had been for upwards of twenty years publicly and generally used to mean and were generally understood to mean a person not registered under the Medical Act, 1858, and not recognised by law as a surgeon who carries on the occupation in which he was engaged. He contended that those words had been publicly and generally used by members of the medical profession and others to distinguish unqualified persons and their occupation from qualified and registered surgeons and their profession. He even went so far as to contend that the word "surgeon" being used in conjunction with the word "manipulative" qualified and defined the word "manipulative" or, in other words, that the substantive qualified the adjective, and he further contended that the statute contained a prohibition against the wilful and false use of the word "surgeon" by itself or the wilful and false use of any name, title or description implying that a person is registered under the Act, or that he is recognised by law as a surgeon, or licentiate in surgery. Indeed, it is apparent that, having persuaded himself, it is to be supposed, of the truth of his contention, he said that he used these words "manipulative surgeon" for the very purpose of directing attention to the fact that he was not a surgeon within the meaning of the statute.

It was contended on the part of the appellant that the statute contained an absolute prohibition against the use of the title "surgeon" by an unregistered person and that the use of the word "manipulative" could not justify or legalise the use by the respondent of the word "surgeon."

The case has not been stated in a very satisfactory form and there is annexed to it a transcript of the notes of evidence. It is interesting to observe that, according to those notes, the respondent said on oath that he used the phrase "manipulative surgeon" to distinguish himself from the registered practitioner. He even went so far as to say that if any other name would properly describe his work he would gladly adopt that name. It is quite obvious that there are other names which would fulfil that purpose, as, for example—as his learned counsel seemed to admit in argument—the words "manipulative healer."

One would think that, in the absence of authority, the words of s. 40 of the Medical Act, 1858, are reasonably plain. [His Lordship read the section, and continued:] It is natural to ask immediately why that section is framed in that twofold form. It would have been quite simple to enact that any person who wilfully and falsely used any name implying that he was registered, &c., when he was not should be liable to a penalty. The legislature has not taken that course. It has set out in the first part of the section certain well-known expressions or descriptions "physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary"—and it is not denied that, if for the moment the word "surgeon" is subtracted from that enumeration, every one of the other expressions there set out has this feature in common with the rest, that it is a well-known professional description. Why is not that remark equally true of the word "surgeon"? All these specific titles or names are enumerated in one phrase and treated as being on the same plane. Those specific and well-known descriptions having been enumerated and protected, the section goes on by way of addition to prohibit the false user of any name, title, addition, or description implying that a person is registered under this Act, or is recognised by law, &c. In other words, the section, having prohibited the improper use of any of the well-known names or titles of qualified practitioners, goes on to sweep into the net of what is forbidden any name which has the effect of implying that the unregistered person is a registered practitioner. And it is quite obvious that these words beginning with "implying that he is registered," &c., are words not purporting to describe the intent of the individual, but are words describing the effect of the name, title, addition, or description. If that name, title, addition, or description carries with it the implication referred to in the section, it matters not what the intention of the person using it may be. The section is for the protection of the public, and what is regarded is not the mind of the individual but the meaning likely to be conveyed by the words which are used. With regard to the first set of words—the descriptions which are specifically enumerated—it seems to me that the section regards the matter as being beyond doubt.

Our attention was directed in the course of the argument to cases, not very satisfactory either in argument or in report, which have approached the present question. There was, for example, *Ladd* v. *Gould* (2), in which the justices came to a certain conclusion of fact. The case related to a dentist, and the justices were of opinion that his use of the word "surgeon" was merely for the purpose of showing what kind of dental business he carried on and that he was not intending to represent himself as a surgeon within the meaning of the Act. All that the court decided, I think, was that there was evidence from which they might come to that conclusion, though they might have come to the opposite conclusion. That case seems to me to be no authority for anything beyond what it states.

There was a later case, *Ellis* v. *Kelly* (3), where a man who had, or thought he had, a diploma from a Bavarian University called himself simply "Dr. Kelly." What was charged against him was not that he had wilfully and falsely assumed the name of "doctor," but that he wilfully and falsely pretended to be a doctor of medicine, the information being based on other words in s. 40. On the particular facts of that case it was held that there was no evidence that he had wilfully and falsely pretended to be a doctor because, as was said by CHANNELL, B., he had not wilfully and falsely used the title of "doctor"; or, as WILDE, B., said (6 H. & N. at p. 227):

> "The defendant had a German diploma, which he might reasonably believe entitled him to describe himself as he did."

BRAMWELL, B., said (6 H. & N. at p. 226):

> "The fortieth section is intended to guard the public against being imposed upon by a person pretending to have a qualification when in fact he has none. It applies to the case of a person using a title falsely implying that he is registered or has a title to be registered. The object is to prevent people from assuming titles in respect of a qualification when they have none. . . . Did the respondent wilfully and falsely, in other words criminally, pretend to be, or use the title of a physician? There is nothing more than this, that having a foreign diploma he chose to put the word 'Dr.' before his name."

He added that the justices:

> "seem to have held that the respondent might well call himself 'Dr. Kelly,' on the supposition that he had a right to do so."

It may well be that words of that kind are relevant and appropriate where the particular offence which is charged is the offence of wilfully and falsely pretending. However, it may be observed that even so, on further reflection, BRAMWELL, B., was a little doubtful of the words which he had employed in *Ellis* v. *Kelly* (3). It appears that twelve years later, in *Andrews* v. *Styrap* (4), BRAMWELL, B., who was a member of the court with MARTIN and PIGOT, BB., observed in the course of the argument (26 L.T. at p. 706)—reference having been made to his observation in *Ellis* v. *Kelly* (3):

> "The matter does not appear to me now as it appears to have appeared to me then."

In other words, he was not quite certain whether he had been accurately reported. But, however that may be, it seems to me when one looks carefully at all these cases that there is no clear judicial authority on the true interpretation of this twofold section.

In my opinion, the effect of this section is to prohibit the use of any of the specifically named and well-known descriptions except in cases where they are lawfully employed. If one of those well-known professional descriptions is employed, I think a defendant cannot be heard to say, borrowing the latter words of the section which are applicable to names and descriptions of a different character, that the name which he employed did not imply that he was registered or recognised* in the sense described by the statute. If he is not a surgeon, he must not call himself a surgeon, and it seems to me to be quite idle to say that in this context the word "surgeon" is used to qualify or modify the word "manipulative." It is perfectly clear as a matter of grammar that the word "manipulative" is the adjective and the word "surgeon" the substantive, and what this respondent is asserting is: "I am a surgeon, and if you ask me what kind of surgeon I am, I am a manipulative surgeon." It is a curious epithet to apply to the word "surgeon." By its very name the profession of surgeon implies a person who does that which he does by means of his hands, and to say that he is a manipulative surgeon is, as it were, to say he is a surgical surgeon.

Various suggestions were made in the course of counsel for the respondent's ingenious argument by way of a reductio ad absurdum. He asked, for example, would it be unlawful for a man to describe himself as a quack surgeon? Of course, no man would do so, because the term would be contradictory within itself. It would be equivalent to saying: "I call myself a surgeon, but I am not." But when reference is made to expressions like "dental surgeon" and "veterinary surgeon" very different considerations apply. Dentists and veterinary surgeons are both expressly protected by statute. Let me refer to an Act of Parliament, which was not mentioned in the course of the argument, but which seems to me to dispose of all that type of argument and suggestion on which so much of the respondent's case seemed to rest. By the Veterinary Surgeons Act, 1881, s. 17, it was provided that if after a named day

---

* His lordship may well have meant to say "qualified," not "recognised": *Younghusband* v. *Luftig*, [1949] 2 All E.R. 72, 77, per curiam.

> "any person, other than a person who for the time being is on the register of veterinary surgeons, or who at the time of the passing of this Act held the veterinary certificate of the Highland and Agricultural Society of Scotland, takes or uses the title of veterinary surgeon or veterinary practitioner, or any name, title, addition, or description stating that he is a veterinary surgeon or a practitioner of veterinary surgery or of any branch thereof, or is specially qualified to practise the same, he shall be liable to a fine not exceeding twenty pounds."

It is obvious that that section is deliberately framed on the scheme and system of s. 40 of the Medical Act, 1858. The use of the specific name in an improper case is forbidden. Apart from the specific name, the use of any other name, title, addition, or description having the same purport and effect is also forbidden. To suggest that the term "manipulative surgeon" does not come within the mischief of s. 40 of the Act of 1858 because a man may lawfully call himself a "dental surgeon" or a "veterinary surgeon" is obviously nothing to the point when one remembers that those persons are expressly protected in each case by a statute.

I am not inquiring into the frame of mind of the respondent. I take it that he is sincere. If, however, he desires to represent to the public that he is not a qualified surgeon, it is a very unfortunate thing that he should choose the description "surgeon," preceded though it be by the epithet "manipulative." If he would gladly achieve the same end—namely, that of telling the public that he is not a qualified surgeon—and have a title not likely to produce that prohibited effect, there are many descriptions open to him. Apparently he does not like the name "bone setter." Counsel seemed to be a little reconciled to the description "manipulative healer." But what does all that class of consideration involve except this, that the use of the word "surgeon" is, and is thought to be, desirable because of the well-known and particular connotation and association of the word? The thing which makes the name "surgeon" appear to be attractive and useful is precisely the thing which this section was enacted to prevent. If the respondent is, as we must take him to be, sincere, there are many ways open to him of telling the public that he is not a surgeon other than the way of telling the public that he is a surgeon.

It seems to me that this case is really beyond argument. The respondent has chosen to use the word "surgeon," the meaning of which is, and is intended to be, clear to the man in the street, and it matters not that he has chosen to attach to it the tautologous epithet "manipulative."

I have thought from an early stage in the discussion in the present case that it was concluded by the judgment of this court in *Whitwell* v. *Shakesby* (1), but I should like to add one word with reference to a passage in my own judgment in that case. No support is given by the judgment in *Whitwell* v. *Shakesby* (1) to the ill-reported and, it would seem, inadequately argued case of *Ladd* v. *Gould* (2). What I was doing in my reference to *Ladd* v. *Gould* (2) in *Whitwell* v. *Shakesby* (1) was to differentiate *Ladd* v. *Gould* (2) from the case then under consideration, and the differentiation was that in *Ladd* v. *Gould* (2) there was a finding of fact. I said nothing of the merits of that fact or that finding. All I said was (147 L.T. at p. 158):

> "There is no such finding as that in this case."

I would add this, that, speaking for myself, I cannot imagine any adjective which, being added to the title "surgeon," would excuse the use of the word "surgeon" by a person not registered or recognised as a surgeon under the Act of 1858, unless, as for example in the case of a veterinary surgeon, he is expressly protected by statute. In the present case the only fact which needed to be found was whether this man called himself a surgeon. The answer to that question was obvious.

On the first of these informations, therefore, it is clear to me that the justices had in law no alternative except to convict. I think the same consideration applies to the second information. With regard to the third, if my copy of this case is correct, the information did not use the word "wilfully." On the substance of the matter it is perfectly plain to me that this appeal must be allowed and the case must go back to the justices with a direction to find that the offence which was charged was proved.

HUMPHREYS, J.—I agree with the judgment which has just been delivered by my Lord for the reasons stated in that judgment, but, in view of the interesting and forcible argument addressed to us by counsel for the respondent, and since we are differing from the justices who acquitted the respondent, I will add a few words of my own.

I understand that the three informations in this case were intended to be alternative charges, and I do not think that the respondent could be mulcted in more than one penalty in respect of one act. Therefore, in my view, it is sufficient to deal with one, and it will be convenient to deal with the first of the informations which, following the words of the Act, charged the respondent with the offence of unlawfully, wilfully and falsely using the title of surgeon, contrary to the section.

Counsel for the respondent's argument, as I understood it, was to this effect. He said that the medical profession have no monopoly of the word "surgeon," and that the use by an unregistered and unqualified person of the title "surgeon" is prohibited by s. 40 of the Act of 1858 only if the use of that title implies that he is registered under the Act or recognised by law as a surgeon. I have great difficulty in accepting that argument, having regard to the perfectly plain language of the section, and I respectfully agree with the view which my Lord has expressed that the beginning of the section makes it an offence for any unqualified person to use any of the named titles. Then the section goes on to make it an offence for any person by the use of any title other than the named titles to imply that he is registered under the Act. But the matter is of very little importance in this case, because counsel for the respondent conceded that the use of the word "surgeon" simpliciter would imply that the person who used it was registered under the Act. He went on to say, however, that it was a question of fact for the justices in each case whether the title proved to have been used by a defendant does or does not imply that he is a registered person. Up to a point that is correct, but I observe in this case that the justices have not found as a fact any answer to that question. They have not found that the use of the words "manipulative surgeon" does not imply that a person is a registered surgeon. Indeed, in spite of an appeal to do so, they seem to have carefully refrained from finding any such thing. I am far from saying, expressing my own view on the matter, that if on the facts of this case the justices had found as a fact that the expression "manipulative surgeon" did not imply that the defendant was representing himself to be a surgeon, this court would not have taken the matter into their consideration and held that there was no evidence on which the justices could come to such a finding.

Counsel for the respondent's next point was that the use of the word "manipulative" in front of the word "surgeon" removed any implication which would otherwise arise from the use of the word "surgeon," and, therefore, that the expression "manipulative surgeon" did not mean "surgeon." I will deal with that argument in a moment, and proceed now to the consideration of the third of counsel for the respondent's arguments. He said that in any event an offence under s. 40 is not committed by an unqualified person unless it is shown that he intends by the use of the title which he takes to imply that he is a registered person. I can find no words in the section which give the smallest indication that that is its meaning. There are no such words as "intent to deceive" or "intention to persuade persons that he is registered." It appears to me that the prohibition against the use of the named words and titles or any other titles having the same implication is absolute.

But for *Ellis* v. *Kelly* (3), to which my Lord has referred, I should have thought that that argument was an extravagant argument. However, counsel supported it by reference to that case, which, he contended, was a decision to the effect that a person could not commit an offence under this section unless he wilfully and falsely took the name and title in question and that "wilfully and falsely" meant not only intentionally, but also with intent to deceive. *Ellis* v. *Kelly* (3) was a very remarkable case and, judging solely, as one must, by the reported facts of the case, it is a little difficult to understand why Mr. Kelly, or Dr. Kelly, as I have no doubt he was perfectly entitled to call himself, was ever prosecuted. Section 40 of the Act of 1858, as was observed in that case and others, is a section designed to deal with unqualified persons who in one way or another represent themselves to the public as being qualified, and "qualified" means registered under the Act or recognised by law. Mr. Kelly was a fully qualified and registered medical practitioner, as much entitled to practise medicine as even the chairman of the Medical Defence Union at that date. He was the holder, and nobody doubted it, of a degree from a well-known German University, which entitled him to call himself a doctor of medicine, and he produced that diploma. The charge against him was that he wilfully and falsely pretended to be a doctor of medicine and thereby implied that he was registered as a doctor of medicine. He was not registered as a doctor of medicine, but was registered under the titles of M.R.C.S. and L.S.A. which he was perfectly justified in using and which enabled him to call himself a registered practitioner. The sole difficulty in the minds of the justices seems to have been that he did not prove his diploma to their satisfaction. For my own part, I share the difficulty which was expressed by BRAMWELL, B., in understanding why the justices did not consider that the diploma was proved. Two witnesses were called who proved the seals of the University and of the medical faculty, and one of them expressed the opinion that the signature of the professor who purported to sign the diploma was the signature of a professor whose writing he knew. However, for some reason or other the justices were not satisfied of the fact of the proof of that document, but nevertheless said that they were not going to convict the defendant of a criminal offence.

All that the court decided in that case was that in such circumstances the qualified registered medical practitioner, who had called himself Dr. Kelly, because in truth he was in possession of a diploma which would entitle him to call himself Dr. Kelly, was not to be convicted of a criminal offence merely because he was not in a position to prove to the satisfaction of the justices the diploma which he produced.

In my opinion it is not necessary to prove, in order to convict an unqualified person under this section, any intention on his part to deceive or to represent himself as a qualified person. In my view, the section is silent as to any such matters and they are quite immaterial.

To return to counsel for the respondent's argument that the use of the word "manipulative" in front of the word "surgeon" in some way prevents the person who uses that word from describing himself as a surgeon, I do not think it necessary to consider whether there may or may not be some combination of words including the word "surgeon" which might properly be held not to imply that the person who uses that combination of words is a registered person. In this case we have to deal with the two simple words "manipulative surgeon," and, in my view, the case is concluded by a recent authority, *Whitwell* v. *Shakesby* (1). The decision in that case was that an unqualified person who described himself as a "bone setter"—that, of course, is unobjectionable—"osteopathic physician and surgeon," committed an offence against s. 40 by the use of the words "physician and surgeon." Now, if the description "osteopathic surgeon" is a description which implies that the person who uses it is a surgeon, how can we say that the expression "manipulative surgeon" does not imply the same? Without referring in detail to the judgments in that case, in my view it is conclusive of this matter, and on that ground I hold that the argument of counsel for the respondent must fail, and that the justices were wrong in the view which they took. The justices say: "We were of opinion that such use was not unlawful"—I suppose that means was not wilful and false—"in that it was used in order to describe the work or craft practised by the respondent." That seems to me to be an excellent reason for saying that the respondent is entitled to describe himself as a manipulator, because that is the art or craft which he uses. But it can be no reason for allowing him to describe himself as a surgeon, which is a description in terms forbidden by s. 40 to unqualified persons.

For these reasons I agree that this case must go back to the justices with a direction to find the offence charged in the first information proved.

SINGLETON, J.—I am of the same opinion. [His Lordship stated the facts and continued:] Section 40 of the Medical Act, 1858, creates a number of offences. In my view, the true reading of the section is that a person commits an offence (a) if he wilfully and falsely uses the name or title of surgeon, and also commits an offence, (b) if he wilfully and falsely uses any name, title, addition, or description implying that he is registered under the Act, or that he is recognised by law, as a surgeon. Counsel for the respondent argued that (a) is too strict a view, and that no offence is committed unless the person charged is thereby implying, or seeking to get others to draw an inference, that he is so registered or recognised. In my view, there is no need to look into any such questions, if the name or title "surgeon" is used. The question of implication only arises on the latter part of the section in reference to the words "or any name, title, addition or description."

It was argued, further, that this view would make it an offence under the section for anyone to describe himself as a "veterinary surgeon" or as a "dental surgeon," but "veterinary surgeon" is a well-recognised term under the Veterinary Surgeons Act, 1881, and a "dental surgeon" is well understood as one who is a dental practitioner under the Dentists Acts, 1878 and 1921. No one could think that one so describing himself was using the name or title of "surgeon" within s. 40 of the Act of 1858. The object of the Act, as stated in the preamble, is that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners, and if one could imagine a case in which the word "surgeon" was qualified by words which made it clear that the person concerned was not qualified in one of the ways stated—in other words, that he was not a surgeon in the ordinary acceptance of the term—it is possible that magistrates would be justified in holding that such description was not false within the meaning of the section. The only instance of such a case suggested by counsel for the respondent in argument was "quack surgeon," a description which it is difficult to think that anyone would use. It is, however, unnecessary to consider any such cases, and I say no more on that matter.

The respondent's plate bore the words "manipulative surgeon." It is impossible to hold that that was not using the name or title of surgeon. The justices have found that the user was wilful, and their finding of fact shows that it was false. In such circumstances the justices ought to have convicted the respondent under the first information. The name or title of "surgeon" is there, even though it is preceded by the word "manipulative," and the offence is proved. There is no finding of fact to the contrary, and if there had been I do not think it could have stood on the facts of the case as stated.

Furthermore, I am of opinion, if it be necessary to consider the matter, that, by having a plate with the words "manipulative surgeon" on it, the respondent was using a description implying that he was recognised by law as a surgeon, which was the charge in the second information. He did that wilfully, and it was false. It is not a question of what he intended, but what was to be implied in and from the description.

The case seems to me to be precisely within the decision of this court in *Whitwell* v. *Shakesby* (1) and to be covered by the words used by LORD HEWART, C.J., towards the conclusion of his judgment in that case (147 L.T. at p. 159), that the respondent used the words or description "only because, as I think, they appear to convey that the respondent had qualifications which in fact he had not and which the Medical Act of 1858 prevented him from assuming without the lawful right so to do." The respondent here knew he was not entitled to use the name or title of surgeon simpliciter. He sought to avoid the effect of the section by putting in the adjective "manipulative," retaining the word "surgeon," which he wished to keep and use because he thought it would be attractive. None the less he is still within both limbs of the section.

I agree that the case must go back with a direction to the justices that there ought to be a conviction. I have no doubt that it was the intention of those who laid the information that the offences charged, if they were proved, should be treated alternatively, and it is sufficient for the purposes of this case if there is a conviction on the first information.

Appeal allowed.

Solicitors: *Hempsons*; *Walter Crimp & Co.*, for *Stanley Richards & Co.*, Paignton.

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

SAXTON *v.* NICHOLSON & CO., LTD.

KING'S BENCH DIVISION (Lewis, J.), November 21, 1935]

[Reported 154 L.T. 149; 80 Sol. Jo. 93]

Sale of Goods—Contract—Sale "subject to sample quantity" of specified dimensions—Sample of good quality, not of specified dimensions—Sample accepted, but buyer's claim for damages for breach of contract as to dimension—Obligation of seller to deliver bulk—Whether binding contract concluded.

A contract for the sale of timber provided that the sale was "subject to a sample quantity" of about fifty logs to be cut in specified thicknesses. The samples delivered were of the contract quality, but not of the specified dimensions. The buyer accepted the samples, but claimed damages for their failure to comply with the contract, and the seller thereupon refused to deliver the bulk.

Held: the buyer was entitled to damages both for the failure of the samples to comply with the contract, and for the failure of the sellers to deliver the bulk, because (i) the phrase "subject to sample quantity" did not prevent there being a binding contract: *Hillas & Co.* v. *Arcos* (1) (1932), 147 L.T. 503, applied; (ii) the object of the sample being to show quality and the buyer having accepted the sample, the seller could not refuse to deliver the bulk, notwithstanding that the buyer was claiming damages in respect of the incorrect dimensions of the sample.

Notes. As to when a contract constitutes a sale by sample, see 29 HALSBURY'S LAWS (2nd Edn.) 67, para. 75, and for cases on the subject, see 39 DIGEST 451–453, *789–799*.

As to the enforceability of contracts made "subject to" certain events or conditions, see 8 HALSBURY'S LAWS (3rd Edn.) 76–77, para. 130, text and notes (*b*)–(*k*), and for cases on the subject, see 12 DIGEST (Repl.) 79 et seq., *438–440*, *445–447*, and 92 et seq., *523–587*.

Case referred to:

(1) *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (1932), 147 L.T. 503; 38 Com. Cas. 23, H.L.; Digest Supp.

Case Stated by an umpire in an arbitration between the sellers and the buyer of timber. A written contract between the sellers and the buyer provided for the sale of certain timber "to be sawn . . . into the following thicknesses unedged and bundled and subject to sample quantity as follows for November shipment; about twenty-five logs hewn all cut $1\frac{1}{8}$ in. thickness . . .; about twenty-five logs round unbarked all cut $1\frac{1}{4}$ in. thickness. . . ."

The dispute arose with regard to the meaning of the words "subject to sample quantity." A sample shipment was sent in November, and the buyer complained that the logs were not of the contract dimensions. The sellers then refused to deliver anything further under the contract. In the arbitration the buyer claimed damages for breach of warranty in delivering goods in the sample not of the contract description, and also damages for non-delivery of the bulk. The umpire awarded damages under both heads, subject to this special case.

The sellers did not now dispute that they were liable for breach of warranty with regard to the sample, but they contended that the words "subject to sample quantity" meant that a binding contract to deliver the bulk could only arise if the buyer approved the sample. The buyer contended that the contract was a sale subject to a proviso that, if the buyer did not approve of the quality of the sample, he need not take the bulk. If the sellers' contention were right, a seller could always avoid his obligation to deliver by purposely supplying an inferior sample. The object of the sample was to show the quality of the goods, which was satisfactory. The complaint was only with regard to the dimensions.

Sellers, K.C., and *Cyril Connor* for the sellers.
H. L. Parker for the buyer.

LEWIS, J.—This matter comes before me as a special case stated at the request of the sellers under the Arbitration Act, 1889. The dispute concerns a contract made between Messrs. Nicholson & Co., the sellers, and Mr. Saxton, the buyer, dated Oct. 30, 1933.

The contract was one under which the sellers, through the agency of certain brokers, sold to the buyer the goods specified (for shipment during the coming season) "fresh first-class Quebec birch timbers," about 1,000 logs cut into boules, subject to sample of about twenty-five logs hewn and twenty-five logs round, all cut to specified thicknesses. On Oct. 30, 1933, the season was nearly finished.

The arbitrator found as a fact that the consignment sent in November, referred to in the contract as the sample quantity, consisted of only forty logs, twenty round and twenty hewn, and was not in accordance with the description because the logs were not properly cut, that is to say, not cut to the thicknesses contained in the contract.

What happened was this. The buyer has accepted the logs but claimed damages because the November shipment was not according to the description given in the contract. The buyer, as the arbitrator finds, made repeated requests for the delivery of the balance of the timber, but no delivery has been made, and the buyer says that he is entitled to damages for the sellers' breach of the contract in failing to deliver the balance of the timber. That depends upon whether or not it is a contract for the sale of "about 1000 logs." The arbitrator has left two questions for the opinion of the court:

"Whether upon the true construction of the said contract of Oct. 30, 1933 [the sellers] committed breaches thereof by their failure to deliver the wood goods specified therein as to (a) a sample quantity for November shipment being about twenty-five logs hewn all cut to 1⅛ in. thickness at 3s. 3d. and about twenty-five logs round unbarked all cut to 1¼ in. thickness at 3s. 3d. per cubic foot, and (b) as to the remainder of the said wood goods, so as to entitle [the buyer] to claim damages for such breaches of the said contract."

With regard to (a), counsel for the sellers said, in my view quite properly, that it was impossible to argue on the finding of the arbitrator that the November shipment was in accordance with the contract, and I therefore answer the first question by saying that the buyer is entitled to damages for failure to ship the November goods in accordance with the contract.

Whether or not there has been a breach of contract on the part of the sellers in regard to the remainder of the contract must depend on whether the contract was for 1,000 logs or was nothing more than a contract to sell "about twenty-five logs round and twenty-five logs hewn," and whether, with regard to further goods mentioned, there was any binding contract to buy or sell. It was said that nothing in excess of fifty logs was in the agreement. I am satisfied that it is for the court to say on the proper construction of the document whether or not it is an agreement to make an agreement or a binding agreement.

My attention has been directed at some length to certain passages in *Hillas & Co.* v. *Arcos* (1), in the judgments of LORD TOMLIN and LORD WRIGHT, and I am satisfied, on reading these judgments, on the principles there laid down, together with consideration of the contract in the present case, that it would be incorrect to say that the contract is only an agreement to make an agreement.

I think that the object of the sample was in order to ascertain the quality and that

A there was a further agreement that so long as the sample with regard to quality was approved, there was a firm agreement by the sellers to sell to the buyer about 1,000 logs of the timber specified. I think the contract is far beyond what might be termed a contract to make a contract. The prices are set out, shipment is to be during "the coming season," the quantities are set out and also the size of the logs. For these reasons I think this was a firm contract for about 1,000 logs, subject to what I have said B about the sample.

There is no finding by the arbitrator that the sample was not approved in regard to quality. If I am right in saying that the object of the sample was in order to ascertain the quality, in my view one is entitled to infer from the facts that so far as the quality was concerned the sample was approved. There is no suggestion that the sample was not approved in respect of the quality but it is found that the buyer, having received the C sample, discovered it was not up to the description in the contract because of the sizes not being as stipulated. The arbitrator also found that the buyer received the sample and pressed for further delivery, and it is therefore not too much to say that the only inference to be drawn is that the buyer approved the sample as far as quality was concerned.

In these circumstances I must find that the sellers had committed breaches of the D contract by their failure to deliver the remainder of the timber, and the buyer is entitled to damages and costs.

Solicitors: *Lightbounds, Jones & Bryant*; *William A. Crump & Son.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

E

F

THOMAS *v.* SAWKINS

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Lawrence, JJ.), May 30, 1935]

[Reported [1935] 2 K.B. 249; 104 L.J.K.B. 572; 153 L.T. 419; 99 J.P. 295; 51 T.L.R. 514; 79 Sol. Jo. 478; 33 L.G.R. 330; 30 Cox, C.C. 265]

G

Police—Execution of duty—Right to enter private premises—Public meeting—No offence committed—Reasonable apprehension that offence imminent or about to be committed.

Where police officers have reasonable grounds for belief that an offence, e.g., a seditious speech, incitement to violence, or a breach of the peace, is imminent or H likely to be committed, they are entitled, and have a duty in the exercise of their general duty to prevent breaches of the peace and the commission of offences, to enter and remain on private premises in which a public meeting is being held.

Notes. As to the powers and duties of constables, see 25 HALSBURY'S LAWS (2nd Edn.) 320 et seq., and for cases, see 37 DIGEST 186 et seq.

I Cases referred to:

(1) *Humphries* v. *Connor* (1864), 17 I.C.L.R. 1; 43 Digest 439, *n.*
(2) *O'Kelly* v. *Harvey* (1883), 14 L.R.Ir. 105; 15 Cox, C.C. 435; Digest Supp.
(3) *Lansbury* v. *Riley*, [1914] 3 K.B. 229; 83 L.J.K.B. 1226; 109 L.T. 546; 77 J.P. 440; 29 T.L.R. 733; 23 Cox, C.C. 582, D.C.; 14 Digest (Repl.) 570, *5702*.
(4) *R.* v. *Queen's County Justices* (1882), 10 L.R.Ir. 294; 33 Digest 368, *n.*
(5) *Wise* v. *Dunning*, [1902] 1 K.B. 167; 71 L.J.K.B. 165; 85 L.T. 721; 66 J.P. 212; 50 W.R. 317; 18 T.L.R. 85; 46 Sol. Jo. 152; 20 Cox, C.C. 121, D.C.; 15 Digest 642, *6829*.

A **Case Stated** by Glamorganshire justices.

At a court of summary jurisdiction sitting at Bridgend an information was preferred by Alun Thomas (the informant) against Police-sergeant Sawkins (the defendant), under s. 42 of the Offences Against the Person Act, 1861, charging the defendant that he on Aug. 17, 1934, did unlawfully assault and beat the informant.

B On the hearing of the information the following facts were proved or admitted: A public meeting was held at the large hall of the Caerau Library on the evening of Aug. 17, 1934, to protest against the Incitement to Disaffection Bill, which was then before Parliament, and to demand the dismissal of the Chief Constable of the county of Glamorgan. Between 500 and 700 persons were present at the meeting, the chairman being one Richard Davies. Certain persons had been appointed to act as stewards at the meeting and to assist in ejecting any police officers who might attend and might C refuse to leave after being requested so to do. The stewards attended the meeting for that purpose. The hall was used for meetings and was hired for the purpose of holding the meeting in question by one Fred Thomas. The public were invited to attend the meeting, but no charge for admission was made. The meeting was advertised extensively by posters in red chalk on paper and by the chalking of pavements, the public being invited to come in crowds. The informant and Fred Thomas were two of the D conveners of the meeting. The defendant, a sergeant of the Glamorgan County Police Force; one Richard Parry, a police inspector; and one Stephen Lawrence, a police sergeant of the force, presented themselves for admission to the meeting, but were informed by Fred Thomas at the entrance that he had been instructed not to admit the defendant or any other police officer. In spite of this, the defendant, with the two other police officers, insisted on entering the hall, and they seated themselves in the front row E seats of the meeting. The informant, soon after his arrival at the meeting, requested the defendant and the other police officers to leave the premises, but they refused to do so. The informant then lodged a complaint against them at the Caerau police station for not leaving the meeting when requested. The informant then returned to the meeting and read over to the defendant and the two other police officers the above-mentioned complaint and again requested them to leave, which they refused to do. He then made a F statement to the meeting with regard to their presence and again requested them to leave, which they refused to do. The informant then stated that the police officers would be ejected and he laid his hand upon Inspector Parry for the purpose of ejecting him. The defendant thereupon pushed the arm and hand of the informant from Inspector Parry, saying: "I won't allow you to interfere with my superior officer." As a result of the entrance of other police officers no further attempt was made to eject G the police officers. In attempting to remove Inspector Parry, the informant used no more force than was reasonably necessary for effecting that purpose, and the defendant used no more force than was reasonably necessary (assuming that he and Inspector Parry had the right to be and remain there) to protect Inspector Parry and to prevent him from being ejected. It was not alleged by the defendant that any criminal offence was committed by any person at the meeting at any time. There was not in or about H the meeting, and there had not been before the entrance of the police, any actual breach of the peace or disorder. The informant was the principal speaker at the meeting, and he and Fred Thomas were lawfully in possession of the hall and gave permission to members of the public to enter.

On the part of the informant it was contended that the premises upon which the meeting was held were private premises, to which neither the police nor the public had I right of access, and that any police officer who entered the premises against the expressed will of the conveners of the meeting was a trespasser; that any police officer lawfully present who remained after being requested to leave the premises became a trespasser either immediately on refusal to leave or after the lapse of time sufficient for him to take his departure; that the informant was entitled to remove the defendant and other police officers, using no more force than was reasonably necessary; and that the defendant, in resisting removal and in the circumstances, committed an unlawful assault upon the informant. On the part of the defendant it was contended that he had a legal right to enter the hall and meeting and remain there against the express wishes of the informant and Fred Thomas; that he did so remain because, in the judgment of himself and the other police officers (based on their experience and knowledge of previous meetings organised by the Communist Party at Caerau), it was anticipated that the meeting would become an unlawful assembly or a riot, or that breaches of the peace would take place, to the alarm of the residents, and that seditious and inflammatory speeches were likely to be made at the meeting.

The justices held that the defendant and the other police officers had reasonable grounds for believing that, if they were not present at the meeting, seditious speeches would be made, and (or) incitements to violence, and (or) breaches of the peace would take place, and that they were entitled to enter and remain in the hall and meeting. They held, accordingly, that the defendant did not assault the informant and dismissed the information.

The informant appealed by Case Stated to the Divisional Court.

Sir Stafford Cripps, K.C., and *Dingle Foot* for the appellant.
R. Vaughan Williams, K.C., and *Dapho L. Powell* for the respondent.

LORD HEWART, C.J.—It is apparent that the conclusion of the justices in this case consisted of two parts. One was a conclusion of fact that the respondent and the police officers who accompanied him believed that certain things might happen at the meeting then about to be held. There were ample materials on which the justices could come to that conclusion. The second part of the justices' finding is no less manifestly an expression of opinion. Finding the facts as they do, and drawing from those facts the inference which they have drawn, they go on to say that the officers were entitled to enter and to remain on the premises on which the meeting was being held.

Against that determination, it is said that it is an unheard-of proposition of law, and that in the books no case is to be found which goes the length of deciding that, where an offence is expected to be committed, as distinct from where an offence has been committed, there is a right in the police to enter on private premises and to remain there against the will of those who, as hirers or otherwise, are for the time being in possession of the premises. When, however, I look at the passages which have been cited from BLACKSTONE'S COMMENTARIES (8th Edn.), vol. 1, p. 356, and from the judgments in *Humphries* v. *Connor* (1) and *O'Kelly* v. *Harvey* (2) and certain observations of AVORY, J., in *Lansbury* v. *Riley* (3), I think that there is quite sufficient ground for the proposition that it is part of the preventive power and, therefore, part of the preventive duty, of the police in cases where there are such reasonable grounds of belief as the justices have found in the present case, to enter and remain on private premises. It goes without saying that the powers and duties of the police are directed, not to the interests of the police, but to the protection and welfare of the public.

It was urged in one part of the argument of counsel for the appellant that what was done here was really a trespass. It seems somewhat remarkable to speak of trespass when members of the public who happen to be police officers attend a public meeting which has been publicly advertised, a meeting to which the public has been invited, and which is to discuss as one part of its business a proposal to demand the dismissal of the chief constable of the county. It is elementary that a good defence to an action for trespass is to show that the act complained of was done by authority of law. I am not at all prepared to accept the doctrine that it is only where an offence has been, or is being, committed that the police are entitled to enter and remain on private premises. On the contrary, it seems to me that a police officer has ex virtute officii full right so to act when he has reasonable ground for believing that an offence is imminent or is likely to be committed. I think, therefore, that the justices were right and that this appeal should be dismissed.

AVORY, J.—I am of the same opinion. I think that it is very material in this case to observe that the meeting was described as a public meeting and that it is conceded that it was extensively advertised, the public being invited to attend it. There can be no doubt that the police officers who attended the meeting were members of the public and were included in that sense in the invitation to attend. It is true that those who had hired the hall for the meeting might withdraw that invitation from any particular individual who was likely to commit a breach of the peace or some other offence, but it is quite a different proposition to say that they might withdraw the invitation from police officers who might be there for the express purpose of preventing a breach of the peace or the commission of any offence.

With regard to the general question regarding the right of the police to attend the meeting notwithstanding the opposition of the promoters, I cannot help thinking that that right follows from the passage which counsel for the appellants relies on in Stone's Justices' Manual (1935, p. 208)*, where it is said that if a constable hears an affray in a house he may break in to suppress it, and may, in pursuit of an affrayer, break in to arrest him. If he can do that, I cannot doubt that he has a right to break in to prevent an affray which he has reasonable cause to suspect may take place on the premises. In other words, it comes within his duty as laid down by Blackstone (Commentaries (8th Edn.), vol. 1, p. 356) to keep the King's peace and to keep watch and ward. In my view, the right is correctly expressed in *R.* v. *Queen's County Justices* (4), where Fitzgerald, J., said (10 L.R.Ir. at p. 301):

> "The foundation of the jurisdiction [to bind persons over to be of good behaviour] is very remote, and probably existed prior to the statute of 1360–61; but whatever its foundation may be, or by whatever language conveyed, we are bound to regard and expound it by the light of immemorial practice and of decision, and especially of direct modern decisions. It may be described as a branch of preventive justice, in the exercise of which magistrates are invested with large judicial discretionary powers, for the maintenance of order and the preservation of the public peace."

That passage was expressly approved in *Lansbury* v. *Riley* (3), and its effect was expressed by Lord Alverstone, C.J., in *Wise* v. *Dunning* (5) ([1902] 1 K.B. at p. 175). In principle, I think that there is no distinction between the duty of a police-constable to prevent a breach of the peace and the power of a magistrate to bind persons to be of good behaviour to prevent a breach of the peace.

I am not impressed by the fact that many statutes have expressly given to police constables in certain circumstances the right to break open or to force an entrance into premises. Those are all cases in which a breach of the peace is not necessarily involved and express statutory authority is, therefore, required to empower the police to enter. In my opinion, no express statutory authority is necessary in a case where the police have reasonable ground to apprehend a breach of the peace, and in the present case I am satisfied that the justices had before them material on which they could properly hold that the police officers in question had reasonable ground for believing that, if they were not present, seditious speeches would be made and (or) that a breach of the peace would take place. To prevent any such breach of the peace the police were entitled to enter and to remain on the premises. I agree that the appeal should be dismissed.

LAWRENCE, J.—As my Lord has pointed out, our judgment proceeds on the particular facts of this case and on those facts I agree with the conclusion. I will only add that I am unable to follow the distinction which counsel for the appellant has drawn between the present matter and the cases which have been cited. If a constable in the execution of his duty in the preservation of the peace is entitled to commit an assault, it appears to me that he is equally entitled to commit a trespass.

Appeal dismissed.

Solicitors: *W. H. Thompson*; *Boxall & Boxall*, for *W. P. David & Snape*, Bridgend.

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

---

* 89th edn. (1957), p. 276.

EVANS *v.* EMPLOYERS MUTUAL INSURANCE ASSOCIATION, LTD.

[COURT OF APPEAL (Greer, Slesser and Roche, L.JJ.), May 7, 8, and 28, 1935]

[Reported [1936] 1 K.B. 505; 105 L.J.K.B. 141; 154 L.T. 137]

Insurance—Mis-statement in proposal form—Insurer's clerk informed of mis-statement by contents of claim form—Clerk's knowledge not communicated to management—Subsequent conduct of third-party negotiations by insurers—Right to repudiate policy.

The proposal form on which a policy insuring a motor car was based contained an untrue statement. An accident occurred which resulted in the insured making a claim under the policy for damage to the car and for liability which he had incurred to third parties. The fact that the statement was untrue came to the knowledge of a clerk in the employment of the insurance company when, in the course of his duty, he compared the proposal form with the claim form which the insured sent in at the insurance company's request, but the clerk wrongfully neglected to inform the claims superintendent, the servant of the company whose duty it was to decide whether to admit the claim.

The insurance company made payments to the insured in respect of the damage to his car and person, and thereupon, pursuant to the policy and with the assent of the insured, took on the conduct of the negotiations with and resistance to the claims of the third party. Subsequently, the claims superintendent became aware of the untruth of the statement in the proposal, and the insurance company repudiated liability. On a claim by the insured based on the policy, the insurance company contended that it did not know of the untruth of the statement until it was discovered by the claims superintendent.

Held: the insurance company was not entitled to repudiate liability because (i) the knowledge of the untruth acquired by the clerk in the course of his duty of comparing the forms was the knowledge of the company which had delegated that duty to him. *Wing* v. *Harvey* (1) (1854), 5 De G. M. & G. 265, and principle stated by KENNEDY, J., in *Forder* v. *Gt. Western Rail. Co.*, (5), [1905] 2 K.B. 532, 537, applied; *Houghton & Co.* v. *Nothard, Lowe, and Wills, Ltd.* (2), [1928] A.C. 1, considered; (ii) having requested the insured to send them the information contained in the forms, and having received the forms, the company could not be heard to say they did not know of their contents, i.e., of the untruth which the forms revealed, on the ground that the forms were not dealt with by the proper official; (iii) by making the payments to the insured the company had affirmed the policy after it had notionally become aware of the true facts, and, as the insured thereupon relinquished his rights to deal with the third-party claims, the company were precluded from repudiating liability: principle stated by BOWEN, L.J., in *Bentsen* v. *Taylor, Sons & Co.* (4), [1893] 2 Q.B. 274, at p. 283, applied.

Notes. As to waiver by insurers of a breach of conditions of the policy, see 18 HALSBURY'S LAWS (2nd Edn.) 440, paras. 629, 630, text and notes (u)–(h); and for cases on the subject, see 29 DIGEST 60–61, *199–206*. As to a company being bound by the knowledge of a subordinate employee, see 6 HALSBURY'S LAWS (3rd Edn.) 422, para. 817. As to estoppel by conduct generally, see 15 HALSBURY'S LAWS (3rd Edn.) 235 et seq., para. 440, and for cases on the subject, see 21 DIGEST 384 et seq., *1537–1557*.

Cases referred to:

(1) *Wing* v. *Harvey* (1854), 5 De G.M. & G. 265; 2 Eq. Rep. 533; 23 L.J.Ch. 511; 23 L.T.O.S. 120; 18 Jur. 394; 2 W.R. 370; 43 E.R. 872; 29 Digest 56, *177*.

(2) *Houghton & Co.* v. *Nothard, Lowe, and Wills, Ltd.*, [1927] 1 K.B. 246; 96 L.J.K.B. 25; 136 L.T. 140, C.A.; affd., [1928] A.C. 1, H.L.; Digest Supp.

(3) *Newsholme Brothers* v. *Road Transport and General Insurance Co., Ltd.*, [1929] 2 K.B. 356; 98 L.J.K.B. 751; 141 L.T. 570; 45 T.L.R. 573; 73 Sol. Jo. 465; 34 Com. Cas. 330, C.A.; Digest Supp.

(4) *Bentsen* v. *Taylor, Sons & Co.* (2), [1893] 2 Q.B. 274; 63 L.J.Q.B. 15; 69 L.T. 487; 42 W.R. 8; 9 T.L.R. 552; 4 R. 510, C.A.; 12 Digest (Repl.) 391, *3032*. A

(5) *Forder* v. *Great Western Rail. Co.*, [1905] 2 K.B. 532; 74 L.J.K.B. 871; 93 L.T. 344; 53 W.R. 574; 21 T.L.R. 625; 49 Sol. Jo. 597, D.C.; 8 Digest (Repl.) 68, *455*.

Appeal from a decision of BRANSON, J., on a special case stated by an umpire, MR. SCHILLER, K.C. B

A policy of insurance on a motor car was based on a proposal form which contained the question:

> "(*a*) Will the car be solely driven by proposer or other named driver? If so, please give name,"

to which the insured answered "No"; and C

> "(*b*) For how long has proposer and proposer's driver (i) held a driving licence? (ii) had a practical experience of motor car driving?"

The insured answered "five years." This was, in fact, an untrue answer to both branches of the second question, since the insured had never previously held a driving licence, and his experience was limited to driving other people's cars on a few occasions. An accident took place during the currency of the policy, in which the car was damaged, D and as a result of which the insured became liable to third parties for injuries inflicted on them. The assured made a claim on the insurance company, and for that purpose filled up a claims form in which the question was asked: "How long have you driven a motor car?" to which the insured answered: "Six weeks." The claim form was received by one Mitchell, a clerk of the insurance company, whose duty it was to check the claims form with the proposal form, and he noticed the discrepancy, but did not communicate it to his superior officer, the claims inspector. E

A sum of £60 was then paid to the insured in settlement of the claim for damage to the car. Shortly afterwards, the claims inspector ascertained that the statement in the proposal form was untrue and repudiated the policy, and refused to pay the claim for third-party liability. It was contended for the insured that the company knew at all material dates that the answer to the question in the proposal form was untrue, and F that by paying the £60 they had affirmed the policy after becoming aware of the real facts, and were therefore estopped from now repudiating it.

The umpire accepted that contention, and made an award in favour of the insured, subject to this special case.

BRANSON, J., held that the company was not estopped by that payment from repudiating the policy or from refusing to admit the claim for third-party liability, since G the company was not affected with notice of mis-statement until it came to the knowledge of the person whose duty it was to determine, on behalf of the company, whether the claim should be admitted.

The insured appealed.

A. T. Miller, K.C., and *Tristram Beresford* for the insured. H
H. D. Samuels, K.C., and *Roger Bacon* for the insurers.

Cur. adv. vult.

May 28, 1935.—The following judgments were read:

GREER, L.J.—On Nov. 27, 1933, the appellant, Mr. R. S. Evans (hereinafter referred to as "the insured"), accompanied by his fiancée, Miss Comfort, and others, was driving his Morris Isis car, when he became involved in an accident which resulted in substantial I damage to his motor car, serious injuries to Miss Comfort, and slight injuries to the insured and his sister. We were told, and it was admitted, that third parties, including Miss Comfort, alleged that they had claims against the insured for damages for negligence, but the only finding in the case stated by the umpire with reference to this matter is contained in para. 30 of the case, where he says that the insured, on the faith of certain representations, which he found were made to him by the insurers' representatives, relinquished his right to deal with the matters arising out of the accident, and allowed the insurers to deal therewith. I think this is meant to include the fact that claims were put forward against the insured by Miss Comfort for personal injuries, and, as we were told, by the Holborn Borough Council and the London County Council, for damage to their property. At the time of the accident the insured had only been driving a motor car for six weeks, and had only held a licence as from the beginning of that period, that is to say, from some time in October, 1933. The insured had, on July 31, 1933, signed an application containing certain declarations in answer to questions put by the respondents (hereinafter referred to as "the insurers"). The only material question and answer to the proposal form is No. 2, which is as follows:

> "(*a*) Will the car(s) be solely driven by proposer or other named driver? If so, please give name.—No. (*b*) For how long has proposer and proposer's driver (i) held a driving licence? (ii) had a practical experience of motor-car driving?—five years."

With regard to the answer to this question, it is not very easy to say what the answer "five years" applies to. It does not seem to have been contended that it referred to the experience and length of the licence held by the proposer's driver, but to refer to the experience and length of licence of the insured. So understood, the answer, as the umpire has found, was definitely untrue for the reasons stated in the award. To prevent misunderstanding, I should say I do not consider the umpire's finding as being that it was consciously or intentionally untrue. At the date of the application the insured had had no experience of driving cars, except that he had occasionally driven friends' cars five years before the date on which he signed the proposal form, and that up to date he had never had a licence. The proposal form contained the usual statement that the declaration should be the basis of the contract between the insured and the insurers.

Pursuant to this application, the insurers issued to the insured their policy insuring him as therein stated as from July 31, 1933. The policy incorporated the statements contained in the proposal form as part of the contract, and provided that the truth of the statements and answers in the proposal form should be conditions precedent to any liability of the insurers to make any payments under the policy. Certain instructions to the policy-holder were endorsed on the policy, which called upon a policy-holder whose car sustained damage, or in cases where there were claims by third parties, to supply full particulars to the insurers of the occurrence on one of the insurers' "Particulars of Accident" forms.

On Nov. 30, 1933, one of the insurers' claims inspectors called on behalf of the insurers upon the insured, bringing with him a document which is headed: "Particulars of Claim Form. Particulars of Accident." This document, like the proposal form, contained a number of questions for the insured person to answer. In it the insured stated his name in full, and that he was the person driving at the time of the accident. In answer to the question: "How long have you been driving motors?" with the authority of the insured the inspector wrote, "Six weeks," and the insured signed the form, which is a document addressed to the insurers. When this form was read by an employee of the insurers who was authorised to deal with claims, it was at once understood as meaning that the insured's experience as a driver did not exceed six weeks, and that his statement in the proposal form that he had had five years' driving experience, and had held a licence for five years, was untrue. The claim form with particulars of accident was taken by Mr. Anderson, the claims superintendent mentioned above, to the insurers' head office in London, and given to a Mr. Morice, the insurers' claims superintendent. Before stating what happened to the claims form afterwards, it is worth noting that Mr. Anderson was definitely told by the insured that he had only been driving for six weeks, and that he had had no licence except the one he obtained in October at the beginning of the six weeks.

Mr. Anderson had, of course, not present to his mind, if he had ever seen them, the declarations contained in the proposal form, but I think it may be assumed that he visited the insured not merely with the object of having the claim form filled in, but with the object of ascertaining on behalf of the insurers whatever information he could obtain from the insured relevant to the question whether they should admit or dispute the claim. Be that as it may, it seems clear that the man to whom he gave the claim form, Mr. Morice, was an employee of the insurers authorised to receive the information contained in the form. According to the finding of the umpire he followed the usual practice of the insurers in handing the form to Mr. Mitchell, a clerk in the employ of the insurers, to check over the statements in the claim form with those contained in the proposal form, and to note any discrepancies between the proposal and claims forms. To do this was in the ordinary course of Mitchell's duty. Mitchell did notice this discrepancy but did not call attention to it because he did not consider it of importance. It seems obvious that the insured in stating his experience as only extending to six weeks was in all probability stating the truth, and not understating his experience, as it could not be in his interest to understate his experience. It seems to me involved in the findings of the umpire that the statements in the claim form interpreted by any reasonable person, when compared with the proposal form, meant that the statements in the proposal form were untrue in two respects, namely, that the insured had not had practical experience of motor car driving for five years, nor had he had a licence for five years. On Jan. 12, 1934, the insurers paid the insured £60 for damages to his car in accordance with the terms of the policy, and on Jan. 17, 1934, £10 1s. for the medical expenses of the insured and his sister. Thereafter they took upon themselves pursuant to condition No. 2 endorsed on the policy the conduct of all negotiations with the third parties for the purpose of settlement of or defence to their claims. On Feb. 22, 1934, Morice had an interview with a member of a firm of solicitors who were acting for Miss Comfort to discuss this lady's claim for damages against the insured. At the interview the solicitor for Miss Comfort stated that the insured was a reckless driver and had had very little experience of driving. After this interview Morice compared the claim form with the proposal form, became aware of the discrepancy between the two documents, and pointed it out to the general manager of the London office. The insurers then repudiated liability. It is to be observed that neither Mr. Morice nor the general manager had the slightest doubt that the statements in the claim form informed them, when they looked at the proposal form, that a condition precedent had been broken by the insured which entitled them to repudiate liability.

The above summary of the facts is taken from the special case stated by MR. SCHILLER, K.C., upon whom devolved the decision of this case under the arbitration clause contained in the policy. The umpire decided that the insurers could not repudiate their liability under the policy after having received the information they received through their agents, Anderson, Morice and Mitchell, and, notwithstanding that information, paid the insured and took to themselves the right of dealing with the third-party claim. The umpire does not use the word "waiver," but I think his decision amounts to a decision that by their conduct the insurers affirmed the policy after notice of the facts which entitled them to repudiate, and thereby waived their right to repudiate liability under the policy. The question he states for the court is whether his decision is correct, which necessarily means correct in law.

In my judgment, it is correct, or, to put it the other way, it is not wrong in law, for two reasons. First, I think the knowledge of Mitchell, to whom in the ordinary course of their business the insurers entrusted the duty of comparing the claim forms with the proposal forms so as to ascertain whether there was any discrepancy between them, fixes the insurers with the knowledge of that which came to the knowledge of Mr. Mitchell. Secondly, I think the award of the umpire was right because the insurers are not entitled in law to say that they were not aware of the contents of documents such as the proposal form and the claim form, which, at their request, the insured addressed to them. They must be treated as having received the information contained in these two documents, and they cannot be heard to say that they did not know their contents. A limited company cannot know anything itself except through its agents or servants. The knowledge which is to be attributed to a company must be the knowledge of some agent or servant. If there be no evidence that the company has delegated the ascertainment of relevant facts to some officer of the company, it may well be that nothing short of knowledge by the board of directors will bind the company. But the knowledge of the directors is attributed to the company because they are agents of the company to whom the duty of knowing the particular facts in question has been delegated by the company. If it be established by evidence that the duty of investigating and ascertaining the facts has been delegated in the ordinary course of the company's business to a subordinate official, the company will in law be bound by his knowledge for the same reasons that they are affected by the knowledge of the board of directors. In my judgment the umpire was entitled to infer from the facts found by him and stated in the special case that the insurers were bound by the knowledge obtained by Mr. Mitchell in carrying out the duties entrusted to him in the ordinary course of the conduct of the business of the insurers. It would be impossible for an insurance company's business to be carried on if they did not delegate to officials the duty of exercising their contractual rights in considering and deciding what course to take with reference to claims which have to be dealt with from day to day.

The decision of the umpire in favour of the insured can be supported on the above ground, and it is, therefore, in my judgment not incorrect in law either on the claim or counterclaim.

There is, moreover, an alternative ground on which the umpire's decision can be supported. The claim form was sent to the insurers by their own request. If the insured had written a letter to the insurers stating that he had only had six weeks' experience of driving motor cars at the date of the accident, after the insurers had asked him to send the information by letter, I am of the opinion that the insurers would be fixed with notice of the statements contained in the letter. The insurers could not say they had no knowledge of its contents because no authorised official read it.

The communication would be a communication to the insurers, and they could not in law be entitled to say they did not know the contents of the letter because it was handed over to the wrong official to consider and to deal with the information it contained. In the present case, the relevant information was not sent by letter, but was sent on a form addressed to the insurers which the insured undertook to send them in the case of immediate repairs being required, and which, in any event, he was instructed to send to the insurers by the instructions endorsed on the policy. I cannot think that the insurers can be allowed to deny knowledge of the contents of a document they asked the insured to fill up and send to them, on the ground, if such be the case, that the document was never read by the official authorised to read it and act on the information contained in it.

I have considered the authorities cited in argument in support of the insurers' case, but I do not think it necessary to refer to them except by saying that they have, in my judgment, no application to the present case, which falls to be decided on the special facts stated expressly or by implication in the special case. Some of the decisions afford definite support for the insured's contentions—see especially *Wing* v. *Harvey* (1). I have had an opportunity of reading Slesser, L.J.'s judgment, where the facts and the decision in *Wing* v. *Harvey* (1) are accurately summarised. Support can also be found for the present judgment in the words of Lord Dunedin in his speech in *Houghton & Co.* v. *Nothard, Lowe, and Wills, Ltd.* (2) ([1928] A.C. at p. 14).

The appeal will be allowed, with costs here and below, and the question put by the umpire will be answered by saying that his decision is correct in law.

SLESSER, L.J.—In this case the facts have been stated by my Lord, and I do not think it necessary to repeat them.

In my opinion, the fundamental question in this case is whether the knowledge which Mr. Mitchell acquired in comparing the claim form with the proposal form thereby became the knowledge of the insurers. It is true that in *Houghton's Case* (2) ([1928] A.C. at p. 18) Lord Sumner points out that

> "the mind, so to speak, of a company is not reached or affected by information merely possessed by its clerks. . . . the knowledge, which is relevant, is that of directors themselves, since it is their board that deals with the company's rights."

But it must depend upon the facts of each case, where the matter is not specially determined by the articles, by what particular means of information and in what circumstances a company may properly be said to acquire knowledge, or have knowledge thrust upon them.

A In this case, as to the two documents themselves, the proposal form and the claim form, it cannot in any view be said that the insurance company did not know their several contents, since both were addressed to the insurance company; but the correlation of the two leading to discrepancy and consequent falsity of the insured's statement, depended solely upon the investigations of Mr. Mitchell. Now, Mr. Mitchell was not a mere clerk. It was his specific duty to do the very act of comparison which here resulted in his ascertainment of the conflict between the insured's two statements. B He carried out his duty and he made the comparison, and the fact that he did not think fit to convey the information so obtained to Mr. Morice or Mr. Last, who were the persons who properly decided that the insurance company should deal with the matter, does not enable the insurance company, in my judgment, to deny that they were bound by the knowledge which he obtained in carrying out the duties entrusted to him, albeit negligently performed, by the insurance company through Mr. Morice. C The history of the dealings between Anderson and Evans points to the same conclusion.

In *Newsholme Brothers* v. *Road Transport and General Insurance Co., Ltd.* (3) ([1929] 2 K.B. at p. 374) SCRUTTON, L.J., quoting LORD SUMNER, says:

> "The knowledge of a person who acquires it in breach of duty and is guilty of a breach of duty, in respect to it, is not to be imputed to a company to whom, from the hypothesis, he would be very unlikely to disclose it in fact." D

In this case, so far from acquiring the knowledge in breach of duty, Mr. Mitchell acquired it in the course of his duty and, but for an erroneous estimate of its significance, he would, in the ordinary course of his work, have communicated it to Mr. Morice or Mr. Last, who were the persons, as I have said, who were competent and in fact decided on behalf of the insurance company to maintain the action in place of the insured. E I think that the knowledge of Mr. Mitchell must be imputed to Mr. Morice, to Mr. Last and to the insurance company, and that the insurance company cannot escape merely because Mr. Mitchell was negligent in the performance of it. If Mr. Morice had such imputed knowledge, it follows, as the learned umpire has found, that he, with such knowledge of the untruth, on behalf of the insurers affirmed the policy after the insurers had notionally become aware of the true facts, F and if the insured, with the matters arising out of the accident, thereupon relinquished his rights to deal and allowed the insurers to deal with them by subrogation or otherwise, the insurers are precluded from repudiating their liability (see *Bentsen* v. *Taylor, Sons & Co.* (4), per BOWEN, L.J., [1893] 2 Q.B. at p. 283).

The case of *Forder* v. *Great Western Rail. Co.* (5), was, as LORD ALVERSTONE said, "very near the line," but KENNEDY, J. ([1905] 2 K.B. at p. 537), G speaking of the knowledge to be imputed to a railway company by acts of its officials, says:

> "In my opinion, the knowledge which is necessary . . . must be knowledge on the part, not of some official of the company . . . but of the person who under the rules of the company is engaged in, or entrusted with the control of, the transaction. . . ."

H The case was dealing with misconduct, but his opinion fortifies my view that once it was established that Mr. Mitchell was so performing his duty, the insurance company acquired the knowledge which he obtained notwithstanding the fact that he did not think it worth while to communicate the information which he had acquired to his superiors.

The case of *Wing* v. *Harvey* (1) is also in point. There, the agent of an insurance company received payments from a gentleman outside Europe without objection, I though there was a clause in the policy making it void if the assured went beyond the limits of Europe without licence. The assignee of the policy, on paying the premium to a local agent at the place where the assurance had been effected, informed him that the assured was resident in Canada; the agent stated that this would not avoid the policy and received the premiums until the assured died. The office in London received the money in their turn, without having notice of the assured's residence beyond the prescribed limits. KNIGHT BRUCE, L.J., was of opinion that whether the agent did or did not inform them in fact of the true state of circumstances in which the premiums were paid to him, the directors became and were as much bound as if the premiums had been paid directly to themselves, they knowing at the time, on each occasion, the place of the assured's residence. And Turner, L.J., was of opinion that "the office was affected with notice of the absence of (the assured) beyond the boundaries limited by the policies."

For these reasons I agree with Greer, L.J., that this appeal must be allowed and the award of the learned arbitrator upheld.

ROCHE, L.J.—I agree that this appeal should be allowed. We are differing from the view of the learned judge and are holding that the contrary view of the learned legal arbitrator was right in law. It is therefore clear that the points involved are of some difficulty and nicety, and I propose to state shortly, in my own way, the views which lead me to the conclusion that the arbitrator was right, and that the judge should have so held.

The provisions in the contract of insurance as to the truth of the statements in the proposal made by the insured were of unilateral operation in favour of the insurance company, and could be waived by that company: (see *Wing* v. *Harvey* (1)). In the case of *Bentsen* v. *Taylor, Sons & Co.* (4), Bowen, L.J., stated the principles governing waiver in such a case, in language that is to be found [1893] 2 Q.B. at p. 283, and has often been quoted with approval, as follows:

> "In order to succeed, the plaintiff must show, either that he has performed the condition precedent, the onus being on him, or that the defendants have excused the performance of the condition, and we have to consider whether the plaintiff has sustained that burthen, so that no reasonable man could doubt that there had been a waiver of the condition or an excuse of its performance. In other words, did the defendants by their acts or conduct lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end, on account of the failure to perform the condition precedent, but that they only intended to rely on the misdescription as a breach of warranty, treating the contract as still open for further performance? Did the defendants lead the plaintiff to believe that they intended to treat the misdescription as a breach of contract only, and not as a failure to perform a condition precedent?"

The arbitrator has found in the present case in para. 30 the following facts:

> "On these contentions I hold that the insured was right in his argument that the insurers in fact at all material times had knowledge that the answer to Question 2 (*b*) of the proposal was untrue, that this knowledge being possessed by their servants who were deputed to receive it, namely, Anderson and Mitchell, must be imputed to the insurance company, and I hold therefore that the insurers affirmed the policy after becoming aware of the true facts, and that they, by their conduct, represented that the policy was a valid policy, and that the insured on the faith of such representation relinquished his right to deal with the matters arising out of the accident and allowed the insurers to deal therewith, and that the insurers are precluded from repudiating their liability under the policy."

The facts so found by the arbitrator in law justified his conclusion, unless he was not justified in law in arriving at that part of his finding which refers to and finds knowledge of the true facts on the part of the insurance company. In my opinion, he was so justified, and the insurance company had the necessary knowledge.

Certain material questions contained in the claim form were directed to ascertaining whether the statements in the proposal form were true. The answers stated the truth and showed that the statements in the proposal form were untrue in the sense that they were inaccurate. I agree with my Lord that if such information is invited by a company and is given and communicated to that company in the manner invited, that fact alone would be sufficient.

But in this case the matter does not rest there. There are further findings of the arbitrator which make the matter even plainer. It was conceded that if the matter came to the notice of Mr. Morice that was sufficient. It is unnecessary, therefore, to consider any question of the directors' knowledge, and for other reasons I do not deem it to be necessary to consider Mr. Anderson's knowledge. As to Mr. Morice, the answers of the insured in the claim form came to his knowledge in the sense that he knew that the questions were answered, but he deputed, as was his practice and proper practice, the ascertainment of the nature and effect of the answers and the existence of discrepancies, if any, between the proposal and claims forms, to his clerk, Mitchell. Mitchell obtained the necessary knowledge, but he failed to appreciate its importance, or to pass it on, as he ought to have done, to his superior, Mr. Morice. The insurance company therefore acquired the knowledge through the very person appointed to acquire it, and, if it failed to use it, the failure was due to that person's default. Cases in which knowledge was acquired by a company for other purposes and by other persons than those concerned with the particular matter under inquiry, have no application to the present case: (see *Houghton's Case* (2), per Lord Sumner in the passage already cited by Slesser, L.J.). The test is well laid down by Lord Dunedin in the same case ([1928] A.C. at p. 14) as follows: The knowledge of the company can only be the knowledge of persons who are entitled to represent the company. It may be assumed that the knowledge of directors is in ordinary circumstances the knowledge of the company. The knowledge of a mere official like the secretary would only be the knowledge of the company if the thing of which knowledge is predicated was a thing within the ordinary domain of the secretary's duties.

In this case, this matter which was under discussion was in the ordinary domain of the duties of Mr. Morice and Mr. Mitchell, and the responsibilities with regard to it were distributed between them in the manner I have above stated. To depute and refer to subordinates matters of detail is essential for the conduct of business on any large scale by companies or others, and, if an official of a company, such as Mr. Morice, does properly depute any matter to a subordinate and the subordinate deals with it, it is as if Mr. Morice dealt with it for himself, and the same consequences follow in the one case as in the other.

In my judgment, the consequence here is that the arbitrator's decision that the insured was entitled to succeed was right, and the appeal should, therefore, be allowed with costs.

Appeal allowed.

Solicitors: *Theodore Goddard & Co.*; *Ponsford* and *Devenish.*

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

MANCHESTER CORPORATION *v.* MARKLAND

[House of Lords (Lords Atkin, Tomlin, Thankerton, Wright and Alness), June 4, 6, and July 8, 1935]

[Reported [1936] A.C. 360; 104 L.J.K.B. 480; 153 L.T. 302; 51 T.L.R. 527; 33 L.G.R. 341]

Water Supply—Duties and liabilities of undertakers—Duty to obtain information as to leaks in pipe—Burst pipe—Leakage to road above—Freezing of water—Resultant skidding of motor car three days after burst—Burst still unknown to undertakers—Reliance on local authority officers for information—Whether duty to take all reasonable precautions discharged.

On Feb. 9, 1933, a burst occurred in a water undertakers' service pipe and water escaped and formed a pool in the road beneath which the pipe ran. The pool was frozen by a severe frost at about 8 p.m. on Feb. 11, 1933. Later that night, and before the burst came to the knowledge of the undertakers, the frozen pool caused a car to skid, without any negligence by the driver, and to knock down and kill the plaintiff's husband. Apart from periodic routine inspections involving a visit to any given spot about once in nine days, the undertakers did nothing to secure prompt notification of bursts in the area, but relied on the officials of the local highway authorities, in their own interests, to inform them of any leakages. On appeal against judgment for the plaintiff in a claim under the Fatal Accidents Act, 1846, the undertakers contended (i) that this reliance on the local authorities discharged the undertakers' duty to take all reasonable precautions to secure that leaks in their system should be brought to their knowledge and repaired with promptitude, and (ii) that the plaintiff was not entitled to succeed because she had failed to show what steps the undertakers should have taken to discharge this duty.

Held: the appeal should be dismissed because (i) the steps taken were unreliable and unco-ordinated methods of receiving information, which without any precautions being taken by the undertakers on their own part, did not discharge the duty above referred to; (ii) the plaintiff proved negligence by showing that, apart from the routine inspections, the matter was left to chance, and that, in this particular instance, no notice of the burst was given to the undertakers until at least three days after it happened.

Notes. The freezing of the water in this case was a danger which the undertakers should have anticipated. For a case in which the danger resulting from a leak was not one which the undertakers should have anticipated, and for which they were, therefore, not liable, see *Longhurst* v. *Metropolitan Water Board*, [1948] 2 All E.R. 834. As to the duty of undertakers with regard to bursts and leaks in pipes, see 33 Halsbury's Laws (2nd Edn.) 440, para. 720. As to the degree of care in making inquiries which is required in ordinary circumstances, see 23 Halsbury's Laws (2nd Edn.) 573–4, para. 826, text and note (q).

Appeal from the decision of the Court of Appeal (Slesser, L.J., and Talbot, J.; Scrutton, L.J., dissenting) affirming the decision of Macnaghten, J., without a jury at Manchester Assizes.

The plaintiff, Rose Ethel Markland, sued the water undertakers, Manchester Corporation, for damages for negligence under the Fatal Accidents Act, 1846, which negligence she averred caused the death of her husband. The material facts were as follows: On Saturday, Feb. 11, 1933, one Bamford, who was a co-defendant of the undertakers, was driving a motor car at night when his car skidded into the rear of a tramcar at Eccles, near Manchester, from which the deceased man was descending, and killed him. The judge found that Bamford was driving properly and reduced his speed when he saw that the tramcar was about to stop to set down passengers, but his wheel came into contact with a sheet of ice which caused the car to become unmanageable and that the presence of this sheet of ice was the cause of the accident. The ice had admittedly been produced through the road having been flooded from a burst in the service pipe running beneath the road through which the undertakers, who were the statutory water authority, supplied the district with water. The burst had occurred three days previously. The negligence alleged was that the undertakers ought to have known that the water-main was leaking and causing water to run over the surface of the roadway and that, in view of the coldness of the weather, the water was likely to freeze and cause ice to form in the roadway, and that they failed to take any reasonably sufficient steps to prevent this happening.

Macnaghten, J., freed the owner of the motor car from liability, but he found that the undertakers were negligent in not knowing of the burst and flooding before the accident, with the consequence that they negligently took no steps to render the roadway safe for persons using it.

In the Court of Appeal it was held by Slesser, L.J., and Talbot, J.; Scrutton, L.J., dissenting, that the learned judge was justified and was right, on the evidence, in coming to the conclusion that the undertakers had failed to discharge the duty which rested upon them. They did not do that which a reasonable authority ought to have done and failed to take reasonable precautions against an obvious and known danger.

The undertakers appealed.

Stuart Bevan, K.C., *T. Eastham, K.C.*, and *Harold Rhodes* for the defendant corporation, the water undertakers.

William Gorman, K.C., and *G. Jessel Rycroft* for the plaintiff, the widow, were not called upon to argue.

The House took time for consideration.

July 8. **LORD ATKIN.**—I have had an opportunity of reading the opinion about to be delivered by my noble and learned friend Lord Tomlin. I entirely agree with it and have nothing to add.

LORD TOMLIN read the following opinion:—I am authorised to say that my noble and learned friends **Lord Thankerton, Lord Wright** and **Lord Alness** concur in the opinion I am about to deliver. In this case the plaintiff sued the undertakers and one William Bamford under the Fatal Accidents Act, 1846, for damages for loss sustained by her by reason of the death of her husband. He had been killed in an accident occurring in circumstances which I will shortly narrate.

The accident happened on the main road running between Salford towards the north-west and Bolton towards the south-east.

About 50 ft. or 60 ft. southward of the point on this road where the accident happened the boundary between the urban district of Worsley towards the north and the borough of Eccles towards the south crosses the road at right angles.

The highway authority immediately north of this boundary is the Urban District Council of Worsley and immediately south of this boundary is the Corporation of the Borough of Eccles.

Along the length of this road runs an electric tram line owned and operated by the Corporation of Salford. The Lancashire county police have jurisdiction in the neighbourhood of the accident.

The districts through which the road runs are outside the city of Manchester, but within the area of supply of the defendant corporation as water undertakers under the Manchester Corporation Waterworks Act, 1897, and the Acts incorporated therewith and amending the same, and as such undertakers the corporation own (inter alia) a 5-inch main running the length of the road on its easternmost side and the service pipes connecting such main with the adjoining houses on each side of the road.

At about 11.15 p.m. on Saturday, Feb. 11, 1933, the deceased descended from the rear of a tram car which was travelling towards Salford and had stopped at a point with its rear end about fifty ft. or sixty ft. north of the boundary already mentioned.

While still holding the rail of the car he was struck by a motor car driven by Bamford and also travelling towards Salford.

The deceased died from his injuries shortly after the accident.

The action was tried at Manchester by Macnaghten, J., sitting without a jury.

The facts as found by the learned judge were in effect as follows: (1) on Thursday, Feb. 9, 1933, a burst occurred in the lead service pipe of the undertakers leading from the five-inch main to two houses on the west side of the road to the south of the point where the accident happened; (2) as the result of the burst, water was forced up on the surface of the road and formed a pool extending northwards towards the site of the accident; (3) this state of things continued all Thursday, Friday and Saturday, Feb. 9, 10 and 11; (4) about 8 o'clock on Saturday evening, Feb. 11, there was a sudden and severe frost which froze the pool; and (5) the skidding of Bamford's car on the ice thus formed was the immediate cause of the accident.

The learned judge held that there was no want of care on the part of Bamford and that the action failed against him. There was no appeal against this conclusion.

With regard to the undertakers the particulars of negligence alleged that they (1) caused and (or) permitted a certain water-main the property of the undertakers to flood the roadway with water in such a manner as to render the roadway dangerous for traffic proceeding thereon; (2) knew or ought to have known that the water-main was leaking and causing water to run over the surface of the roadway and knew or ought to have known that in view of the coldness of the weather the water was likely to freeze and cause a sheet of ice to form in the roadway to the danger of traffic proceeding thereon and failed to take any or any reasonably sufficient steps to prevent this happening and (or) to warn traffic using the roadway of the said danger or otherwise to provide for the safety of persons lawfully using the roadway.

The learned judge held that there was no ground for alleging any negligence or want of care against the undertakers either in the laying of the pipe which burst or in the maintenance of that pipe, and that, therefore, the case made against them under the first head of the particulars failed.

Upon the second head of the particulars the learned judge held that it was incumbent upon the undertakers to take all reasonable steps to inform themselves of bursts in the pipes of their system and to effect prompt repairs and that they had failed to discharge that duty in the present case and were liable to the plaintiff for the result of their negligence.

By consent an order was made for payment by the undertakers to the plaintiff in lieu of a lump sum for damages of the sum of £2 10s. per week during her widowhood.

On appeal by the undertakers the Court of Appeal by a majority (Scrutton, L.J., dissenting) affirmed the learned judge. Scrutton, L.J., took the view that what occurred was due to a failure of the undertakers' precautions or sources of warning, and was not a failure due to negligence.

It is not disputed that the undertakers have a duty to take all reasonable precautions to secure that leaks in their system should be brought to their knowledge and repaired with promptitude. The question is whether they failed in that duty in the present case.

The undertakers' area of supply extends considerably beyond the boundaries of the city of Manchester and into districts in which the highways, the police and transport undertakings such as tramways are under the control of other bodies. The area of supply is 130 square miles in extent. It contains 1,250 miles of mains and 200 miles of lead service pipes. There are said to be an average of about fifty bursts a week.

Now what is it that the undertakers did to secure that in districts outside the city bursts in their pipes should be promptly made known to them? They had certain periodical examinations and tests made at the various stopcocks and hydrants, involving a visit to any given spot about once in nine days, but beyond this they did nothing. I adopt the words of Talbot, J. ([1934] 1 K.B. at p. 505):

> ". . . but as to anything more they rely entirely on the chance that some policeman

> or road officer or other servant of another authority, or some householder or other person may give them information." A

This was a system or want of system which the undertakers' own officer, Mr. Dalton, did not apparently regard as satisfactory.

It is said on the undertakers' behalf that the interest of the several authorities outside the city, to see that no damage is done to the roadways within their several districts and that no loss or inconvenience is occasioned to the inhabitants, is so strong as to make it B reasonable on the part of the undertakers to trust to the officials of such authorities to communicate to them news of leakages.

I do not think so. I agree with SLESSER, L.J., that the learned judge was fully entitled to come to the conclusion that these precarious, unreliable and unco-ordinated methods of receiving information did not exonerate the undertakers. C

If the undertakers choose to rely upon the chance of being kept informed by the outside means which I have indicated without taking any precautions on their own part and that chance fails them, they cannot be heard to say that they have discharged their duty.

It is contended, however, that the plaintiff was bound to show what steps the undertakers ought to have taken. I do not agree. It is obvious that there are many things D which might reasonably have been done to secure to the undertakers early notice of any burst. It is, in my opinion, enough for the plaintiff to have shown, as she has shown here, that apart from the routine examinations which I have mentioned the matter was left to chance, and that in the particular case no notice of the burst was given to the undertakers until at least three days after the burst happened.

I think that upon the material before him the trial judge was fully entitled to reach E the conclusion he did. In my opinion his conclusion was the right one, and this appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard, & Co.*, for *F. E. Warbreck Howell*, Town Clerk, Manchester; *Sydney G. Carnt*, for *Flint & Holmes*, Salford.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*] F

SIMPSON (INSPECTOR OF TAXES) *v.* GRANGE TRUST, LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Tomlin, Lord Russell, Lord Macmillan and Lord Wright), February 25, 26, and March 15, 1935]

[Reported [1935] A.C. 422; 104 L.J.K.B. 276; 152 L.T. 517; 51 T.L.R. 320; 79 Sol. Jo. 287; 19 Tax Cas. 231]

Income Tax—Reliefs—Investment company—Restriction of relief—Management expenses—Restriction of relief by reference to tax payable if company charged to tax under Case I of Sched. D—Company not chargeable under Case I of Sched. D—Application of restriction—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 33 (1).

A company carried on the business of an investment trust company, and was not carrying on a trade the profits of which were assessable to tax under Case I of Sched. D to the Income Tax Act, 1918. The receipts of the company's business, being derived from shares and bonds and from interest on State and municipal loans, were taxed by deduction of the income tax from its dividends and interest. The management expenses of the company for the year ended April 5, 1932, amounted to £2,294, and the company claimed repayment under s. 33 (1) of the Act of 1918 of £573 10s., being the tax at 5s. in the pound on £2,294. The inspector of taxes, in reliance on proviso (*a*) to s. 33 (1), objected to the claim for relief on the ground that the amount of tax paid by the company was less than the tax which would have been paid if the profits had been charged under Case I, Sched. D, and that proviso (*a*) to s. 33 (1) applied to all companies seeking relief under that sub-section.

Held: proviso (*a*) to s. 33 (1) applied only where an assessment under Case I of Sched. D, though not in fact made, could properly have been made, and, therefore, since the company was not so assessable, it was not excluded by proviso (*a*) from relief under s. 33 (1).

Notes. The Income Tax Act, 1918, was repealed by the Income Tax Act, 1952, s. 527. See s. 425 of the latter Act, which replaced s. 33 (1)–(3) of the Act of 1918.

As to restriction of relief in respect of expenses of management, see 20 HALSBURY'S LAWS (3rd Edn.) 475, para. 903; and for cases on the subject, see DIGEST SUPP., tit. Income Tax.

Cases referred to:

(1) *The Rosyth Building and Estates Co., Ltd.* v. *Rogers* (1921), 8 Tax Cas. 11.

(2) *Fry* v. *Salisbury House Estates, Ltd.*, [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 46 T.L.R. 336, 358; 74 Sol. Jo. 232; 15 Tax Cas. 266, H.L.; Digest Supp.

(3) *Ormond Investment Co.* v. *Betts*, [1928] A.C. 143; 97 L.J.K.B. 342; 138 L.T. 600; 13 Tax Cas. 400, H.L.; Digest Supp.

(4) *Liverpool and London and Globe Insurance Co.* v. *Bennett*, [1913] A.C. 610; 82 L.J.K.B. 1221; 109 L.T. 483; 29 T.L.R. 757; 57 Sol. Jo. 739; 20 Mans. 295; 6 Tax Cas. 327, H.L.; 28 Digest 60, *304*.

Appeal by the Crown from the decision of the Court of Appeal (LORD HANWORTH, M.R., SLESSER and ROMER, L.JJ.) on a Case Stated under the Income Tax Act, 1918, s. 33 (2), and s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The Case stated as follows:

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on Dec. 15, 1932, they heard the claim of the Grange Trust, Ltd., hereinafter called "the company," for relief under s. 33 of the Income Tax Act, 1918, for the year 1931–32, in respect of its expenses of management.

2. The company's claim for relief under s. 33 had been objected to by the inspector of taxes on the ground that proviso (*a*) of s. 33 (1), applied to this claim, and that as a result no relief was due.

The relevant provisions of s. 33 (1) are as follows:

> "(1) Where an assurance company carrying on life assurance business, or any company whose business consists mainly in the making of investments and the principal part of whose income is derived therefrom or any savings bank or other bank for savings, claims and proves to the satisfaction of the Special Commissioners that for any year of assessment it has been charged to tax by deduction or otherwise and has not been charged in respect of its profits in accordance with the rules applicable to Case I of Sched. D, the company or bank shall be entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year: Provided that (*a*) relief shall not be given under this section so as to make the tax paid by the company or bank less than the tax which would have been paid if the profits had been charged in accordance with the said rules."

3. The company, which was incorporated in 1926, carried on the business of an investment trust company. It was admitted by the inspector of taxes that the company was not carrying on a trade, the profits of which were assessable under Case I of Sched. D.

4. The company's year of account ends on May 31. The management expenses of the company for the year ended April 5, 1932, arrived at by aggregating one-sixth of the expenses for the year ended May 31, 1931, and five-sixths of the expenses for the year ended May 31, 1932, amounted to £2,294, and the company's claim was for repayment of the sum of £573 10s., being the tax at 5s. in the £, on £2,294.

5. The receipts of the company were derived from shares and bonds of English and foreign companies, and from interest on State and municipal loans. Nearly the whole of the receipts were taxed by deduction. The greater part of such receipts fell within the charge under Sched. D, but about fifteen per cent. fell under Sched. C.

6. If the company's profits had been charged in accordance with the rules applicable to Case I of Sched. D, on the basis of no tax having been deducted at the source, the amount of the tax which would have been paid for the year 1931–32, based on the profits for the company's year ended on May 31, 1930, would have been tax on a sum of £48,048. The amount of tax actually paid by the company (by deduction and by direct assessment) for the year ended April 5, 1932, computed by taking one-sixth of the tax so paid for the year ended May 31, 1931, and five-sixths of the tax so paid for the year ended April 5, 1932, amounted to tax on a sum of £42,159.

7. The inspector of taxes had objected to the claim on the ground that the amount of tax paid by the company was less than the tax which would have been paid if the profits had been charged in accordance with the rules applicable to Case I of Sched. D.

8. It was contended on behalf of the company:

(1) That under the decision in the case of *The Rosyth Building and Estates Co., Ltd.* v. *Rogers* (1), proviso (*a*) of s. 33 (1), could only be applied to the claim of a company, the profits of which the Crown was entitled to charge under Case I of Sched. D;

(2) That this company was admittedly not chargeable under Case I of Sched. D;

(3) That proviso (*a*) did not apply to the claim of the company;

(4) That even if proviso (*a*) applied, the hypothetical assessment ought to be based on the company's profits for the year to May 31, 1931, corresponding to the income tax year 1931–32, and not on its profits for the year to May 31, 1930, corresponding to the income tax year 1930–31;

(5) That in the alternative if proviso (*a*) did apply, the only profits of the company which would be chargeable in accordance with the rules of Case I of Sched. D, were the profits which were not chargeable under any other schedule, and had not been already charged by deduction; and

(6) That the claim should be allowed.

9. It was contended on behalf of the inspector of taxes:

(1) (a) That on a true construction of s. 33 (1), proviso (*a*) applied to all companies and banks which claimed repayment under its provisions, whether the profits of such companies or banks were assessable to tax under Case I or otherwise;

(b) That accordingly the said proviso applied to the present claim;

(2) That the tax which would have been paid if the profits had been charged in accordance with the said rules (i.e., the rules applicable to Case I of Sched. D) was tax on the profits of the company for the year ended May 31, 1930, in accordance with the Income Tax Act, 1918, Sched. D, rule applicable to Case I and the Finance Act, 1926, ss. 29 and 34;

(3) (a) That such last-mentioned amount of tax was tax on a sum of £48,048, arrived at as set out in para. 6 above;

(b) That accordingly as the tax which had been paid by the company (i.e., tax on £42,159—see para. 6 above) was less than the tax on £48,048, no relief was due to the company;

(4) Alternatively to (3) above that if in calculating the amount of "tax which would have been paid if the profits had been charged in accordance with the said rules"—for whatever year such tax had to be calculated—the profits of the company were to be arrived at by excluding from the computation receipts taxed by deduction, "the tax which would have been paid" by the company would be the tax on the profits as so computed together with the tax deducted from its interest and dividends, and that the aggregate of these amounts would be greater than the tax actually paid by the company for the year 1931–32; and

(5) That the claim should be refused.

10. Having considered the arguments the commissioners gave the following decision:

> "(1) The view held by the Court of Session in the case of *The Rosyth Building and Estates Co., Ltd.* v. *Rogers* (1) that in order that proviso (*a*) of s. 33 (1) of the Income Tax Act, 1918, may operate the company must be capable of assessment under Case I of Sched. D, was left untouched by the observations made on that case in the case of *Fry* v. *Salisbury House Estates, Ltd.* (2).
>
> "The company is admittedly not assessable under Case I of Sched. D, and consequently, following the view of the court in the *Rosyth Case* (1), we hold that the proviso cannot be applied in this case.
>
> "We accordingly allow the claim in principle.
>
> "(2) If we are wrong in this opinion, and what is required by the proviso is a notional assessment under Case I of Sched. D, whether the company is capable of assessment under that case or not, we hold that that notional assessment must include the whole profits of the company irrespective of the schedule under which they are actually taxed, and must be computed on the previous year's profits in the manner laid down in the rules of Case I.
>
> "Even if this is not so, the 'tax which would have been paid' by the company includes in our opinion not only the tax which would have been paid under the notional Case I assessment but also that paid by the company by deduction or under the other cases or schedules."

11. The commissioners requested that if they were wrong on both (1) and (2) above the case be remitted to them for consideration of the figures in accordance with the judgment of the court.

12. The appellant, the inspector of taxes, immediately after the determination of the appeal, declared to the commissioners his dissatisfaction therewith as being erroneous in point of law, and in due course required them to state a case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 33 (2), and s. 149.

The Court of Appeal held, affirming the decision of FINLAY, J., that, this company not carrying on a trade and having nearly all its income taxed by deduction, there would be great difficulty in applying the rules to Case I in such a case, and, further, to do as the Crown suggested would be to do what the House of Lords in *Ormond Investment Co.* v. *Betts* (3) had said ought not to be done.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *R. P. Hills* for the appellant, the inspector of taxes.

Latter, K.C., and *J. H. Stamp* for the respondent, the company.

The House took time for consideration.

March 15. **LORD ATKIN.**—I have had the opportunity of reading the opinion which is about to be delivered by my noble and learned friend LORD WRIGHT, and I entirely agree with it and have nothing to add.

I am asked to say that my noble and learned friend, **Lord Tomlin**, also agrees with it.

LORD RUSSELL.—I find myself in the same position and have nothing to add to the opinion about to be read by my noble and learned friend, LORD WRIGHT.

LORD MACMILLAN.—I also agree.

LORD WRIGHT.—The question in this appeal is whether the respondent, which for purposes of this case is admitted (whether rightly or not need not be here considered) to be a non-trading company, is excluded by proviso (*a*) to s. 33 (1) of the Income Tax Act, 1918, from the relief in respect of management expenses to which under s. 33 (1), they are primâ facie entitled; or to state the question in another form, whether proviso (*a*) applies to non-trading companies.

It may be convenient to set out the material parts of s. 33 (1), which are as follows:

> "Where an assurance company carrying on life assurance business, or any company whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom, or any savings bank or other bank for savings, claims and proves to the satisfaction of the Special Commissioners that, for any year of assessment, it has been charged to tax by deduction or otherwise, and has not been charged in respect of its profits in accordance with the rules applicable to Case I of Schedule D, the company or bank shall be entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year: Provided that: (*a*) relief shall not be given under this section so as to make the tax paid by the company or bank less than the tax which would have been paid if the profits had been charged in accordance with the said rules; and (*b*) the amount of any fines, fees, or profits arising from reversions in the case of an assurance company, and, in the case of any other company or any such bank, the amount of any income or profits derived from sources not charged to tax, shall be deducted from the amount treated as expenses of management for the year."

The section reproduced s. 14 (1) of the Finance Act, 1915, which first gave relief in such cases. An ordinary trading company assessed on the balance of its profits and gains for the year under Sched. D, Case I, is entitled in order to arrive at the balance to an allowance for outlays incurred for the purpose of earning its profits: the companies or concerns enumerated in s. 33 (1), whose income is in the main taxed by deduction, would be placed at a disadvantage if no allowance was made to them for management expenses.

The respondent is a limited company incorporated in 1926; it is conceded for purposes of this case that it has been at all material times a company within the description in s. 33 (1), as being a company "whose business consists mainly in the making of investments and the principal part of whose income is obtained therefrom." Its income has been almost entirely derived from shares and bonds of English and foreign companies and from interest on State and municipal loans, and nearly the whole of these receipts have been taxed by deduction. The greater part of these receipts from investments have been chargeable under Sched. D, but about fifteen per cent. have been chargeable under Sched. C. During the material period the respondent has not been charged under Case I of Sched. D, and it is conceded for the purposes of this case that it is not chargeable under that case.

The fiscal year in respect of which relief is claimed is 1931–32; the respondent's net income during that fiscal year amounted to £42,159; the actual receipts were almost entirely derived from the sources enumerated above, but there were in addition some other small items, namely, bank interest amounting to £20 in all, separately assessed under Case III of Sched. D, and certain underwriting commissions amounting to £200, which sum was assessed under Case VI of Sched. D. The actual receipts from investments for the fiscal year, all of which were taxed at the source, came to £45,356, but from the sum of these and the other receipts there was deducted interest paid to the bank amounting to £3,417, giving £42,159 as the net figure of income.

The respondent's expenses of management for the same period came to £2,294. The respondent accordingly claimed under the section repayment of £573 10s. as being the tax on £2,294 at 5s. in the £ of these expenses.

The appellant resisted this claim on the ground that it was barred by proviso (*a*). The respondent's taxed income for the previous fiscal year 1930–31 had amounted to £48,048; it has been found by the commissioners that if the respondent's profits for 1931–32 had been assessed as profits of a trade under Sched. D, Case I, on the basis of no tax having been deducted at the source, the amount of tax which would have been paid for that year (which would have been, so it is said, assessed under the rules of Case I, as amended by s. 29 of the Finance Act, 1926, on the profits of the preceding year) would have been a tax on £48,048, whereas the actual tax paid was tax on £42,159 only. Hence, it was said, proviso (*a*) came into force so that no relief could be granted, because the tax that was paid was less than the tax which would have been paid under the Rules of Case I. Such was the argument.

In the case of a trading company which comes within the terms of s. 33 (1), the Crown has an option where more than one case of Sched. D is applicable, to elect to tax under the case which is most advantageous to it, though the Crown cannot elect as between different schedules (*Fry* v. *Salisbury House Estates, Ltd.* (2)). An illustration of the Crown's right to elect between cases of Sched. D is furnished by *Liverpool and London and Globe Insurance Co.* v. *Bennett* (4), where it was held by this House that in regard to an assurance company the Crown could elect to tax under Sched. D, Case I, interest collected abroad, even though not received in this country; the company was a trader and the interest on its invested funds was a part of the profits of its business because these investments were made in the ordinary course of its business as an insurance company and for the purpose of that business. In such a case the company might come within s. 33 (1), provided that it had not in fact been taxed in respect of any of its profits in that year under the rules of Case I, and hence in proper cases proviso (*a*) would apply to it. Even in a case where the profits of the company had been in fact charged under some other case of Sched. D, yet as the particular profits might have been assessed under Case I, it would in these conditions be easy to calculate what tax it would have paid if it had been charged under the rules of Case I. Such an assessment may be described as a notional assessment.

But a different state of things arises where, as in the present case, the company, though answering one of the descriptions contained in s. 33 (1), is not a trading company. Since it is a non-trading company, the Crown has no option to assess it under Case I or the rules of that case; it can only be taxed normally by deduction in respect of its invested funds under whatever other cases of Sched. D are appropriate, that is Cases III, IV, or V, or under Sched. C; if it has also some other receipts, these will generally be taxed under the relevant cases or schedules. Case I is limited to profits of a trade and the respondent ex hypothesi carries on no trade. Hence it follows that what is called the "notional assessment," if it can be made at all, must be something which not only had not in fact been made but could not ever according to income tax law have been made at all: the respondent could not legally be charged in accordance with the rules of Case I of Sched. D, nor could it ever pay any tax under these rules. Not only has the actual tax paid been outside the rules of Case I, but the Crown has never been entitled to elect to assess under these rules. It would seem, therefore, that while the respondent has a right primâ facie to the benefit of s. 33 (1), that right is not affected by proviso (*a*), which by its very terms can only be applied to a case in which, if the Crown had so elected, tax could have been paid and charged under the rules of Case I. In my opinion proviso (*a*) in its true construction is restricted to cases where tax would have been paid in fact under a legal assessment. The postulated assessment is one which is not only notional as regards the fact, but as to the legal possibility.

The appellant contends for a different construction: he contends that proviso (*a*) on its true construction requires a "notional assessment" even though the income is not taxable under Case I, an assessment in which all the receipts are deemed to be A profits of a trade and the balance is to be arrived at by some computation of allowances corresponding as far as possible to the allowances under the rules applicable to Case I of Sched. D. But I do not think the words of proviso (*a*) are susceptible of such a construction. The word "profits" in s. 33 (1) clearly means trade "profits" chargeable under Case I, and I think in proviso (*a*) "profits" must have the same meaning. But, furthermore, clear words would, in my opinion, be necessary to justify a fictitious B assessment so arbitrary and so far removed from the provisions of the income tax law. This construction would mean re-writing Case I, so that Case I, which is limited expressly to trades, should be notionally applied to what is not a trade at all; but, even if that were done, it would be impossible to apply in the notional assessment the rules which are applicable to Cases I and II. Thus r. (1) of these rules prescribes that tax shall be charged "without any other deduction than is by this Act allowed." Rule (3) says C that no sums shall be deducted unless for "money wholly or exclusively laid out or expended for the purposes of the trade"; this express limitation to "the trade" is repeated in respect of all the allowances permitted under that rule. I need not give further instances to show that the rules applicable to Case I cannot be applied as they stand to the receipts of non-traders, such as the respondents. But there is nothing in proviso (*a*) to provide that the rules are to be applied with necessary modifications or D that they are to be applied to income to which not only is Case I of Sched. D inapplicable, but as to some parts of which, for instance, that falling within Sched. C, even Sched. D is inapplicable. In the absence of clear and express words to justify the course for which the appellant contends, I think he must fail. It is a recognised rule in the construction of the Income Tax Acts that taxation cannot be imposed by analogy or by implication or by any sort of cy près doctrine; the same rule equally applies to the E construction of a provision like proviso (*a*) which is directed to excluding the enjoyment of a relief from taxation given by the section unless the proviso applies.

In my opinion the construction put forward by the appellant cannot be accepted. It is retorted on his behalf that the respondent's construction involves reading in words which are not there. Thus, it is said, on that construction proviso (*a*) must be read as if its words were "paid if the profits had been (chargeable and) charged." I do not F agree with this argument because I think, as I have already said, that the actual language of the proviso on its true construction can only refer to the case of profits capable of being brought within Case I, but I may observe that the sense which the appellant seeks to impose on the proviso involves a substantial re-writing of its language, somewhat to this effect, "less than the tax which would have been payable if the receipts had been deemed to be profits chargeable under the rules modified so as to apply as far as possible G to such receipts, and had been charged accordingly." I certainly cannot extract any such meaning from the words as they stand. And I cannot help protesting against the idea of a "notional assessment" which not only would confuse Case I with the other cases of Sched. D, but would also overleap the bounds between the different schedules and as in this case confuse Sched. D with Sched. C. Proviso (*a*) on its true construction is, in my opinion, limited to cases where an assessment under Case I of Sched. D, though H not made in fact, could properly have been made under the Income Tax Law. If words have to be read in the proviso (*a*) it is much simpler to read in the word "chargeable" as ROMER, L.J., suggests, than to re-write the proviso as the appellant's construction requires. But for myself, I find the words sufficient as they are.

This conclusion is sufficient to dispose of the appeal, which after all depends simply on the construction of proviso (*a*). I think it unnecessary to discuss some further I matters which were mooted in argument but do not help a decision on the real point.

I should, however, add that the difficulties felt by ROMER, L.J., would, I think, disappear if it were remembered that a company like the respondent whose business is mainly in the making of investments, may have some sources of income taxable by direct assessment, for instance, under Sched. A or Sched. B, or under Case VI of Sched. D: these pieces of income would be subject to appropriate taxation, like the bank interest and underwriting profits received by the respondent. And if it had trading profits in respect of which it was actually taxed under Case I of Sched. D, s. 33 (1) would by its very terms not apply at all. It is clear that a concern may be taxed in respect of different parts of its income under different schedules of cases (see, for instance, *Fry* v. *Salisbury House Estates, Ltd.* (2)).

It is not necessary to refer to *Rosyth Building and Estates Co., Ltd.* v. *Rogers* (1), which cannot be regarded as law in view of what was said in *Fry* v. *Salisbury House Estates, Ltd.* (2), even though the observation of LORD SKERRINGTON in reference to proviso (*a*) is, abstracted from its application in that case, correct.

In my opinion the conclusions of the commissioners, of FINLAY, J., and of the Court of Appeal were right.

I think the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue*; *Clifford-Turner, Hopton, & Lawrence.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re HEATH. PUBLIC TRUSTEE *v.* HEATH

[CHANCERY DIVISION (Farwell, J.), October 15, 1935]

[Reported [1936] Ch. 259; 105 L.J.Ch. 29; 154 L.T. 536; 52 T.L.R. 54]

Will—Vesting—Gift to A. of personalty if she should survive testator and attain age of twenty-one years or marry—Gift over to B. if A. predeceased testator or died under twenty-one unmarried—Death of testator while A. under twenty-one and unmarried.

A testator gave £5,000 to A. if she should survive him and his wife and should attain the age of twenty-one years or marry under that age, and directed that, if A. should not survive him or should survive him and not attain the age of twenty-one years or should not marry under that age, the legacy was to go to B. A. survived the testator and his wife, but had not reached the age of twenty-one years and was unmarried.

Held: the rule in *Phipps* v. *Ackers* (1) (1842), 9 Cl. & Fin. 583, applied to a gift of pure personalty, and, therefore, the gift to A. was, not a contingent gift, but a vested gift, liable to be divested in the events stated in the gift.

Notes. As to effect of a gift over on vesting, see 34 HALSBURY'S LAWS (2nd Edn.) 380 et seq., and for cases, see 44 DIGEST 1031 et seq.

Cases referred to:

(1) *Phipps* v. *Ackers* (1842), 9 Cl. & Fin. 583, H.L.

(2) *Edwards* v. *Hammond* (1864), 3 Lev. 132; 1 Bos. & P. 324, n.; 83 E.R. 614; sub nom. *Stocker* v. *Edwards*, 2 Show. 398; 44 Digest 1037, *8950.*

(3) *Bull* v. *Pritchard* (1847), 5 Hare, 567; 16 L.J.Ch. 185; 8 L.O.T.S. 337; 11 Jur. 34; 67 E.R. 1036; 44 Digest 1044, *8998.*

(4) *Whitter* v. *Bremridge* (1866), L.R. 2 Eq. 736; 35 L.J.Ch. 807; 14 W.R. 912; 44 Digest 1103, *9530.*

(5) *Finch* v. *Lane* (1870), L.R. 10 Eq. 501; 44 Digest 1051, *9037.*

(6) *Re Francis, Francis* v. *Francis*, [1905] 2 Ch. 295; 74 L.J.Ch. 487; 93 L.T. 132; 53 W.R. 571; 49 Sol. Jo. 536; 44 Digest 1040, *8969.*

Adjourned Summons.

By his will made on Feb. 8, 1929, the testator provided that:

"From and after the death of the survivor of me and my wife, I direct my trustees to raise out of the residuary trust funds and pay the following sums free of duty:

> "The sum of £5,000 to my granddaughter, Elizabeth Lorna Heath if she shall be living at the date of the death of the survivor of myself and my wife and shall attain the age of twenty-one years or marry under that age. In case the said Elizabeth Lorna Heath shall predecease me or shall survive me, but shall not attain the age of twenty-one years or marry under that age, then . . . I give the said legacy of £5,000 to Lorna Keell Baynes."

The testator died on July 4, 1934, his wife having died before that date. The defendant, Elizabeth Lorna Heath, was then a spinster of the age of nineteen years. She did not stand in loco parentis to the testator.

By this summons the court was asked the question whether the gift of £5,000 to Miss Heath was a contingent legacy or a vested legacy subject to be divested in the event of her dying under the age of twenty-one years unmarried.

A. P. Vanneck for the plaintiff, the trustee of the will.
H. A. Rose for E. L. Heath.
J. F. Bowyer and *H. S. G. Buckmaster* for other persons interested.

FARWELL, J.—The question that is raised on this summons is whether the legacy of £5,000 given to the granddaughter, Elizabeth Lorna Heath, is a vested gift liable to be divested in certain events or whether it is a contingent legacy. The question is one of some importance in this case, because, if the legacy of £5,000 is vested, the income derived from it will be applicable for the maintenance of the granddaughter until she attains the age of twenty-one years. On the other hand, if the legacy is a contingent legacy, then the income will not be so applicable. It is, therefore, of importance for the parties to know which is the true construction of this gift.

Apart altogether from authority I think that anyone looking at the terms of the gift itself would not hesitate long before they said that it was a contingent gift; it looks from the language used as though that was what the testator intended and that it ought to be so construed. It is said, however, that that is not the true construction, because there is a primâ facie rule, which ought to be applied in a case of this kind, namely, that a gift in these or similar terms, where there is a gift over to a particular person, is a vested and not a contingent gift. The rule is frequently referred to as the rule in *Phipps* v. *Ackers* (1), because it was so decided in that case, which was a decision of the House of Lords. The question there concerned a devise of realty. The rule is stated in Mr. Hawkin's book (3rd Edn.), p. 286. It is mentioned under the heading of *Edwards* v. *Hammond* (2), which was an earlier case than *Phipps* v. *Ackers* (1), but was one of the cases cited and approved by the House of Lords in *Phipps* v. *Ackers* (1). The rule is stated in this way:

> "If real estate be devised to A., 'if' or 'when' he shall attain a given age, with a limitation over in the event of his dying under that age, the attainment of the given age is held to be a condition subsequent and not precedent, and A. takes an immediate vested estate, subject to be divested upon his death under the specified age. And if the devise be to A. if or when he shall attain a given age, with a limitation over upon his death under that age without issue, A. takes a vested estate, defeasible only in the event of his death without issue under the specified age."

The rule is stated in Mr. Jarman's book (7th Edn.), p. 1350, in very much the same terms: "The construction also obtains" (that is, the construction which the House of Lords put upon the devise in *Phipps* v. *Ackers* (1)) "where the lands are devised to trustees, upon trust to convey to limitations of the nature of those under consideration." Then he cites *Phipps* v. *Ackers* (1) and says:

> "This decision is generally treated as the leading case on the question; the principle on which it was decided is, that the gift over in the event of the devisee dying under twenty-one shows the meaning of the testator to have been, that the first devisee should take whatever interest the party claiming under the gift over is not entitled to, which gives the first devisee the immediate interest, subject only to the chance of its being divested on a future contingency."

MR. HAWKINS, in the first edition of his book, p. 241, stated the principle in this way:

> "Where the devise is to a party at a given age, and the property is given over if the devisee dies under that age, . . . the court has discovered an intention expressed in the will, that the first devisee shall take all that the testator has to give, except what he has given to the devisee over; and in order to give effect to that intention, has held by force of the language of the will, that the first devise was not contingent, but vested, subject to be divested upon the happening of the event upon which the property was given over."

This passage appears to be a quotation from the judgment of WIGRAM, V.-C., in *Bull* v. *Pritchard* (3).

If that be the true ratio decidendi of this rule of construction in the case of a devise of real estate it appears to me it must apply notwithstanding that there may be more than one contingency, that is to say, supposing in this case there had been a devise of real estate, this rule would have applied although the gift over was to take effect in either of the two events, i.e., the devisee predeceasing the testator or surviving the testator and not attaining the age of twenty-one years or marrying under that age. In my judgment, apart from anything else in the will, had this been a case of a devise of real estate the rule to which I have referred as the rule in *Phipps* v. *Ackers* (1) would have applied.

Further, it appears from the cases which have been cited that the rule is applicable in a case where the gift is a gift of both personalty and realty. It was so decided in *Whitter* v. *Bremridge* (4), where reading the headnote there was a

> "Gift of residuary real and personal estate upon trust to sell and invest, and pay 'the said property and interest arising therefrom to A., on his attaining the age of twenty-four years; but in case of his not attaining that age or leaving male issue, I give, devise, and bequeath the said properties' to other persons:—Held, that A. took an absolute vested interest in the testator's residuary estate liable to be divested in the events mentioned in the will."

PAGE WOOD, V.-C., dealing with that case in his judgment, begins by saying: "The case follows *Phipps* v. *Ackers*" (1). So it is quite plain the learned Vice-Chancellor took the view that the rule of construction to be found in *Phipps* v. *Ackers* (1) applied, although the subject-matter of the gift was not confined to realty, that is to say, it was applicable to a case where both real and personal estate were the subject-matter of the gift.

There is another decision to the same effect, *Finch* v. *Lane* (5), where LORD ROMILLY, dealing with the case of real and personal estate, used the same words (L.R. 10 Eq. at p. 503): "The case is governed by *Phipps* v. *Ackers*" (1). I think it is reasonably plain that the rule of construction is one which is not confined to a devise of realty, but is applicable where the gift is a mixed gift of realty and personalty. So far as the industry of counsel has been able to discover there is no case in which it has been definitely held that this rule applies in the case of personalty alone, although there is some indication that the rule does so apply to be found in *Re Francis, Francis* v. *Francis* (6). When one looks at the ratio decidendi of the rule in *Phipps* v. *Ackers* (1), as stated both by MR. JARMAN and by MR. HAWKINS—and the learned text writers in both those cases in my judgment rightly interpreted that decision—when one looks at the ratio decidendi it is difficult to see why it should not apply to a case of personal estate. That view is greatly strengthened when one finds two learned judges having, apparently, no doubt whatever that the rule is applicable in a case where there is a gift, not only of realty but also of personalty.

I confess I am unable to find any logical reason for saying that the rule applies to a gift of realty and to a gift of mixed realty and personalty, but not to a gift of pure personalty. No doubt, in some respects different considerations apply to devises of real estate and gifts of pure personalty, but in a case of this kind there does not appear to be the smallest reason for saying that the rule in *Phipps* v. *Ackers* (1) does not equally apply in both cases. In my judgment, it is impossible not to come to the conclusion that that rule, applicable as it undoubtedly is to realty, applicable as it undoubtedly is to a mixed gift of realty and personalty, is also applicable to a gift of personal estate. But there is this to be remembered, the rule in *Phipps* v. *Ackers* (1) is a rule of construction only, and, therefore, a rule which, whether the gift be of real estate or of real and personal estate, may be excluded if it appears from the will itself that the primâ facie rule of construction was not intended to apply. One has, therefore, to look at the will as a whole in each case to see whether there is anything which excludes what otherwise is the primâ facie rule of construction. Looking at the gift in this case it seems to me that the rule in *Phipps* v. *Ackers* (1) does apply, and that, accordingly, this gift is vested and not contingent. In the absence of a gift over this would be a contingent gift, because the whole basis of the decision in *Phipps* v. *Ackers* (1) rests upon the fact that there is a gift over, but there being a gift over in this case, the rule is applicable unless there is anything in the other parts of the will to exclude it.

I have looked carefully at the various provisions in the will to which my attention has been directed and I am unable to satisfy myself that there is anything in those provisions which excludes the application of the primâ facie rule in this case. According, in my judgment, the gift in this case of the £5,000 to Elizabeth Lorna Heath is a vested gift, liable to be divested in the events stated in that gift.

Solicitors for all parties: *Biddle, Thorne, Welsford, & Gait.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

R. *v.* SANDBACH. Ex Parte WILLIAMS

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Humphreys, JJ.), April 8, 1935]

[Reported [1935] 2 K.B. 192; 104 L.J.K.B. 420; 153 L.T. 63; 99 J.P. 251; 51 T.L.R. 430; 79 Sol. Jo. 343; 33 L.G.R. 268; 30 Cox, C.C. 226]

Magistrates—Recognisances—Obstruction of police—No apprehension of violence—Prevention of Crimes Act, 1871 (34 *&* 35 *Vict., c.* 112), *s.* 12*—Prevention of Crimes Amendment Act,* 1885 (48 *&* 49 *Vict., c.* 75), *s.* 2.

A defendant was convicted by a metropolitan police magistrate of obstructing a police constable in the execution of his duty. He had been on seven previous occasions convicted of similar offences, and the magistrate ordered him to enter into a recognisance for good behaviour in the sum of £20, with two sureties of £10 each, or in default to undergo two months' imprisonment. The maximum penalty for the offence of obstructing a police constable in the execution of his duty, under s. 12 of the Prevention of Crimes Act, 1871, as extended by the Prevention of Crimes Amendment Act, 1885, is £5.

Held: there was an apprehension that the defendant might do something against the law, and, therefore, the magistrate had power to order him to enter into a recognisance, although there was no apprehension of violence towards any person, and although the defendant, in the event of a breach of the recognisance, might become liable to a penalty greater than the maximum penalty allowed by the statute under which the conviction took place.

Lansbury v. *Riley* (1), [1914] 3 K.B. 229, followed.

Notes. As to orders for recognisances, see 21 HALSBURY'S LAWS (2nd Edn.) 633 et seq., and for cases, see 33 DIGEST 365 et seq. For the Prevention of Crimes Acts, see 5 HALSBURY'S STATUTES (2nd Edn.) 898 et seq., 33 ibid., 34.

Case referred to:

(1) *Lansbury* v. *Riley*, [1914] 3 K.B. 229; 83 L.J.K.B. 1226; 109 L.T. 546; 77 J.P. 440; 29 T.L.R. 733; 23 Cox, C.C. 582, D.C.; 14 Digest (Repl.) 570, *5702*.

Rule nisi for certiorari.

One Williams was charged before Mr. Sandbach, a metropolitan police magistrate, with obstructing a police constable in the execution of his duty, contrary to s. 12 of the Prevention of Crimes Act, 1871, as extended by s. 2 of the Prevention of Crimes Act, 1885. It was alleged that Williams had given warning to a street bookmaker and thereby enabled him to evade arrest. The magistrate convicted Williams, who had been previously convicted on seven occasions of similar offences, and ordered him to enter into a recognisance for good behaviour in the sum of £20, with two sureties of £10 each, or in default to be imprisoned for two months.

At the instance of Williams a rule nisi for certiorari was granted, calling on the magistrate to show cause why the above order should not be removed into the High Court in order that it might be quashed. The grounds urged in support of the rule were (i) that the magistrate had no jurisdiction to make the order because there was no allegation or evidence of any actual or apprehended breach of the peace by the applicant or any other person as a result of any conduct of the applicant; and (ii) that the magistrate had no jurisdiction to make the order because it in effect imposed on the applicant a penalty different from and possibly more severe than the maximum which could be imposed for the offence of which he was actually convicted, namely, a fine of £5.

Montgomery, K.C., and *G. G. Raphael* showing cause.

Comyns Carr, K.C., and *Derek Curtis Bennett* in support of the rule.

LORD HEWART, C.J.—I am clearly of the opinion that this rule ought to be discharged. There is no need to reiterate the facts which have been put before the court. This case is covered in all material respects by *Lansbury* v. *Riley* (1), and especially by the judgment of AVORY, J., in that case. Counsel, who argued in support of the rule, asks: If this action by a magistrate be permissible, in what way can the power be limited? The answer I give is that the matter is discretionary and the limits are to be found in discretion. We should assume that judicial powers, when given, will in all cases be exercised properly, as they have been in this case.

AVORY, J.—I am of the same opinion, and in view of the judgment of LORD HEWART, C.J., I do not think it right to add anything to what I am reported to have said in *Lansbury* v. *Riley* (1). In view, however, of the argument of counsel supporting the rule, which, undoubtedly, at first sight is impressive, namely, that the effect of what was done in this case is to increase the penalty which has been fixed by statute for a particular offence, I must say that I am not prepared to assent to his proposition that there can be no binding over of a person to be of good behaviour unless he has done something which tends to a breach of the peace in the sense of something which is calculated to lead to violence, that is, to personal violence. In my view, the phrase, "calculated to lead to a breach of the peace," is far more extensive in its meaning than counsel has suggested. If further authority is wanted, I think a passage from BLACKSTONE, vol. 4, c. xviii, p. 251, shows that the scope of this remedy is what is called "preventive" justice. This passage reads:

> "This preventive justice consists in obliging those persons, whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public that such offence as is apprehended shall not happen: by finding pledges or securities for keeping the peace, or for their good behaviour."

With that addition I content myself with saying that I am in agreement with the judgment delivered by LORD HEWART, C.J.

HUMPHREYS, J.—I also agree. Counsel appearing to support the rule has argued that the power of a magistrate to order a person to enter into recognisances and to find sureties to be of good behaviour is confined to cases where there is apprehension of a breach of the peace in the sense of violence towards some person. In my view, it is quite impossible to accept that argument without refusing to agree with a very important chapter in Blackstone. Avory, J., has referred to some words used by that great author. I only desire to read a few more words. After dealing with such matters as the nature of this security, how it may be demanded and how it may be discharged, and when it is grantable, the learned author says (vol. 4, c. xviii, p. 255):

> "The other species of recognisance, with sureties, is for the good abearance, or good behaviour. This includes security for the peace, and somewhat more; we will therefore examine it in the same manner as the other. First, then, the justices are empowered by the statute 34 Edw. 3, c. 1, to bind over to the good behaviour towards the King and his people, all them that be not of good fame, wherever they be found; to the intent that the people be not troubled nor endamaged, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression, that be not of good fame, it is holden that a man may be bound to his good behaviour for causes of scandal, contra bonos mores, as well as contra pacem."

I cannot think that the expressions "against the peace" or "apprehension of a breach of the peace" are confined to a breach or apprehension of a breach of that part of the law which provides that persons shall not commit assaults, and I think that the distinction which is there drawn by Blackstone is the distinction between such matters as are contrary to morality, "contra bonos mores," and such matters are as contrary to law, "contra pacem." Blackstone says in terms that a magistrate may properly bind over a person in any case where it is apprehended that he will commit a breach of the peace or that he will do something against the law. That, in my judgment, is the law, and it is too late in 1935 to attempt to show that Blackstone was wrong. I, therefore, agree with the judgments delivered by Lord Hewart, C.J., and Avory, J.

Rule discharged.

Solicitors: *Wontner & Sons*; *Lucien Fior.*

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

FLEETWOOD-HESKETH *v.* INLAND REVENUE COMMISSIONERS

[Court of Appeal (Lord Hanworth, M.R., Romer and Maugham, L.JJ.), July 11, 1935]

[Reported [1936] 1 K.B. 351; 105 L.J.K.B. 676; 153 L.T. 409]

Stamp Duty—Agreement for sale of interest in property—Conveyance on sale—Acknowledgment of receipt of purchase price—Signed only by vendor—Stamp Act, 1891 (54 *&* 55 *Vict., c.* 39), *s.* 54, *s.* 59 (1), *Sched. I.*

In 1896, under the will of A. H., Major F. became tenant for life of certain property, his son being tenant in tail. In 1923, by a deed of separation between Major F. and his wife, Major F. became liable to make certain payments to his wife. In 1932 Major F. purchased from his son the son's interest as tenant in tail. The transaction was effected by a disentailing deed entered into between the parties and an oral agreement between Major F. and the son under which the son agreed to sell to his father his reversion for £160,000. The son then executed a document acknowledging the receipt of £160,000, "being the purchase price agreed as part of a family arrangement for my absolute reversion under the will of A. H. dated Aug. 17, 1896, and a disentailing deed dated Dec. 14, 1932 . . . expectant on the life interest of" Major F. "under the said will in the investments and cash mentioned in the schedule hereto."

A **Held:** any memorandum of agreement which contained all the terms agreed between the parties was itself an agreement, and was not less so because it was signed only by the party against whom it could be used; the "acknowledgment" executed by the son was an agreement for the sale of an interest in property within s. 59 (1) of the Stamp Act, 1891; and, therefore, it was chargeable with the same ad valorem duty as if it were an actual conveyance on sale of the son's interest.

B Per **Maugham, L.J.**—The "acknowledgment" was also a "conveyance on sale" within s. 54 of the Act and thus liable to ad valorem duty under Sched. I to the Act.

Notes. As to stamp duty on a conveyance or transfer, see 28 HALSBURY'S LAWS (2nd Edn.) 457–465, and for cases, see 39 DIGEST 278 et seq. For Stamp Act, 1891, see 21 HALSBURY'S STATUTES (2nd Edn.) 610.
C

Cases referred to:

(1) *Horsfall* v. *Hey* (1848), 2 Exch. 778; 17 L.J.Exch. 266; 11 L.T.O.S. 271; 154 E.R. 705; 39 Digest 280, *641*.

(2) *Garnett* v. *Inland Revenue Commissioners* (1899), 81 L.T. 633; 48 W.R. 303, D.C.; 39 Digest 279, *636*.

D (3) *Re Baum, Ex parte Cooper* (1878), 10 Ch.D. 313; 48 L.J.Bcy. 54; 39 L.T. 523; 27 W.R. 299, C.A.; 4 Digest 61, *522*.

(4) *Woodgate* v. *Godfrey* (1879), 5 Exch. D. 24; 49 L.J.Q.B. 1; 42 L.T. 34; 28 W.R. 88, C.A.; 7 Digest 7, *24*.

(5) *Ramsey* v. *Margrett*, [1894] 2 Q.B. 18; 63 L.J.Q.B. 513; 70 L.T. 788; 10 T.L.R. 355; 1 Mans. 184; 9 R. 407, C.A.; 7 Digest 11, *44*.

E (6) *Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454; 74 L.J.K.B. 898; 93 L.T. 495; 21 T.L.R. 710; 11 Com. Cas. 1, H.L.; 8 Digest (Repl.) 573, *230*.

(7) *Knight* v. *Barber* (1846), 16 M. & W. 66; 2 Car. & Kir. 333; 1 New Pract. Cas. 557; 4 Ry. & Can. Cas. 674; 16 L.J.Ex. 18; 8 L.T.O.S. 121; 10 Jur. 929; 153 E.R. 1101; 9 Digest (Repl.) 372, *2390*.

F **Case Stated** by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

1. The opinion of the court is desired upon the stamp duty chargeable upon certain instruments in writing which have been presented to the Commissioners of Inland Revenue pursuant to the provisions of s. 12 of the Stamp Act, 1891, for their opinion upon the amount of the said duty thereon. The instruments presented to the commissioners comprised the following twenty documents:
G

(*a*) (Exhibit 1.) A document (hereinafter called "the acknowledgment") signed by the appellant, Roger Fleetwood Fleetwood-Hesketh (who is hereinafter called "Mr. Roger" and is the eldest son of the other appellant), and dated Dec. 14, 1932, purporting to be an acknowledgment of receipt from the appellant, Charles Hesketh Fleetwood-Hesketh (who is hereinafter called Major Fleetwood-Hesketh), of
H £160,000, being the purchase price agreed as part of a family arrangement for Mr. Roger's absolute reversion under the will of Anna Maria Alice Hesketh deceased and a disentailing deed dated Dec. 14, 1932, and made between Major Fleetwood-Hesketh, of the first part, Mr. Roger, of the second part, and George Cockshott, of the third part, expectant on the life interest of Major Fleetwood-Hesketh under the said will in the investments and cash therein mentioned standing in the joint
I names of the trustees of the said will.

(*b*) (Exhibit 2.) A transfer in common form dated Dec. 23, 1932, by G. E. Gregson, Sir T. A. L. Brocklebank and W. M. Saunders (who are the trustees of the aforesaid will) to Mr. Roger of £9,975 three per cent. debenture stock of the London and North-Eastern Railway Company, being one of the investments standing in the names of the trustees of the said will.

(*c*) Thirteen further transfers, in form similar to the last-mentioned transfer (exhibit 2), and made the same date between the same parties, of the following investments also standing in the names of the trustees of the said will:

£8,550 four per cent. preference stock of the London Midland and Scottish Rail. Co.

£8,550 five per cent. preference stock of the Southern Rail. Co.

£3,135 five per cent. redeemable preference stock 1950, and £5,700 five per cent. consolidated preference stock of the Great Western Rail. Co.

£3,990 five per cent. debenture stock of the Royal Mail Steam Packet Co.

£570 four-and-a-half per cent. debenture stock of the Royal Mail Steam Packet Co.

385 participating preference shares of £7 10s. of the Northern Assurance Co., Ltd.

£7,125 five per cent. cumulative preferred stock of the Peninsula and Oriental Steam Navigation Co.

2,850 six per cent. cumulative preference shares of the North Metropolitan Electric Power Supply Co.

2,850 six per cent. cumulative preference shares of the Shropshire, Worcestershire and Staffordshire Electric Power Co.

£885 four per cent. perpetual debenture stock of the Tottenham and District Gas Co.

1,425 six per cent. cumulative preference shares of the Yorkshire Electric Power Co.

£2,850 five per cent. debenture stock of the Wandsworth, Wimbledon and Epsom District Gas Co.

£4,750 three per cent. consolidated debenture stock of the Gas Light and Coke Co.

(*d*) (Exhibit 3.) A transfer dated Dec. 23, 1932, by the same trustees to Mr. Roger of £7,125 five per cent. registered stock of the Government of Australia, which also formed part of the investments standing in the names of the transferors as such trustees. This stock is one of the colonial stocks to which the Colonial Stock Act, 1877, applies.

(*e*) (Exhibit 4.) A transfer dated Dec. 23, 1932, by the same trustees to Agnes S. Brocklebank and Ralph Assheton of £1,425 five per cent. redeemable stock of the Bristol Corporation standing in the names of the transferors as such trustees.

(*f*) Three further transfers, in form similar to the last-mentioned transfer (Exhibit 4) and made the same date and between the same parties, of the following investments also standing in the names of the said trustees:

£2,850 five per cent. redeemable stock of the Birmingham Corporation.

£3,420 five per cent. redeemable debenture stock of the Manchester Ship Canal Co.

£5,700 five per cent. redeemable debenture stock of the Gas Light and Coke Co.

2. Prior to, or contemporaneously with, the presenting to the commissioners of the instruments aforesaid there were also presented to the commissioners for their opinion upon the stamp duty thereon certain other deeds which explain the transaction or transactions between the parties. They comprise the following:

(Exhibit A.) A disentailing deed dated Dec. 14, 1932, made between Major Fleetwood-Hesketh of the first part, Mr. Roger of the second part and George Cockshott of the third part whereby (i) the real estate remaining unsold subject to the limitations of the will of Anna Maria Alice Hesketh deceased (the greater part thereof having been sold) was conveyed to George Cockshott in fee simple upon such trusts as Major Fleetwood-Hesketh and Mr. Roger should by deed jointly appoint and in default of and subject to such appointment upon the trusts immediately before the execution thereof subsisting namely to the use of Major Fleetwood-Hesketh for life with remainder to the use of Mr. Roger in tail male with remainders over, (ii) Mr. Roger with the consent of Major Fleetwood-Hesketh conveyed and disposed unto George Cockshott all the money and investments and other personal estate subject to the trusts of the said will to hold subject to the life interest of Major Fleetwood-Hesketh under the said will but discharged from the estate or interest in tail male of Mr. Roger under the said will in trust for Mr. Roger absolutely.

(Exhibit B.) A deed of appointment dated Dec. 14, 1932, made between Major Fleetwood-Hesketh of the first part, Mr. Roger of the second part and the trustees of the will of Anna Maria Alice Hesketh deceased of the third part whereby in exercise of the power conferred on them by the disentailing deed Major Fleetwood-Hesketh and Mr. Roger appointed that the trustees should stand possessed of the net purchase money receivable by them in respect of part of the settled land (which had been agreed to be sold by Major Fleetwood-Hesketh as tenant for life) in trust for Major Fleetwood-Hesketh and Mr. Roger in the proportions of forty-seven per cent. and fifty-three per cent.

(Exhibit C.) A deed of variation and release dated Dec. 14, 1932, made between Major Fleetwood-Hesketh of the first part, Mr. Roger of the second part, Anne Dorothea Fleetwood-Hesketh (wife of Major Fleetwood-Hesketh and mother of Mr. Roger) of the third part, and John James Cockshott and John Jasper Brocklebank as trustees of the fourth part. This deed is supplemental to a deed dated Jan. 4, 1923, and made between Major Fleetwood-Hesketh of the first part, Anne Dorothea Fleetwood-Hesketh of the second part and the trustees of the third part, and recites that Major Fleetwood-Hesketh and Mr. Roger had entered into a family arrangement for (among other things) the purchase by Major Fleetwood-Hesketh of the reversionary interest of Mr. Roger in certain investments of large value representing the proceeds of sale of parts of the family settled estates at a price considerably exceeding the actuarial value thereof and on the terms that Mr. Roger should enter into that deed and also a deed of covenant to be executed immediately afterwards and to be made between Mr. Roger of the first part, Anne Dorothea Fleetwood-Hesketh of the second part and Agnes Sylvia Brocklebank and Ralph Assheton of the third part. By this deed Mr. Roger undertook the liability of Major Fleetwood-Hesketh under the principal deed of Jan. 4, 1923, for all payments to be made thereunder to Anne Dorothea Fleetwood-Hesketh other than those mentioned in clause 10 of the principal deed and Major Fleetwood-Hesketh was released from liability in respect of such payments.

(Exhibit D.) A deed of covenant dated Dec. 14, 1932, made between Mr. Roger of the first part, Anne Dorothea Fleetwood-Hesketh (Mrs. Fleetwood-Hesketh) of the second part and Agnes Sylvia Brocklebank and Ralph Assheton (the trustees) of the third part. This is the deed referred to in the last-mentioned deed and executed immediately afterwards. By it Mr. Roger covenanted with Mrs. Fleetwood-Hesketh and with the trustees to pay for Mrs. Fleetwood-Hesketh's benefit certain annual payments (being the payments stipulated for by the last-mentioned deed) and declared that certain investments mentioned in the schedule thereto (which comprised, inter alia, the investments mentioned in para. 1 (*e*) and (*f*) of this case as having been transferred by the trustees of the will of Anna Maria Alice Hesketh to Agnes S. Brocklebank and Ralph Assheton) should be held by Agnes S. Brocklebank and Ralph Assheton as trustees upon trusts to secure such payments.

(Exhibit E.) A deed of release and indemnity dated Dec. 23, 1932, and made between Major Fleetwood-Hesketh of the first part, Mr. Roger of the second part and G. E. Gregson, Sir T. A. L. Brocklebank and W. M. Saunders (trustees of the will of Anna Maria Alice Hesketh) of the third part. This deed, after reciting (inter alia) the will of Anna Maria Alice Hesketh under which her residuary estate was devised to the use of her grandson Major Fleetwood-Hesketh for life with remainder to Mr. Roger in tail male with remainders over, the sale of the greater part of the residuary real estate and investments of the proceeds in the securities mentioned in the third schedule thereto (being the investments mentioned in the schedule to the acknowledgment), and the disentailing deed, contains recitals (27), (28) and (29) as follows:

> "(27) The said Charles Hesketh Fleetwood-Hesketh as part of a family arrangement has purchased at the price of £160,000 from the said Roger Fleetwood-Hesketh the absolute reversion of the said Roger Fleetwood-Hesketh under the

> trusts and provisions of the said will of the testatrix and the said disentailing deed expectant on the death of the said Charles Hesketh Fleetwood-Hesketh the tenant for life under the said will in all and singular the investments and cash mentioned in the Fourth Schedule hereto and such purchase has been duly completed by payment of the said purchase price by the said Charles Hesketh Fleetwood-Hesketh to the said Roger Fleetwood-Hesketh as he hereby acknowledges.
>
> "(28) Since the completion of the last-mentioned purchase the said Roger Fleetwood-Hesketh has for the purpose of investing the said sum of £160,000 paid to him as aforesaid purchased from the said Charles Hesketh Fleetwood-Hesketh at the price of £160,000 the whole beneficial interest of the said Charles Hesketh Fleetwood-Hesketh in the investments and cash mentioned in Part I of the Fourth Schedule hereto and such purchase has been duly completed by payment of the said purchase price by the said Roger Fleetwood-Hesketh to the said Charles Hesketh Fleetwood-Hesketh as he hereby acknowledges.
>
> "(29) The life interest of the said Charles Hesketh Fleetwood-Hesketh in all the investments and cash mentioned in the Fourth Schedule hereto having (as he hereby declares) become merged and extinguished on the acquisition by him as aforesaid of the absolute reversion therein expectant on such life interest the said Roger Fleetwood-Hesketh being entitled as aforesaid to the whole beneficial interest in the investments and cash mentioned in Part I of the said Fourth Schedule has requested the trustees to transfer and pay the same to him and the said Charles Hesketh Fleetwood-Hesketh being entitled as aforesaid to the whole beneficial interest in the investments and cash mentioned in Part II of the same schedule has requested the trustees to transfer and pay the same to him."

The investments mentioned in the fourth schedule to the deed of release and indemnity (Exhibit E) are the same as those mentioned in the third schedule to the same deed. Those mentioned in Part I to the fourth schedule were transferred by the trustees of the will either to Mr. Roger or to Agnes Sylvia Brocklebank and Ralph Assheton (trustees under the deed of covenant dated Dec. 14, 1932, Exhibit D), and the transfers of these investments (except such transfers as are not liable to stamp duty) are the subject of this case. The investments mentioned in Part II to the fourth schedule were transferred by the trustees of the will to Major Fleetwood-Hesketh and the stamp duty on these transfers is not in question.

3. The commissioners were informed that there was no deed or agreement or assignment in existence relating to the acquisition by Major Fleetwood-Hesketh of Mr. Roger's reversion as recited in recital (27) of the last-mentioned deed (Exhibit E) other than those produced. The commissioners were further informed that the £160,000 paid to Mr. Roger for his reversion as recited represented fifty-seven per cent. of the total value of the fund, while the actuarial value of his reversion was fifty-two per cent. thereof, and accordingly that the part of the £160,000 which was in excess of the value of the reversion was five per cent. of the whole fund or about £14,000 which might be taken to be the apportioned consideration for the obligations in favour of his mother undertaken by Mr. Roger.

4. The commissioners were of opinion:

(1) That on the facts brought to their notice there had been two sales, one by Mr. Roger to Major Fleetwood-Hesketh of his reversion, and the other by Major Fleetwood-Hesketh to Mr. Roger of certain investments (namely the investments mentioned in Part I of the fourth schedule to the deed of release and indemnity (Exhibit E)).

(2) That the acknowledgment (Exhibit 1) was liable to ad valorem duty under the head of charge "Conveyance or transfer on sale" in Sched. I to the Stamp Act, 1891, as being either a conveyance on sale of Mr. Roger's reversion in the settled property therein mentioned, or an agreement for sale, liable to ad valorem duty as a conveyance on sale under s. 59 of the same Act, either of an equitable interest in property or of property not falling within any of the exceptions mentioned in sub-s. (1) of that section.

(3) That the apportioned consideration for such sale on which ad valorem duty was payable was £160,000 less £14,000 or £146,000.

(4) That the transfers by the trustees of the will to Mr. Roger or to Agnes Sylvia Brocklebank and Ralph Assheton on his behalf or by his direction were conveyances or transfers on sale and were liable to ad valorem duty accordingly.

5. The commissioners, accordingly, assessed the stamp duties as follows:

(i) On the "acknowledgment" (Exhibit 1) under the head of charge "conveyance or transfer on sale of any property" in Sched. I to the Stamp Act, 1891, and s. 73 of the Finance (1909–10) Act, 1910, and other statutory provisions, namely, ad valorem duty at the rate of 10s. per £50 on the sum of £146,000......... £1,460.

(ii) On the transfers to Mr. Roger (Exhibit 2 and the transfers referred to in paragraph 1 (*c*))—

Stock Transferred.	Consideration.	Duty.
	£	£
£9,975 three per cent. debenture stock of the London and North Eastern Rail. Co.	6,135	61 10 0
£8,550 four per cent. preference stock of the London, Midland and Scottish Rail. Co.	2,693	27 0 0
£8,550 five per cent. preference stock of Southern Rail. Co. ..	6,027	60 10 0
£3,135 redeemable preference stock and £5,700 five per cent. consolidated preference stock of Great Western Rail. Co. ..	6,901	69 10 0
£3,990 five per cent. debenture stock of Royal Mail Steam Packet Co.	598	6 0 0
£570 four-and-a-half per cent. debenture stock of Royal Mail Steam Packet Co.	430	4 10 0
385 participating preference shares of Northern Assurance Co., Ltd.	7,219	72 10 0
£7,125 five per cent. cumulative preferred stock of the Peninsula and Oriental Steam Navigation Co.	5,344	53 10 0
2,850 six per cent. cumulative preference shares of the North Metropolitan Electric Power Supply Co., Ltd.	4,132	41 10 0
2,850 cumulative preference shares of the Shropshire, Worcestershire and Staffordshire Electric Power Co.	3,776	38 0 0
£885 four per cent. perpetual debenture stock of the Tottenham and District Gas Co.	875	9 0 0
1,425 six per cent. cumulative preference shares of the Yorkshire Electric Power Co.	2,066	21 0 0
£2,850 five per cent. debenture stock of Wandsworth, Wimbledon and Epsom District Gas Co.	3,406	34 10 0
£4,750 Gas Light and Coke Co. three per cent. debenture stock ..	3,752	38 0 0

The apportioned consideration in the case of each of these transfers was the proportion of the £160,000 paid by Mr. Roger to Major Fleetwood-Hesketh for the investments which in the opinion of the commissioners were bought by the former.

(iii) On the transfer by the trustees of the will to Mr. Roger of the £7,125 five per cent. registered stock of the government of Australia (Exhibit 3) to which stock the Colonial Stock Act, 1877, applies, ad valorem duty at the rate of 5s. per £100 of the nominal amount of the stock transferred £7,125 under the head of charge "conveyance or transfer on sale or otherwise............................of any colonial stock to which the Colonial Stock Act, 1877, applies" in Sched. I to the Stamp Act, 1891, and s. 36 (2) of the Finance Act, 1920.....................................£18.

(iv) On the transfers to Agnes S. Brocklebank and Ralph Assheton (Exhibit 4 and the transfers referred to in para. 1 (*f*))—

Stock Transferred.	Consideration.	Duty.
	£	£
£1,425 five per cent. redeemable stock of the Bristol Corporation	1,624	16 10 0
£2,850 five per cent. redeemable stock of the Birmingham Corporation	3,220	32 10 0
£3,420 five per cent. redeemable debenture stock of the Manchester Ship Canal Co.	3,437	34 10 0
£5,700 redeemable debenture stock of the Gas Light and Coke Co.	6,526	65 10 0

The apportioned consideration in the case of each of these transfers was the proportion of the £160,000 paid by Mr. Roger to Major Fleetwood-Hesketh for the investments which in the opinion of the commissioners were bought by the former.

6. It was contended by the appellants:

(1) that the "acknowledgment" was neither an agreement for sale, nor a conveyance on sale, nor liable to stamp duty as such, but was a receipt only, liable to stamp duty as such;

(2) that the transfers by the trustees of the will to Mr. Roger or to Agnes S. Brocklebank and Ralph Assheton were not transfers on sale and were liable each to the fixed duty of 10s. under the head of charge "conveyance or transfer of any kind not hereinbefore described in Sched. I to the Stamp Act, 1891," with the exception of the transfer of the £7,125 five per cent. registered stock of the government of Australia, which they contended was liable to the duty at the rate of 2s. 6d. per £100, not 5s. per £100, on £7,125 under Sched. I to the Stamp Act, 1891, as not being a transfer on sale and therefore not a transfer the duty whereon had been doubled by s. 36 (2) of the Finance Act, 1920.

and being dissatisfied with the assessments made and having paid the duty in accordance with the assessments of the commissioners the appellants required the commissioners to sign and state a case. The commissioners signed and stated this case accordingly.

7. The questions for the opinion of the court were—

(1) Whether the "acknowledgment" was liable to ad valorem duty as assessed by the commissioners.

(2) Whether the transfers by the trustees of the will of Anna Maria Alice Hesketh to Mr. Roger or to Agnes S. Brocklebank and Ralph Assheton were liable to duty as assessed by the commissioners.

(3) If not, to what duty was each of the said instruments liable.

Finlay, J., held that the acknowledgment (Exhibit 1) was a conveyance on sale within s. 54 of the Stamp Act, 1891, as being an instrument whereby an interest in property upon the sale thereof was vested in a purchaser, and so, under Sched. I to the Act, was liable to ad valorem stamp duty. The appellant, Roger Fleetwood-Hesketh, appealed.

Gavin Simonds, K.C., and *F. McMullan* for the appellant.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *J. H. Stamp* for the Commissioners of Inland Revenue.

LORD HANWORTH, M.R.—This case raises a difficult point. The facts on which it arises are these. The mother of Mr. Roger Fleetwood Fleetwood-Hesketh died in 1898, and under her will Major Charles became tenant for life of certain property, and he had a son, Roger, who was the tenant in tail. In 1923 a deed of separation was executed between Major Charles and his wife, under which Major Charles became bound to pay to his wife a certain sum year by year. In 1932 an agreement was made between the father, Major Charles, and the son, the tenant in tail, whereby the father purchased all the interest of his son, Roger, as tenant in tail, for a certain sum. The figure was £160,000, but that figure was reached because an undertaking was given by the son to pay the annuity which his father, Major Fleetwood-Hesketh, had undertaken to pay under the deed of separation in 1923. The result of this transaction, therefore, was that the tenant in tail had passed his interest as tenant in tail to his father, who thereupon became tenant in possession absolutely of the property, but meantime the son had undertaken to defray the liability of the father under the disentailing deed, and in respect of the loss of his tenancy in tail and his undertaking to pay the mother's annuity he was paid a sum of £160,000. It was carried out in this way. A disentailing deed was entered into and executed between the father and the son and the trustees on Dec. 14, 1932, a deed which was stamped, as we are told, with merely a 10s. stamp. In order to carry that transaction to completion there had to be paid to the son £160,000, and it was important that the father should be able to hold as a record the receipt signed by the son showing that he had been paid the £160,000. I need not complicate the story by saying that after that had been initially paid there was a purchase by the son of some of the securities which had previously belonged to the trust. It is sufficient for the purpose of this case to take note of the fact that the transaction was carried out by a payment to the son of the £160,000 in return for the interest he had as tenant in tail and the obligation he undertook under the deed of separation of 1923. It is now claimed by the revenue authorities that this receipt (which I will read) ought to be charged to stamp duty ad valorem. This is the document:

> "I, Roger Fleetwood Fleetwood-Hesketh of 1 Wyndham-place in the county of London barrister-at-law hereby acknowledge that I have this 14th day of December, 1932, received from Major Charles Hesketh Fleetwood-Hesketh of Stocken Hall, Stretton, in the county of Rutland, the sum of £160,000, being the purchase price agreed as part of a family arrangement for my absolute reversion under the will of Anna Maria Alice Hesketh deceased dated the 17th day of August, 1896, and a disentailing deed dated the 14th day of December, 1932, and made between the said Charles Hesketh Fleetwood-Hesketh, of the first part, myself of the second part, and George Cockshott, of the third part, expectant on the life interest of the said Charles Hesketh Fleetwood-Hesketh under the said will in the investments and cash mentioned in the schedule hereto standing in the joint names of the trustees of the said will."

It is argued with great force by counsel for the appellant that that receipt has no effect whatever, because, he says, all that was done was under an agreement which was orally made between the father and the son and which, as to the disentailing deed, was put into writing, but as between father and son there was ultimately the transfer of a lot of securities, and this receipt, signed, as it was, by the son only, is in no sense an agreement. The revenue contend that it falls within s. 54 of the Stamp Act, 1891, which provides: "For the purposes of this Act the expression 'conveyance on sale' includes every instrument, and every decree or order of any court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf, or by his direction."

FINLAY, J., came to the conclusion, following two decisions, namely, *Horsfall* v. *Hey* (1) and *Garnett* v. *Inland Revenue Commissioners* (2), that this receipt was a conveyance on sale within the meaning of s. 54. I have some doubt and difficulty in following the reasoning on which that decision is based. I should like rather to withhold my opinion upon the effect of s. 54. In *Garnett* v. *Inland Revenue Commissioners* (2), CHANNELL, J., said (81 L.T. at p. 638):

> "On the whole I think there is not very much doubt about the matter, although it is, perhaps, a little difficult to give the very best possible reasons for the decision which I think must be right."

A If one cannot give reasons, if one cannot explain to oneself how you hold that the document is a conveyance on sale, I have some mistrust whether the document is a conveyance on sale within the meaning of s. 54. Paying all respect to what FINLAY, J., said, I still remain in doubt about it.

Then we turn to s. 59, to which our attention has been more specially directed by counsel for the commissioners. That contains the words:

B

> "Any contract or agreement made . . . for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares, or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold." C

It will be observed that that section imposes liability to tax on something which is less effective than an actual conveyance; there may be a contract or agreement, and liable under s. 59 to pay tax, although it is not an actual conveyance on the sale of the estate. D Comment was made that the receipt in this case is signed by the recipient of the money only and not by the purchaser. To my mind, that is not a difficulty, and, indeed, is of slender, if any, importance. What is required is the signature of the person who is to be charged with the result of the transaction. At any time in the present case the father could add his signature as an unnecessary signature. Just as you have in the case of a lease of a certain kind a signature of the lease by the landlord only, E so here it was unnecessary to have more than one signature which was the effective signature. Is it, on that ground, any the less an agreement? What is meant by "agreement" in s. 59? It has been suggested that because there was an oral agreement antecedent to this, you may, so to speak, put the document in the fire, and you are no worse off. To my mind, that will not do, because I think the parties have, as a F part of their agreement, intended—and carried out their intention—that the agreement should be recorded; and when you say you have got an agreement you mean that you have got the record of two minds which have become united for the purpose of the terms contained in the agreement. It seems to me, therefore, that this document is a document which it was the intention of the parties to bring into being, which it was important —perhaps essential—for the father to hold as a record that the term of the disentailing G assurance had been fulfilled by him, and as connoting that the securities which are mentioned were received by the son. Although that did not amount to an actual conveyance, that document records something which is an agreement because it has reference to an interest in property and the sale of that interest. Having regard to the cases that have been referred to upon the Stamp Act, I have come to the conclusion that s. 59 does apply to this case. I am rather inclined to think that one might be misled H if one turned back to the decisions under the Bills of Sale Act. It is important to bear in mind the observations that were made in respect of this Act—that if you can prove the transaction wholly independent of any document in writing there is nothing required to be registered under the Bills of Sale Act, and if no registration is required you do not invalidate the transaction which stood proprio vigore without any document at all. So far as there is reasoning to be applied to this case, when we go deeper into the cases I I am inclined to think we take ourselves away from the proper consideration of the relevant matters in the present case.

I have come to the conclusion that this receipt is a record, a necessary record, an intended record, of an agreement made between the parties, not less an agreement because it is signed only by the party against whom it can be used, and that it is the record of an agreement which is within the words in s. 59, and, therefore, is liable to stamp duty. It will be noted that my observations are directed to a different section and to different considerations from those which were before FINLAY, J. Without saying any more about that decision I prefer to put my judgment upon the grounds upon which I have put it. The result will be that the appeal must be dismissed with costs.

ROMER, L.J.—The first question argued upon this appeal and the question which was solely considered by FINLAY, J., in the court below, is whether the document with which we have had to deal is, within the meaning of the Stamp Act, a conveyance or transfer on sale or otherwise—it being provided by s. 54:

> "For the purposes of this Act the expression 'conveyance or sale' includes every instrument and every decree or order of any court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction."

It appears to me, therefore, that the question to be decided is whether this document, which is in form a receipt and purports to be nothing more than a receipt, did transfer or vest in the purchaser, the person who paid the purchase money, any interest whatsoever in the property for which the purchase money was paid.

The question whether a particular document does or does not transfer or convey an interest is not to be determined by considering what name the parties themselves have given to the document. A document may be called a receipt and yet it may appear that it is a document by which an interest in certain property has passed; or it may be called a conveyance on sale, a transfer on sale, or whatever the parties may have chosen to call it. Instances of such cases as that have been brought to our attention. The first is to be found in *Horsfall* v. *Hey* (1). In that case there was a document signed by both parties to the transaction which purported to record that "A. B. has sold to C. D. all the goods, stock in trade, and fixtures in a certain shop for £50"; and it was held, that notwithstanding the use of the past tense, that document, according to its true construction, meant: "A. B. hereby sells to C. D." In that case no property had passed from A. B. to C. D. before the document was signed, and if property had passed at all from A. B. to C. D. (and everybody admitted that it had) it passed by virtue of that document and nothing else. It was admitted that the right to sever the fixtures which were referred to had passed to C. D. How had the right to sever the fixtures passed to C. D.? By that document and nothing else. It was, accordingly, held that that was a transfer on sale.

To much the same effect was the next case to which our attention was called, *Garnett* v. *Inland Revenue Commissioners* (2). There the court were concerned with the dissolution of a partnership, and a document which in terms amounted to little more than a receipt and acknowledgment was held by the court to have been the document which effected the dissolution and caused the interest in the property mentioned in the deed to pass from one party to another.

Re Baum, Ex parte Cooper (3) was the third of these cases. There a receipt had been given, and it was held in the Court of Appeal that the document, although in form a receipt, was a complete assurance; it was the document which conferred the title upon the purchaser. That was pointed out by the Court of Appeal in *Woodgate* v. *Godfrey* (4). Commenting on *Re Baum, Ex parte Cooper* (3), SIR GEORGE JESSEL said (5 Ex.D. at p. 26):

> "We have had the benefit of some remarks made by THESIGER, L.J., as to that case, and those remarks show that the decision may be explained upon an intelligible principle. That principle is, that independently of the document there was no sale of the goods, that there was one transaction constituted by the inventory and the receipt thereto attached, and that if there had been no document there would have been no transaction."

The principle to be applied in these cases was stated by LORD ESHER in *Ramsey* v. *Margrett* (5) ([1894] 2 Q.B. at p. 23) thus:

> "If a document is intended by the parties to it to be a part of the bargain to pass the property in the goods, then, whatever the form of the document may be, even if it be only a simple receipt for the purchase money, it is, by s. 4, to be deemed to

> be a bill of sale, though it is not so in fact. But, if the document is not intended to be part of the bargain to pass the property in the goods—if the bargain is complete without it, so that the property passes independently of it—then it is not to be deemed to be that which it is not in fact—a bill of sale."

The mere fact that the document in question was intended to be part of a complicated transaction between the parties is not sufficient; the document must be "intended to be a part of the bargain"—by which I understand he means, to be part of the machinery to pass the property from one to another. If it be that, then whatever the parties may choose to call it it is a conveyance or transfer on sale.

Applying those considerations to the present case, I would like to point out the almost unique character of the present transaction. The object of it was that Roger, the son, should have transferred to him a part of the securities representing capital trust moneys under the settlement in question. Accordingly, his father disentailed, turned his estate tail into an absolute interest. All that was necessary after that, to give complete effect to the transaction, was for the two of them to direct the trustees to transfer those securities to Roger. I have left out the initial bargain between the parties—that the son was to take upon himself the liability which the father up to then had been under to pay the wife of the father a certain sum, or sums. Apart from that, all that was necessary was to transfer these securities to the son. Had that been done, the father would have been entitled to have the transfer stamped with ad valorem duty, as I understand it, by virtue of s. 74 of the Finance Act, 1910, which provides that:

> "Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale."

Stamp duty would have been paid on £160,000, the value of the property. For some reason or another which has not been explained to me the parties chose to carry out that comparatively simple transaction in the following way. After the disentailing deed the father purported to buy from his son, and the son purported to sell to the father, by oral agreement, the whole of his reversion for £160,000, and then the son agreed to invest the £160,000 by purchasing from the trustees these securities that he wanted, leaving the other securities with the father. The result of that is that you get two contracts of sale: (i) an oral contract by the son to sell to his father the reversion for £160,000, and (ii) a contract by the son to buy from the trustees these investments which he wanted for £160,000 with the result that the Crown are now claiming double ad valorem duty—on the sale from the son to the father of the reversion and on the sale by the trustees to the son of the securities for £160,000. It does not matter what the reason of it was. It will be observed that it was wholly unnecessary for there to be any formal transfer to the father of the son's reversion. As a rule, when a person buys even an equitable interest in property he is not content to rest merely upon an oral contract, or even a receipt: it is nearly always followed by a formal conveyance or transfer of the equitable interest. What I am emphasising in the present case is that no one wanted a formal conveyance of this equitable interest; such a conveyance would have been wholly unnecessary. That, I think, is a relevant consideration when we are asked to hold that this receipt was intended by the parties to be a conveyance of the property. It was not. It was, in my opinion, intended to be what it is expressed to be, merely an acknowledgment by the son of the receipt of £160,000. The property had passed when the oral agreement was made, and this receipt, although, no doubt, part of the transaction between the parties, was not a part of the bargain to vest the property in the father. With all respect to FINLAY, J., I should be of opinion that this document is not a conveyance on sale.

Then comes the question whether it is not an agreement within the meaning of s. 59 of the Act. I will not read s. 59 again: it is sufficient to point out that it in effect provides that any contract or agreement for the sale of an equitable estate or interest in any property whatsoever shall be stamped with ad valorem duty as though it were a conveyance on sale of the equitable property. It has been pointed out on more than

A one occasion that the Stamp Act does not require transactions to bear stamp duty; it is dealing only with documents. Where, therefore, there has been an oral agreement of sale no stamp duty is exigible, but if the parties choose to make a record of the fact that they have entered into an agreement there seems every reason why duty should be exigible. I cannot myself think that in s. 59 the legislature intended to draw any distinction between the case where by a document in writing the parties were recording B an agreement entered into at the time of signing the record and by means of an offer and acceptance contained in the written document, and where they are making a record of an oral offer and an oral acceptance, made, it may be, only a few days before. In my opinion, s. 59 does apply to a record made of an oral agreement arrived at between the parties, and I think no one can doubt that in this case in the document there is a record of an agreement come to between the parties, a record that shows all the terms of such C agreement. Therefore, in my opinion, this document is not chargeable with stamp duty as a conveyance, but is chargeable with ad valorem duty as an agreement or contract within the meaning of s. 59 of the Act.

MAUGHAM, L.J.—I have arrived at the same conclusion as my brethren, that the appeal should be dismissed; but I ought to say (although I am conscious, having regard D to what has fallen from my brethren, of some doubt about the matter) that I should be inclined to agree with the learned judge and to come to the conclusion that the so-called acknowledgment is liable to stamp duty under s. 54 of the Stamp Act. Inasmuch as I agree with my brethren on the point under s. 59, if the document is not liable to ad valorem stamp duty under s. 54, I can be brief on this point; and I only make the observations I do because, as I have said, I think the learned judge was right on that E point and because this case may conceivably go to another tribunal.

My view is founded upon the circumstance that the conveyance on sale, if there be a conveyance on sale within s. 54 here, is no more than an equitable assignment of property. I attribute considerable importance to the fact that an equitable assignment does not require any particular words to give it effect. I am not going to take up time by reading the very interesting speech of LORD MACNAGHTEN in *Brandt's Sons &* F *Co.* v. *Dunlop Rubber Co.* (6) ([1905] A.C. at p. 462); everybody, I expect, is aware of it. But I would like to add that even an endorsement in blank of company debentures has been held to be a good equitable assignment, and nobody I think has ever doubted that this is correct. I agree, however, that, although the form of words is wholly immaterial, it is necessary to come to the conclusion, based on the surrounding circumstances and the terms of the document itself, that the parties intended that the G property should pass in equity to the transferee. In approaching this matter I must state that, as I read the case, there is no justification for the view that there was a previous parol agreement for the transfer of the absolute reversion in question. I think the true view is that nothing was binding on any one until the twenty documents or instruments referred to in para. 1 of the Case were signed or exchanged—all of them dated Dec. 14, 1932, and, there being no antecedent transfer by parol, but for what my H brethren have said, I should be inclined to hold that the so-called acknowledgment was sufficient to establish the fact that the parties intended that the absolute reversion should pass in equity to Major Fleetwood-Hesketh, and was, therefore, a conveyance on sale.

But I am very glad to be able to proceed on the footing that I am wrong; and, on that footing I ask myself: What is the effect of s. 59? There does arise a rather curious I point of construction there, having regard to the way in which the Stamp Act is drawn. Section 1 of the Act proceeds to charge the stamp duties upon the several instruments specified in Sched. I to the Act, that is the charging section, and when we look at the Schedule we find that "agreement or any memorandum of an agreement" is chargeable with a certain duty, 6d., and we find another place in the Schedule where a conveyance on sale is made chargeable. If we look at s. 54 we see a statement of what the expression "conveyance on sale" includes; and in s. 59 a statement that "any contract or agreement for the sale of any equitable estate or interest in any property" is to be charged with the same ad valorem duty as if it were an actual conveyance on sale. It has been

A ingeniously argued that in s. 59 the phrase used is "any contract or agreement" and that it says nothing about "any memorandum," that when we look at the Schedule to find what is the duty in respect of an agreement it says: "agreement or any memorandum of an agreement," and contains in addition the words

> "whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument."

B The argument is that s. 59 will apply only to a contract or agreement of a somewhat formal character. I do not accept that view. I should point out that s. 22 of the Act is strongly against that construction. By s. 22 it is provided:

> "The duty of sixpence upon an agreement [not mentioning a memorandum] may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed." C

I do not suppose counsel for the appellant would have been bold enough to suggest that during all the years since this Act has been in force the right course with regard to a memorandum of agreement was to pay the stamp duty under s. 22 by an impressed stamp. It is plain, as I think, from s. 22, that the word "agreement" includes a memorandum of agreement, but, whether that be so or not, I think it is reasonably clear that D any memorandum of agreement which contains all the terms of what has been or is being agreed between the parties is itself an agreement. It is true that only one party has signed the acknowledgment. It may be mentioned that the signature of such an acknowledgment is, of course, followed by the handing over of the receipt to the person who has paid the £160,000, which is expressed to be the purchase price agreed as part of the family agreement. But I do not rely upon that. To my mind, it is clear, E both on principle and on authority, that an agreement or a memorandum of agreement containing all the terms is certainly within s. 59 of the Act, even though one party only has signed it. It is the commonest possible thing for one party only to sign an agreement and to hand it over to the other party, being the person who is likely to want to enforce it. I may add that so far as regards an agreement under the Act, it was long ago settled that it is immaterial that only one party signed it. If any authority is F wanted for that it will be found in *Knight* v. *Barber* (7), where a note: "Bought of Nathan Knight 50 shares . . . at £10 per share," a note that was signed by Barber, was held to require a stamp.

However, my conclusion on s. 59 is that, for the reasons I have given in addition to the reasons given by my brethren, the document which is called here an acknowledgment, containing as it did all the material terms of the bargain between the parties, was G within the terms of s. 59 as being a contract or agreement for the sale of an equitable estate in the stocks, shares and securities in question, and was, therefore, stampable with the ad valorem stamp.

Appeal dismissed.

Solicitors: *Pritchard, Englefield & Co.*, for *Buck, Cockshott, & Cockshott*, Southport; *Solicitor of Inland Revenue.* H

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

ROBEY *v.* VLADINIER

[KING'S BENCH DIVISION (Lord Hewart, C.J., Humphreys and Singleton, JJ.), October 23, 1935]

[Reported 154 L.T. 87; 99 J.P. 428; 52 T.L.R. 22; 80 Sol. Jo. 76; 18 Asp. M.L.C. 560; 33 L.G.R. 474]

Shipping—Stowaway—Alien stowaway in British ship in foreign harbour—Arrest in England—Jurisdiction of magistrate to deal with offence—Merchant Shipping Act, 1894 (57 *&* 58 Vict., *c.* 60), *s.* 237 (1), *s.* 686 (1).

By the Merchant Shipping Act, 1894, s. 237: "(1) If a person secretes himself and goes to sea in a ship without the consent of either the owner . . . or of the person in charge of the ship, or of any other person entitled to give that consent, he shall be liable [to a penalty]."

By s. 686 (1) jurisdiction is given to a magistrate to deal with an alien "charged with having committed any offence on board a British ship on the high seas," if such person "is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognisance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction."

An alien secreted himself in a British ship which was lying moored to the quay of a foreign port and disclosed himself for the first time on the day after the ship had sailed. On the arrival of the ship at Millwall Docks, London, he was arrested and brought before a metropolitan magistrate on a charge under s. 237 (1). The magistrate held that, as the person charged was an alien, he had no jurisdiction to deal with the case.

Held: the offence of secreting and going to sea which was prohibited by the sub-section was a continuing offence, and, therefore, under s. 686 (1), the magistrate had jurisdiction to deal with it.

Notes. As to penalties on stowaways, see 30 HALSBURY'S LAWS (2nd Edn.) 645, and for Merchant Shipping Act, 1894, see 23 HALSBURY'S STATUTES (2nd Edn.) 395.

Case Stated by a metropolitan police magistrate.

An information was preferred by the appellant, Robey, under s. 237 (1) of the Merchant Shipping Act, 1894, against the respondent, Vladinier, charging that the respondent, on Oct. 14, 1934, at Oran, unlawfully secreted himself and proceeded to sea on board the British steamship *Rio Azul*, without the consent of either the owners, master, or any other person entitled to give such consent.

On the hearing of the information the following facts were proved or admitted:—On Oct. 14, 1934, the respondent, a national of Yugoslavia, boarded the ship when it was lying moored to the quay at Oran, Algeria, and there secreted himself without the consent of either the owners, master, or any other person entitled to give such consent. The ship left Oran and proceeded to sea on Oct. 14, 1934, on her voyage to London via Capetown. On the following day, the respondent disclosed himself for the first time and was afterwards treated as a member of the crew until the ship arrived at Millwall Docks, London, on Dec. 12, 1934. The respondent was there arrested pursuant to a warrant issued from the Thames Police Court.

On the part of the appellant it was contended that the court had jurisdiction to determine the information; that the offence defined in s. 237 (1) of the Merchant Shipping Act, 1894, contained two necessary ingredients: (a) secreting; and (b) going to sea; that the respondent committed an act of secretion not only by concealing himself on board the ship at Oran, but also throughout the time when he remained concealed; that, in any event, as part of the offence consisted in going to sea, there was jurisdiction to determine the matter; that by reason of s. 686 of the Merchant Shipping Act, 1894, there was jurisdiction in respect of offences committed on board a British ship on the high seas; that the port of Oran must be regarded for the present purpose as being situated on the high seas; and that s. 684 of the Act gave jurisdiction to the court.

On the part of the respondent it was contended that a court of summary jurisdiction had no jurisdiction to try offences committed by any person, not being a British subject, on board a British ship in a foreign port or harbour; that s. 237 (1) of the Merchant Shipping Act, 1894, did not make it an offence for an alien to secrete himself in a ship in a foreign port or harbour; that the offence under that section, if any, was completed within the port of Oran; that s. 684 dealt only with venue and pre-supposed an offence committed within the jurisdiction of an English court.

The magistrate accepted the contentions urged on the part of the respondent, and held that he had no jurisdiction in the matter. He, accordingly, dismissed the information. The appellant appealed to the Divisional Court.

The Merchant Shipping Act, 1894, provides:

> Section 237 (1): "If a person secretes himself and goes to sea in a ship without the consent of either the owner, consignee, or master, or of a mate, or of the person in charge of the ship, or of any other person entitled to give that consent, he shall be liable [to a penalty]."
>
> Section 684: "For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed and every cause of complaint to have arisen either in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against may be."
>
> Section 686 (1): "Where any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas or in any foreign port or harbour or on board any foreign ship to which he does not belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the offence as if it had been so committed."

Lord Erleigh, K.C., and *G. S. Harvie Watt* for the appellant.
A. H. Armstrong for the respondent.

LORD HEWART, C.J.—I am clearly of opinion that this appeal must be allowed. The magistrate, in his very proper zeal for the interests of an alien, has allowed himself to be misled as to the true construction of the relevant sections of the Merchant Shipping Act, 1894. Those sections appear to be reasonably plain. [His Lordship read s. 237 (1), and continued:] The offence created by that section does not consist in secreting only, nor in going to sea only. The words "secretes himself and goes to sea" are a compound term, the two elements making one whole, and the offence consists in secreting and going to sea without the consent of any person entitled to give consent.

When one turns to the section relating to jurisdiction, s. 684 provides as follows: [His Lordship read the section, and continued:] The respondent came to Millwall Docks, London, and at the material time, namely, that of his arrest, he was, therefore, within the jurisdiction of the magistrate, but he was within that jurisdiction only for the purpose of being tried for an offence which the magistrate had jurisdiction to try. Had he jurisdiction to try the offence with which the respondent was charged? Section 686 is obviously divided into two parts, and as the respondent was not a British subject he could be tried for "any offence on board any British ship on the high seas."

I am of opinion that the offence with which the respondent was charged is plainly a continuing offence and that the contentions urged on behalf of the appellant were right. If the construction which the magistrate was induced to put on these sections were right, it seems to me that it would be difficult ever to say that the offence had been committed, because, on the one hand, at the inception of the matter, when the first step in the secreting took place, the answer of the person accused would be that he was not on the high seas, and later, when he was on the high seas, he would say that he was not secreting himself and that he had done that at the beginning. At no moment, therefore, would he be liable except, perhaps, if circumstances permitted, at a time when he both secreted himself and was on the high seas. On the interpretation of the relevant parts of the statute the contentions of the appellant were, in my opinion, clearly right and the magistrate had the jurisdiction which he declined.

HUMPHREYS, J.—I am of the same opinion, and have nothing to add except that I think this was a very plain case.

SINGLETON, J.—I agree.

Appeal allowed.

Solicitors: *Botterell & Roche*; *Edward Fail.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

JAMES SMITH & SONS (NORWOOD), LTD. *v.* GOODMAN

[COURT OF APPEAL (Lord Hanworth, M.R., Romer and Maugham, L.JJ.), July 18, 19, 22, 1935]

[Reported [1936] Ch. 216; 105 L.J.Ch. 70; 154 L.T. 113; [1934–5] B. & C.R. 283]

Company—Winding-up—Voluntary winding-up—Duty of liquidator—Claim by landlords for rent—Duty to see that claim brought in—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 247, *s.* 261.

By leases dated Sept. 28, 1925, the plaintiffs demised premises to a company which entered into a personal covenant to pay the rent. In January, 1933, they granted the company a licence to assign, and the premises were assigned for the residue of the term of years granted by the lease. On April 1, 1933, the company went into voluntary liquidation and the defendant was appointed the liquidator. The liquidation was advertised in the "London Gazette" on April 4, 1933, but no other steps were taken to ascertain the creditors of the company, and on Aug. 31, 1933, the company was dissolved. At that time the known creditors had been paid and a return of the surplus assets made to the shareholders, and the rent had been paid, the company remaining solvent. Subsequently, the rent was not paid, and the plaintiffs found that the assignee was insolvent, and for the first time discovered that their lessees, the company, had gone into liquidation. On a claim by the plaintiffs that the defendant, in not having kept the assets of the company, had neglected his duty under s. 247 of the Companies Act, 1929, and was personally liable in damages,

Held: the company's liability for rent was a debt payable on a contingency within s. 261 of the Act of 1929 (for the assignee might have paid the rent) and capable of ascertainment, and, therefore, it was the duty of the defendant, as liquidator, to have seen that the plaintiffs' claim was brought in, and he, having failed in that duty, was liable to the plaintiffs in damages.

Hardy v. *Fothergill* (1) (1888), 13 App. Cas. 351, applied.

Notes. Sections 247 and 261 of the Companies Act, 1929, are reproduced in ss. 302 and 316 of the Companies Act, 1948, which repealed the Act of 1929.

As to the powers and duties of a liquidator, see 6 HALSBURY'S LAWS (3rd Edn.) 582 et seq., and 739 et seq., and for cases, see 10 DIGEST (Repl.) 917 et seq., and 1050. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

(1) *Hardy* v. *Fothergill* (1888), 13 App. Cas. 551; 58 L.J.Q.B. 44; 59 L.T. 273; 53 J.P. 36; 37 W.R. 177; 4 T.L.R. 603, H.L.; 4 Digest 250, *2385*.

(2) *Pulsford* v. *Devenish*, [1903] 2 Ch. 625; 73 L.J.Ch. 35; 52 W.R. 73; 19 T.L.R. 688; 11 Mans. 393; 10 Digest (Repl.) 1060, *7361*.

(3) *Re Panther Lead Co.*, [1896] 1 Ch. 978; 65 L.J.Ch. 499; 44 W.R. 573; 12 T.L.R. 327; 40 Sol. Jo. 437; 3 Mans. 165; 10 Digest (Repl.) 984, *6778*.
(4) *Re Midland Coal, Coke, and Iron Co.; Craig's Claim*, [1895] 1 Ch. 267; 64 L.J.Ch. 279; 71 L.T. 705; 43 W.R. 244; 11 T.L.R. 100; 39 Sol. Jo. 112; 2 Mans. 75; 12 R. 62, C.A.; on appeal (1896), 74 L.T. 744, H.L.; 10 Digest (Repl.) 1131, *7874*.
(5) *Gooch* v. *London Banking Association* (1885), 32 Ch.D. 41; 1 T.L.R. 642, on appeal, 32 Ch.D. 49, C.A.; 10 Digest (Repl.) 1061, *7366*.
(6) *Re Hoyle, Ex parte Waters* (1873), 8 Ch. App. 562; 28 L.T. 757; 21 W.R. 554; 4 Digest 257, *2446*.

Action for damages for breach of duty by the defendant under the Companies Act, 1929, s. 247.

BENNETT, J., held that the defendant was liable. The defendant appealed.

Harold Christie, K.C., and *J. G. Strangman* for the defendant.
Stable, K.C., and *Montgomery White* for the plaintiffs.

LORD HANWORTH, M.R.—This appeal fails. The action was brought by Messrs. James Smith and Sons (Norwood), Ltd., against the defendant, Mr. Frank Ernest Goodman, in the circumstances which are set out in the careful judgment of BENNETT, J., and I do not intend to go through all the facts once more. Shortly put, the matter arises in this way. The plaintiffs made a demise of certain premises under two leases to a company called G. A. Brittain, Ltd., who were the lessees, and there was a personal covenant on the part of G. A. Brittain, Ltd., as tenants to pay the rent during the currency of the leases. The leases were for twenty-one years from Michaelmas, 1924, at considerable rents. In December, 1932, notice was given by the lessees to determine these leases, so that, in fact, they come to an end at Michaelmas, 1938, that being the closing of one of the periods of fourteen years at which a break was possible. In January, 1933, a licence to assign the premises was given and the premises were assigned. On April 1, 1933, a special resolution was passed for the voluntary liquidation of G. A. Brittain, Ltd., and the defendant was appointed liquidator. He had been appointed auditor of G. A. Brittain, Ltd., on Feb. 28, 1933, and when the voluntary liquidation was resolved upon he was appointed liquidator. He has been quite candid about it, and I do not want to obscure his candour, but it appears he had never acted as a liquidator before. To qualify himself in the discharge of his duties he purchased a textbook from which he hoped to derive sufficient information to enable him to discharge them properly. Unfortunately, that knowledge proved to be in the nature of a little knowledge being a dangerous thing. At any rate, the defendant was left under the impression, which he knows now to be wrong, that when an assignment takes place the liability of the tenant under the lease ceases. He had overlooked the continuing liability of the tenant under a demise, although there had been an assignment.

The liquidation of the company was swift. The learned judge says that the liquidation proceeded with the maximum speed and a minimum amount of publicity, and the only advertisement with regard to the liquidation of G. A. Brittain, Ltd., was an advertisement in the "London Gazette" of April 4, 1933. In no other paper was there any advertisement of the resolution, and no intimation was given to any creditor of the company that a resolution for voluntary liquidation had been passed.

As I say, I do not want to minimise the candour of the defendant, which one respects. He says he made a mistake. The company was dissolved on Aug. 31, 1933. What had been done at that time was the known creditors had been paid, and from the account which was put in before BENNETT, J., it appears that a return was made to the shareholders of G. A. Brittain, Ltd. In other words, the company remained solvent; it was able to meet, and did meet, its liabilities. At that time, in August, the rent had been fully paid, and there was no claim on the part of the plaintiffs for unpaid rent. Subsequently, at a later stage, there has been a default in the full payment of the rent. BENNETT, J., has come to the conclusion that there was a liability on the part of the defendant, who failed to do his duty as liquidator, and he holds it clearly proved before him that, if the liquidator had done his duty and had kept the assets, they would have been available to satisfy the plaintiffs' claim for rent under the lease, and he feels that he has no alternative but to hold that the defendant is liable to the plaintiffs for damages for breach of his statutory duty.

Here I will say a word as to what was the breach committed by the liquidator. I think that is clearly stated in a case which has now stood for over thirty-two years, the case before FARWELL, J., of *Pulsford* v. *Devenish* (2). There the headnote, following the judgment correctly, states:

> "It is the duty of a liquidator to find out from the books and papers of the company and the statement of affairs who are the creditors of the company, and if any creditor omits to put in his claim the liquidator should communicate with him."

FARWELL, J., holds that quite clearly. He says this ([1903] 2 Ch. at p. 631):

> "The defendant took no steps whatever to ascertain the claims of any creditors against the old company except by inserting advertisements in six London newspapers. He knew of the existence of this claim by the plaintiffs for the payments under the licence; but he says he did not know, and I accept his statement, of the existence of the claim for the lamps. If, however, he had performed that which I consider to be the duty of a liquidator, namely, not merely to advertise for creditors, but to write to the creditors of whose existence he knows, and who do not send in claims, and ask them if they have any claim, he would undoubtedly have received a claim, not merely for the instalments payable under the licence, but also for the purchase-money of the lamps."

It appears to me quite plain that the defendant misconceived his position, misconceived the effect of an assignment, failed to appreciate that there was this liability under the leases of which, of course, he knew, and he ought to have ascertained whether there was a claim which would be made by the plaintiffs.

In respect of such matters, s. 261 of the Bankruptcy Act, 1914, lays down:

> "In every winding-up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of bankruptcy), all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value."

In my opinion, this claim by the landlords against their tenant was clearly a liability in respect of which they could have brought in a proof. It was a contingent liability, for the assignee might have satisfied the liability for the rent, but it was a right which they had against the company who were their tenants under the demise, and who were liable to them under contract to pay the rent. That being so, if the liquidator had done his duty he would have seen that a claim was brought in.

What was the claim? It is suggested that it is impossible to ascertain, and that in those circumstances it was so contingent that it would not be possible to put a money value upon the claim. To my mind, the dicta in *Hardy* v. *Fothergill* (1) are directly contrary to any such suggestion. I need not refer to the various passages which were referred to in the course of the argument; but LORD SELBORNE, I think, makes it quite plain that there are cases where there are debts capable of valuation. He says (13 App. Cas. at p. 360) this:

> "There may be contracts, such, for example, as a promise to marry (not broken), or a covenant not to molest, or not to carry on a particular trade within certain limits, &c.; which, on a fair interpretation of these words, ought to be excluded as having a different object from the payment of money in any contingency; although if they were broken a jury might award damages for their breach. I must guard myself against being supposed to lay down any rule applicable to cases of that kind, or to any others in which an injunction or specific performance would be the most proper remedy. But the present is not a case of that kind. A contract to

> indemnify against the non-performance of covenants in a lease, such as covenants to pay rent, or to keep the demised premises in repair, or to deliver them up in a proper state at the end of the term is, to all intents and purposes, 'an obligation or possibility of an obligation to pay money or money's worth' on the breach of any such covenant; it is 'an engagement to pay, or capable of resulting in the payment of, money or money's worth,' if the contingency against which the indemnity is provided should occur. Unless excluded (according to the view of the MASTER OF THE ROLLS) on the ground that the statute contemplates those liabilities only which are capable of being fairly valued, and that this particular liability is not capable of being fairly valued, it is, and must be included in those words."

A

B

It is true, as counsel for the defendant said, the court were considering words contained in a passage in the statute which does not find its place in the statute that we are considering at the present moment, but it is abundantly plain that LORD SELBORNE, in the words to which I have rather cursorily referred, intended to indicate that it was a liability which was a contingent liability, and one which was capable of being fairly valued. LORD MACNAGHTEN deals with the matter in more precise terms (13 App. Cas. at p. 369):

C

D

> "It was said that the trustee would have done a foolish thing if he had tried to estimate it, and that if he had put a value upon it, the court on appeal must have set the estimate aside. I cannot agree in this view. A covenant such as that which has given rise to the liability as between the lessor and the lessee is not uncommon. It is not an uncommon thing for leases to be assigned, and for the assignee to undertake the assignor's liability. I cannot think that a person of practical experience in dealing with leasehold property would have any great difficulty in making a fair estimate of the value of such a liability when he was once made acquainted with the circumstances of the particular case."

E

In those circumstances, it appears that here there was a liability under the demise which could have been and was proper for estimation, and since *Hardy* v. *Fothergill* (1), one must look at these contingent liabilities as provable in a liquidation or in a bankruptcy.

F

ROMER, L.J., in 1896, dealing with *Re Panther Lead Co.* (3), said this ([1896] 1 Ch. at p. 985):

> "Since the decision in *Hardy* v. *Fothergill* (1), the old cases as to proof by a lessor to a company in liquidation have to be reconsidered, as was pointed out by LINDLEY, L.J., in *Re Midland Coal, Coke, and Iron Co., Craig's Claim* (4) ([1895) 1 Ch. at p. 275), and certainly it will be the duty of the court to assist a lessor in proving in respect of the obligations of a company as lessee under its lease in all cases like the present where the lessor is desirous of proving at once for his loss on the footing of the lease being determined or treated as determined. It will be the duty of the court to assist a lessor in proving in respect of the obligations of a company as lessee under its lease in all cases like the present where the lessor is desirous of proving at once for his loss."

G

H

Of course, in some of the cases, as in *Gooch* v. *London Banking Association* (5), the liability which was said to rest upon the liquidator was that he ought to have set aside sufficient assets to provide for future rent and other liabilities under the lease. That may be so in proper cases, but it does not appear that that course is one which would be followed in all cases, and the liquidator would have the opportunity of going to the court if he was in difficulty as to what ought to be done.

I

Upon these facts and the findings of BENNETT, J., it appears to me that it is clear that there is a liability upon the defendant in respect of his breach of duty as liquidator.

His counsel argued that the plaintiffs had misconceived their remedies and that the only remedy which was open to them was one under which they could have proceeded under s. 294 of the Companies Act, 1929, that section giving power to the court to declare the dissolution of the company void. The only advantage of following that procedure, apparently, was to give the defendant some opportunity of raising points which, but for this, it would be difficult to raise at the present time. Why the plaintiffs should go and ask for a declaration that the dissolution of the company is void, I do not follow. The effect of that would be to restore the company into being, but with what result? There has been a distribution of the surplus assets back to the shareholders, and recalling that dissolution will not give animation to the company in the sense that it will once more restore to the coffers of the company the money that has been distributed to the shareholders. I do not find any authority for saying that that remedy is the only one. The cases that we have looked at are sufficient to show that if a creditor has been injured by the failure of the liquidator to take the steps that he ought to have taken, and has suffered damage, he can "succeed in the action on the case," as FARWELL, J., put it in *Pulsford* v. *Devenish* (2) in establishing a liability against the liquidator. That being so, it appears to me that this appeal fails and must be dismissed.

BENNETT, J., made an order that there should be made an inquiry whether the plaintiffs have sustained any, and if so what, damage by reason of the defendant having acted wrongfully and in breach of his duty as such liquidator as aforesaid. Counsel for the defendant urged that this court should impose some directions which would be in the nature of limitations to that order for an inquiry. I think that would be unfortunate from the point of view of both the parties to the case. It occurs to me that in the course of the inquiry it would be open to the defendant to show that, if there had been a claim made by the plaintiffs for the rent it would have been contingent only and that at that time there was a good prospect of the liability being one remotely contingent only; on the other hand, it would be open to the plaintiffs to show that it was not a liability remotely contingent, but one which was a real liability, although contingent. The amount, therefore, that ought to have been allowed to proof by the plaintiffs ought not to have been merely a nominal sum, but something which would be based upon the real liability of G. A. Brittain, Ltd., to pay the rent under the demise. I think, therefore, the order made by BENNETT, J., is right and this inquiry must proceed, and it will be possible in that inquiry for both sides to discuss the question of what ought to be the quantification of the damages, as to which I do not desire to say anything more particular.

For these reasons the appeal fails and must be dismissed with costs.

ROMER, L.J.—I agree.

MAUGHAM, L.J.—The plaintiffs are the lessors under two leases of September, 1925. The company were the lessees, and the rents payable are substantial in amount. The premises were at Brighton, and there was evidence given—and it appeared from the correspondence—that, like many other commercial premises in these hard times, they had ceased to be as valuable before the liquidation as they were at the date when they were granted. The directors of the company, who, it may be mentioned, included two solicitors who were acting for the company, were very desirous of getting rid of the leases, and negotiations shortly before the liquidation were entered into for that purpose. The landlords, the plaintiffs, declined to release the company from its obligations, and by a resolution dated April 1, 1933, the company, which was perfectly solvent, went into liquidation. The defendant was appointed the liquidator, the liquidation was conducted with extreme dispatch, the final meeting of the company was held on May 27, 1933, not much more than a month after the date of the resolution, and the company was finally dissolved on Aug. 31, 1933, the landlords of those large premises which had been in the possession of the company for a considerable period till shortly before the liquidation never having heard a word of the liquidation and not having had any communication made to them whatever in reference to the matter. At the date of the liquidation the lease had been assigned to one Kingsman. The assignment took place in January, 1933, some three months before the liquidation. Kingsman, however, subsequently assigned the premises, with the consent of the plaintiffs, to a company, Mann's Motors, Ltd. We have no evidence as to what their position was at the date of liquidation. We do, however, know that they were unable to pay any rent since Dec. 25 of that year, and that a large sum is now due to the plaintiffs in respect of rent, and when they sought to get their rent and found that Mann's Motors, Ltd., the tenants in occupation, were apparently insolvent, they made an application, or sought to make an application, against the company, G. A. Brittain, Ltd., and found out that it had been finally dissolved. Hence this action. A

I wish to add nothing further to what the MASTER OF THE ROLLS has said with regard to the negligence from which unfortunately the defendant cannot be absolved. The defendant misunderstood the position, and, apparently, abstained from making inquiries from the directors of the company, including the solicitors of the company, which would have resulted in showing that the plaintiff company had a claim in liquidation, and, therefore, there is, in my opinion, no doubt whatever that he was guilty of negligence in not making some provision for the liability of the company under the two leases in question. We have heard a long argument as to what the nature of the provision should have been. For my part I am satisfied that since the decision in *Hardy* v. *Fothergill* (1) it has been impossible to doubt but that a company in liquidation, and a fortiori a perfectly solvent company in liquidation, is bound to submit to the assessment under the Companies Act of its contingent liability to a landlord in such a case as the present, that is to say, in a case in which the company in liquidation is no longer interested in the lease. The lease having been assigned to third parties, the only question is whether the landlords are not entitled, under s. 261, to prove for the debt as one payable on a contingency or to prove as for a claim against the company, "present or future, certain or contingent, ascertained or sounding only in damages," arising by reason of the fact that the company has covenanted to pay the rent to the landlords during the continuance of the lease. I have said that in such a case as the present, in my opinion, there never was any doubt about the right of proof; but I am not forgetting that where the company is itself the tenant at the time of liquidation considerable difficulty may arise as to what the precise right may be. Two cases particularly may arise. The company may desire to surrender and the lessor may be unwilling to let him do so, and the liquidator may be unwilling to surrender, though the lessor may be willing to accept the surrender on terms as to proof or otherwise. Those circumstances do not exist here, and as a matter of fact since the Act of 1928 will seldom arise, for under s. 267 of the present Act there is what there was not, I think, before the Act, a right of disclaimer when a company was in liquidation. B C D E F

In my opinion, in the case which we have here, where the company is no longer interested in the lease, there is no serious difficulty in estimating the amount for which the lessor is entitled to prove and all the Lords in *Hardy* v. *Fothergill* (1) expressed, as I think, an opinion which would cover this comparatively simple case. I will mention that LORD SELBORNE (13 App. Cas. at p. 362) referred to a dictum of MELLISH, L.J., in *Re Hoyle, Ex parte Waters* (6), intimating a doubt as to the right of proof in respect of the liability of a lessee who had assigned his lease under the covenants in the lease, and LORD SELBORNE disagreed with the expression of opinion by MELLISH, L.J., if he meant to intimate an opinion that that liability could never be provable in bankruptcy, and said that he was not able to find sufficient ground for it in the words of the statute before him, which was the Bankruptcy Act of 1869. Other passages which have been referred to, in the speeches of LORD HALSBURY and LORD MACNAGHTEN, seem to me beyond all doubt to show that the liability here in question was capable of estimate, and I would add that all the textbooks, BUCKLEY, PALMER and STIEGEL, concur in thinking that since the case of *Hardy* v. *Fothergill* (1) that was a perfectly feasible course, at any rate, in such a case as the present. G H

Accordingly, in my opinion, we have not to consider here whether the course taken in *Gooch* v. *London Banking Association* (5), and, I may add, in other cases, of declining to allow the final winding-up of the company and the distribution of all its assets without making provision for a landlord's claim under his lease was the right one. I am content to agree with the view expressed by my brethren that here was a claim which could properly be proved under s. 261 of the present Act. The result is that the liquidator, acting no doubt in complete good faith, but still in breach of his duty, committed a breach of his statutory duty to pay the debts of the company, and the case is exactly within the decision of FARWELL, J., in *Pulsford* v. *Devenish* (2), with the result that the I defendant is liable in damages to the unpaid creditor of the company whom we have before us, namely, the plaintiff in the present action.

It has been argued that the fact that there is now a section under which the company can be restored to the register differentiates the present from the case of *Pulsford* v. *Devenish* (2). I do not take that view. I think that the decision of FARWELL, J., that it was an absolute statutory duty on the liquidator to pay the debts out of the assets of the company remains just as valid as when he pronounced it, and the mere fact that under certain circumstances there may be a setting aside of a dissolution and the restoration to the register under s. 294 does not qualify that in any way. The amount of the damages which will be recoverable must be left at the present moment in doubt. There are many circumstances which we have not before us, and I wish to express no opinion upon that matter. I am satisfied to say that the judgment of the learned judge can be supported on the grounds which we have mentioned. It is true that he did not actually decide that the debt was provable and was content with the statement that the statutory duty on a liquidator had not been complied with. We have to that extent clarified the matter, but that does not affect the correctness of the inquiry which he has directed. The appeal must therefore be dismissed with costs.

Appeal dismissed.

Solicitors: *T. J. Robinson & Son*; *Finnis, Downey, Linnell, & Chesshire.*

Reported by G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

SHEFFIELD BURGESSES *v.* MINISTER OF HEALTH

[KING'S BENCH DIVISION (Swift, J.), December 17, 1935]

[Reported 154 L.T. 183; 100 J.P. 99; 52 T.L.R. 171; 80 Sol. Jo. 16;
34 L.G.R. 92]

Housing—Clearance area—Compulsory purchase of adjoining land—Purchase necessary for satisfactory development of clearance area in conjunction with other, neighbouring, clearance areas—Housing Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 29), *s.* 3.

A local authority made, and the Minister of Health confirmed, an order for the compulsory purchase of certain land adjoining a clearance area. The acquisition of that land was reasonably necessary for the carrying out of a scheme for the development of that clearance area in conjunction with other clearance areas in the neighbourhood, but would not have been necessary had it been proposed to develop the area as a separate unit.

Held: under s. 3 of the Housing Act, 1930, the local authority had power to make, and the Minister of Health had power to confirm, the compulsory purchase order.

Notes. Section 3 of the Housing Act, 1930, was replaced by s. 27 of the Housing Act, 1936, which in turn has been replaced by s. 43 of the Housing Act, 1957. The Minister concerned is now the Minister of Housing and Local Government.

As to clearance areas and purchase of land, see 26 HALSBURY'S LAWS (2nd Edn.) 533 et seq., and for cases, see 38 DIGEST 212 et seq. For Housing Act, 1936, see 11 HALSBURY'S STATUTES (2nd Edn.) 444.

Application under s. 11 of the Housing Act, 1930, asking that a compulsory purchase order, made by Sheffield Corporation and confirmed by the Minister of Health, should be quashed, on the ground that it applied to land adjacent to, but not forming part of, a clearance area, and that it was not reasonably necessary for the development of that clearance area that the land in question should be purchased.

The question involved was the construction of s. 3 of the Act of 1930, which provided as follows:

> "Where as respects any area declared by them to be a clearance area a local authority determine to purchase any land comprised in the area, they may purchase also . . . any adjoining land the acquisition of which is reasonably necessary for the satisfactory development or user of the cleared area."

The corporation of Sheffield had made compulsory purchase orders in respect of four areas numbered 74B, 75, 76, and 77. No question arose in respect of the first three areas. In the case of area 77, part of that area (which was coloured pink on the corporation's map) had been declared by resolution to be a clearance area, and another part (coloured grey on the map) did not form part of any clearance area.

The Minister of Health had stated in a letter to the town clerk of Sheffield that the acquisition of the grey land in area 77 was necessary for the satisfactory development of all the land in areas 74B, 75, 76, and 77, but that its acquisition would not have been necessary for the development of area 77 alone. The Minister considered that that brought the case within s. 3, and he confirmed the order.

The applicants, who were the owners of the land coloured grey, contended that the section only authorised the purchase of that land if it were required for the development of the land coloured pink in area 77, and that the section gave no power to purchase it for the purpose of developing land which was not adjacent to it.

Linton Thorp, K.C., and *H. A. Hill* for the applicants.

The Solicitor-General (*Sir Donald Somervell, K.C.*) and *Valentine Holmes* for the Minister of Health.

SWIFT, J.—By a resolution passed by the council of the city of Sheffield on July 4, 1934, the city council declared an area in Broad-lane and Wheeldon-street in the city to be a clearance area within the meaning of s. 1 (1) of the Housing Act, 1930, and they ultimately decided by a resolution of Nov. 9, 1934, for the purpose of giving effect to their object in securing the demolition of the houses in that area, that they should purchase the land comprised in the area under s. 1 (3) (ii), and themselves undertake the demolition of the buildings thereof.

When the land was cleared of buildings it became quite clear that for its development or advantageous user it would not have to be dealt with as a small piece of land which is coloured pink on the maps referred to in the resolutions, but would have to be dealt with, in order that the most satisfactory development of that small piece could be attained, as part of a larger scheme. If the corporation had merely secured the demolition of the houses on it, and had either left the land, as they might have done, in the possession of its owners, or if they had bought the land and taken the existing insanitary houses down, it would have been impossible to have developed or used that land in the most satisfactory manner when it stood in the midst of other dwellings and other land, and in order to use or develop it in the most satisfactory manner it was obvious to the corporation that it should be developed and used in conformity with, and along with, other lands in the neighbourhood which they were securing, and which they proposed to develop, together with the part coloured pink in No. 77. That was clearly, I think, their object. The question which is to be decided is: Had they any power to attain that object under the Housing Act, 1930? There may be some other Act of Parliament under which they might attain that object, or they might secure a private Act of Parliament of their own to enable them to do it, but the question which I have to decide is: Can they do it under the Act of 1930? The corporation say that they can do so under the provisions of s. 3 of the Act of 1930. That section provides:

> "Where as respects any area declared by them to be a clearance area a local authority determine to purchase any land comprised in the area, they may purchase also any land which is surrounded by the clearance area and the acquisition of which is reasonably necessary for the purpose of securing a cleared area of convenient shape and dimensions . . ."

It seems to me that the corporation clearly could not act under those words of that section. The land which they propose to purchase in this area is not land which is surrounded by the clearance area; it surrounds the clearance area. The section goes on to provide that the local authority may purchase "any adjoining land the acquisition of which is reasonably necessary for the satisfactory development or user of the cleared area." The part which is coloured grey on the map, and which this authority is seeking to purchase is clearly adjoining land. Counsel for the applicants disputed that proposition. It is said that the acquisition of that adjoining land is reasonably necessary for the satisfactory development and user of the cleared area—that is to say, in acquiring it the corporation have got to have in mind the development or user of the cleared area, they have to have in mind the satisfactory development and user of it, and then they have got to be satisfied and have got to satisfy the Minister that the land which they are seeking to purchase compulsorily is reasonably necessary for that satisfactory user. If they go to the Minister asking for powers to buy land compulsorily which is not reasonably necessary for the satisfactory development of the land in the cleared area, they will not get those powers; the Minister would simply say to them: "This is not reasonably necessary." Even if the Minister gave them power, if the applicants came to this court and satisfied the court that there was no material upon which it could be said that the land was reasonably required, or that it was reasonably necessary for the satisfactory development of the cleared area, the court would quash the order. It is for the corporation in the first place to say whether it is reasonably necessary or not; it is for the Minister in the second place to say whether it is reasonably necessary or not, and it is for this court, if the matter is brought before this court, to say whether there is any material upon which the Minister could have come to the conclusion that it was reasonably necessary. If this court comes to the conclusion that there is no such material, then this court will not hesitate to quash the Minister's order.

Looking at this matter in that way I have come to the conclusion that it is impossible to say that there was not ample material before the corporation, and before the Minister for saying that for the satisfactory development of that piece of land which is coloured pink in area No. 77, it was reasonably necessary to acquire the land which is coloured grey. When you are deciding how you will develop or how you will use your land, you cannot build a high brick wall around it and say: "I must look only at what is inside that wall, and I must not let my eyes wander beyond." When you are talking of developing land or when you are considering the most advantageous user of the land, you look around and see what can be done to the best advantage with your piece of land and see if you can get your neighbour to join with you in carrying out a common scheme for development, or, better still, see if you can purchase your neighbour's land and so develop the whole of it yourself.

Here the corporation of Sheffield had got parts of their city which were encumbered with a considerable number of insanitary dwelling-houses, and they divided them into areas, as I think they were bound to divide them, for the purpose of effecting the improvements for the safety of the people living there which is required by the legislature. When they come to consider what they are to do with the areas, I do not think it can be said that they are not, in considering what is best to be done in developing the area in No. 77, to look and see what it is possible to do with areas No. 76, No. 75, and No. 74B. It may be obvious to anybody experienced and expert in these matters that the proper course, the sensible course, and the business-like course of dealing with No. 77 for its reasonable and satisfactory development and user, is to treat it as part of a whole with Nos. 74B, 75, and 76. That is what it seems to me the corporation have done in this case, and what I venture to think the Minister very properly did, as evidenced by the letter which he wrote on August 23, 1935, where he said:

> "As regards the areas in compulsory purchase orders 74B, 75 and 76 he is satisfied that in each case the land proposed to be purchased under s. 3 is reasonably necessary for the satisfactory development of the areas quite apart from the proposed development of any of the adjoining areas. In the case of the land comprised in compulsory purchase order 77, the position is somewhat different. In that case the Minister would not have been prepared to regard the whole of the grey land as reasonably necessary for the satisfactory development of the cleared area in the absence of any knowledge of the proposed development of the adjoining areas. He

> is advised, however, that in considering what is a satisfactory development of a cleared area it is right and necessary to have regard to the character and proposed development of the land in the immediate neighbourhood. It is, indeed, obvious that the probable development of this neighbouring land may profoundly affect the use to which the cleared area should be put, and the fact that, as in the present case, the neighbouring land will be developed by the local authorities themselves, does not make it any the less necessary to take such development into consideration. Thus, in the present instance, if for any reason compulsory purchase orders 74B, 75 and 76 had not been made and there had been no prospect of the development for housing purposes of the land included in those areas, the Minister would not have regarded the whole of the grey land included in compulsory purchase order 77 as necessary for the purpose of that order. In view, however, of the proposed user of the land in the first three orders as the site of blocks of flats forming, together with the proposed flats on the land in compulsory purchase order 77, a single and complete scheme of development, the Minister is satisfied that the whole of the grey land in the last-mentioned order is reasonably necessary for the satisfactory development of the cleared area comprised in order 77."

I cannot say that the Minister was wrong in coming to that conclusion. Whether I agree with him or not is immaterial, but incidentally I may say I do. The only question is whether there was material upon which he could come to the conclusion that this land was reasonably necessary for the satisfactory development of the land in the cleared area. I think there was such material, and this application must be dismissed.

Application dismissed.

Solicitors: *Fielder, Le Riche, & Co.*, for *J. B. Wheat*, Sheffield; *Solicitor for Minister of Health.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* GRAVESEND CORPORATION

[CHANCERY DIVISION (Bennett, J.), December 11, 12, 13, 1935]

[Reported [1936] Ch. 550; 105 L.J.Ch. 202; 155 L.T. 409; 52 T.L.R. 205; 80 Sol. Jo. 74; 34 L.G.R. 412]

Electricity—Supply—Delivery of energy—Consumer's terminals—Need to be within undertaker's area of supply.

On the true interpretation of the Electrical (Supply) Acts delivery of electrical energy must be made at the consumer's terminals, and those terminals must be placed upon some land or some building upon land for which electrical energy is required, and that land or building must be within the undertaker's area of supply.

Notes. As to supply of electricity, see 14 HALSBURY'S LAWS (3rd Edn.) 398 et seq., and for cases, see 20 DIGEST 204 et seq.

Case referred to:

(1) *A.-G.* v. *Leicester Corpn.*, [1910] 2 Ch. 359; 80 L.J.Ch. 21; 103 L.T. 214; 74 J.P. 385; 26 T.L.R. 568; 9 L.G.R. 185; 20 Digest 199, *5*.

Action

The plaintiffs, the Attorney-General (at the relation of the Kent Electric Power Co.) and the Kent Electric Power Co., claimed against the defendants, the mayor, aldermen, and burgesses of the borough of Gravesend, an injunction to restrain them from supplying electrical energy to the premises of the Cellactite and British Uralite, Ltd., and of the Atlas Stone Co., Ltd., or from supplying otherwise electrical energy beyond the defendants' authorised area of supply.

The defendants were supplying electrical energy under the provisions of three statutory orders: (i) An Electric Lighting Order, confirmed by the Electric Lighting Orders Confirmation (No. 5) Act, 1898; (ii) the Gravesend Electricity Extension Special Order of 1928, made by the Electricity Commissioners under the Electricity (Supply) Acts and confirmed by the Minister of Transport under the Electricity (Supply) Act, 1919; (iii) the Gravesend Electricity Extension Special Order, 1931, made by the same authority. There were incorporated into these orders the provisions in the Schedule to the Electric Lighting (Clauses) Act, 1899. Clause 4 of that Schedule provides that

> "(1) the area of supply shall be the area named for that purpose in the special order; (2) the undertakers shall not at any time after the commencement of this special order supply energy or (except for the purposes of that order) erect or lay down any electric lines or works beyond the area of supply otherwise than under the authority of Parliament, or under a licence granted by the Board of Trade under the principal Act."

The plaintiffs, the Kent Electrical Power Co., were authorised to supply electrical energy in the county of Kent, except the Isle of Thanet. They alleged that the defendants were supplying electrical energy outside the area in which they were authorised to supply it by the above-mentioned orders, because they were supplying electrical energy to the premises of the Cellactite and British Uralite Co., and also to those of the Atlas Stone Co., and the premises of both those companies were outside the said area. Originally the defendants had been authorised to supply electrical energy to the two companies under the provisions of a fringe order made by the Electricity Commissioners on Jan. 25, 1929, under s. 6 of the Electric Lighting Act, 1909, which provides as follows:

> "Where it is proved to the satisfaction of the Board of Trade that the occupier of any premises is desirous of obtaining a supply of electricity from any undertakers within whose area of supply those premises are not situate, the Board of Trade may, if the local authority, within whose district the premises are situate, and the undertakers (if any) authorised to supply electricity to such premises, consent, by order permit the first-mentioned undertakers to give a supply to those premises on such terms and subject to such conditions as the board think fit."

The fringe order of Jan. 25, 1929, was in these terms:

> "Whereas application has been made to the Electricity Commissioners under the provisions of the Electricity (Supply) Acts, 1882 to 1928, by the mayor, aldermen and burgesses of the borough of Gravesend (hereinafter called 'the undertakers') being undertakers for the supply of electricity within the borough of Gravesend for an order under those Acts authorising the supply of electricity to the premises of Cellactite and British Uralite, Ltd., and Hodson's Concrete Units, Ltd., situate within the rural district of Strood and whereas the Electricity Commissioners have considered such application. Now therefore the Electricity Commissioners in pursuance of the powers exercisable by them on behalf of the Minister of Transport under the aforesaid Acts hereby order that as from the date hereof the undertakers may supply electricity to the said premises notwithstanding that the same are outside the area of supply of the undertakers subject to the same obligations but with the same rights in all respects as if the said premises were within that area and may break up such streets and roads and may lay down and place therein such electric lines and other works as may be necessary for that purpose under and in accordance with the provisions of the Electricity (Supply) Acts, 1882 to 1928, and of the Schedule to the Electric Lighting (Clauses) Act, 1899, with respect to the breaking up of streets and the laying down and placing therein of electric lines and other works by undertakers who are not the local authority of the district. This order is subject to revocation whenever any undertakers in whose area of supply such premises may be situate are able and willing to give a supply to such premises on reasonable terms and to pay to the undertakers such portion of the expenditure

> incurred by the undertakers in giving such supply as may be agreed or failing agreement as may be determined to be reasonable by an arbitrator to be appointed by the Minister of Transport."

Hodson's Concrete Units, Ltd., were the predecessors of the Atlas Stone Co. The fringe order having been made, the energy was brought from the defendants' generating station to the premises of the Cellactite Co., and the Atlas Stone Co. by an overhead cable suspended from poles placed on the towpath of a canal, which was the property of the Southern Railway Co., with the consent of that company.

In 1933 the plaintiff company applied to the Electricity Commissioners that the said fringe order by which the defendants were authorised to supply electrical energy to the two companies should be revoked, and on Oct. 6, 1933, the Electricity Commissioners revoked the fringe order, the order of revocation providing that: "The Electricity Commissioners are satisfied that the company" (i.e., the plaintiff company), "are able and willing to give a supply to such premises on reasonable terms."

In the meantime the defendants made an agreement on Sept. 27, 1933, with the Cellactite Co., which provided, by cl. (2):

> "The company shall take and the corporation shall give a supply of electricity at a point within the area of supply of the corporation being the point at which a meter or meters referred to in par. 4 hereof shall be placed."

Clauses (4) and (5) provided:

> "The corporation will provide all necessary service cables which shall terminate at or near the eastern boundary of the parish of Chalk in the rural district of Strood in the county of Kent being a point within the area of supply of the corporation where the corporation will also provide the necessary meter or meters. Clause (5): In consideration of this agreement the corporation hereby sell and the company hereby purchase all cables poles and other appliances and equipment at present belonging to the corporation to the east of the point where the said meter or meters shall be fixed which were originally provided by the corporation for the purpose of supplying electricity to the works of the company situate in the parish of Shorne in the rural district of Strood in the county of Kent."

On Sept. 29, 1933, an agreement was entered into between the Southern Railway Co. and the Cellactite Co. by which the Southern Railway Co. granted to the Cellactite Co. the right

> "to maintain and use in or upon through or over the company's property at or near the Gravesend and Higham Canal in the county of Kent the works more particularly described in the schedule."

The works more particularly described in the schedule were described as

> "eighteen wooden poles along the course of the towing path of the Gravesend and Higham Canal and a three-core electric cable . . . suspended at least 22 ft. above the surface of the said towing path on the said poles, and also passing under the said canal in one place, the route of such cable being indicated by a red line on the plan attached hereto."

At the same time another agreement was made between the Southern Railway Co. and the defendants whereby the defendants were given a licence to place a line of poles and to suspend from those poles a cable between their generating station and, approximately, the point at which the way-leave of the Cellactite Co. began in the west.

The pole upon which the defendants placed the meter referred to in cl. (4) of the agreement of Sept. 27, 1933, was numbered 39 on the agreed plan and was within the area in which the defendants were authorised to supply electrical energy. The cables running from that pole in an easterly direction to the works of the Cellactite Co. and the Atlas Stone Co. were outside the defendants' area.

The plaintiffs contended that upon the true construction of the Electric Lighting Acts the defendants were bound to deliver electrical energy at the consumers' terminals, and the delivery must be made entirely within the defendants' area of supply, but as a matter of fact the consumers' terminals were outside the defendants' area of supply and, therefore, the defendants were acting illegally. On the other hand the defendants contended that they were delivering electrical energy at the meter on the pole which was numbered 39, and that point was within their boundary, and that, moreover, the consumers had agreed to take delivery of the energy at that point, and therefore the defendants were not infringing any statutory prohibition against supplying electrical energy beyond the area of supply.

Tyldesley Jones, K.C., and *A. Andrewes-Uthwatt* for the plaintiffs.
Montgomery, K.C., and *S. M. Noakes* for the defendants.

BENNETT, J., stated the facts and continued: On those facts the defendants say: "We are delivering electrical energy within our area of supply. We are delivering our electrical energy at the meter on the pole which has been numbered 39, and that point is within our boundary," and they say: "So long as we are delivering energy within our boundary and so long as the consumer has agreed to take delivery of our energy within our boundary, we are not infringing the statutory prohibition against supplying beyond the area of supply."

The plaintiffs say that, upon the true construction of the Electric Lighting Acts and, in particular, the Electric Lighting (Clauses) Act, 1899, and the provisions in the Schedule to that Act which are incorporated into the defendants' orders, the defendants infringe the prohibition if they deliver electrical energy otherwise than at the consumer's terminals, and that the consumer's terminals must be found to be within the undertaker's area of supply. They say that in this case there are not to be found at pole 39 any consumer's terminals and that the provisions of the statute prohibit undertakers and consumers from making an arrangement or an agreement which will enable the undertakers to deliver electrical energy at any other place except the consumer's terminals. Their argument is that TOMLIN, J., and NEVILLE, J., have so decided.

The question depends to some extent upon the definition of three terms which are to be found in the Schedule to the Electric Lighting (Clauses) Act, 1899, which are incorporated in the defendants' orders. By the first clause of the Schedule "main" is defined as

> "any electric line which may be laid down by the undertakers in any street or public place, and through which energy may be supplied or intended to be supplied by the undertakers for the purposes of general supply."

"'Service line' means any electric line through which energy may be supplied or intended to be supplied by the undertakers to a consumer either from any main or directly from the premises of the undertakers." "The expression 'consumer's terminals' means the ends of the electric lines situate upon any consumer's premises and belonging to him, at which the supply of energy is delivered from the service lines." The first argument of counsel for the defendants was that by the agreement of Sept. 27, 1933, the defendants and the Cellactite Co. had agreed that the defendants should supply the electricity to the Cellactite Co. within their area and that the Cellactite Co. had agreed to take delivery of supply within the defendants' area. I think by cl. 2 they have so agreed. His next point on the agreement was that by it all the cables outside the defendants' area, by which electricity was delivered to the Cellactite Co., had been made the property of the Cellactite Co., and I think that is the effect of cl. 5 of the agreement. Then he argued that the service line of the defendants ended at the point at which the defendants had erected a meter in accordance with the provisions of the agreement of Sept. 27, 1933, namely, at pole 39. Then he argued that the Cellactite Co.'s terminals were to be found at that point, his argument being that at that point there was something which could properly be described as the consumer's premises.

I am quite satisfied that, upon a proper construction of cl. 1 of the Schedule to the Electric Lighting (Clauses) Act, 1899, the point at which the wires or lines of the Cellactite Co. meet the lines which are the property of the defendants is not the consumer's terminals as defined by the Schedule. Consumer's terminals must, in my judgment, be found upon some land or some building upon land for which electrical energy is required.

I cannot hold that upon a proper construction of cl. 1 of the Schedule to the Electric Lighting (Clauses) Act, 1899, the terminals of the Cellactite Co. are at pole 39. If that be so, then, if TOMLIN, J., and NEVILLE, J., have decided that "supply" within the meaning of the Electric Lighting Acts means supply at the consumer's terminals, it seems to me that the defendants are infringing the prohibition of the order.

The question is whether TOMLIN, J., and NEVILLE, J., did so decide. After having read the judgment of TOMLIN, J., and after having had it discussed by counsel for both parties, and after having heard the judgment of NEVILLE, J., in *A.-G.* v. *Leicester Coprn.* (1) discussed, I come to the conclusion that they have decided that "supply," for the purposes of the Acts, means supply at the consumer's terminals, and once that conclusion is reached it becomes clear that if delivery is made to a consumer at some place other than his terminals, even if the place of delivery is within the area of the undertakers, the prohibition is infringed, if the supply so delivered is used outside the undertakers' area. On the true interpretation of the statute, delivery must be made at a consumer's terminals, and those terminals must be placed upon some land or some building upon land for which electrical energy is required, and that land or building must be within the undertakers' area of supply.

The result is that, in my judgment, the action succeeds and the plaintiffs are entitled to the injunction which they claim. There will be an order upon the defendants to pay the plaintiffs' costs.

Solicitors: *I. R. G. Jones*; *Watkins, Pulleyn, & Ellison*, for *H. H. Brown*, Town Clerk, Gravesend.

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

DUNCAN *v.* JONES

[KING'S BENCH DIVISION (Lord Hewart, C.J., Humphreys and Singleton, JJ.), October 16, 1935]

[Reported [1936] 1 K.B. 218; 105 L.J.K.B. 71; 154 L.T. 110; 99 J.P. 399; 52 T.L.R. 26; 79 Sol. Jo. 903; 33 L.G.R. 491; 30 Cox, C.C. 279, D.C.]

Police—Execution of duty—Prevention of apprehended breach of peace—Public meeting sought to be held in same circumstances as previous meeting resulting in breach.

The appellant obstructed an inspector of police by attempting to address a street meeting, the holding of which at the particular place had been prohibited by the inspector. Neither the appellant nor any of the persons attending the meeting had either committed, incited, or provoked any breach of the peace, but a previous meeting addressed by the appellant at the same place had terminated in disorder, and the inspector reasonably apprehended that, if the meeting in question were held at the particular place, a breach of the peace would follow.

Held: it was the duty of the police to prevent an apprehended breach of the peace and it was reasonable to apprehend such a breach if it was sought to hold a public meeting in the same place as that in which a previous meeting, which had been addressed by the same speaker and had resulted in a breach of the peace, had been held; and, therefore, the inspector was right in prohibiting the holding of the meeting in question at the particular place, and the appellant was rightly convicted of obstructing him when in the execution of his duty.

Notes. As to the powers and duties of constables, see 25 HALSBURY'S LAWS (2nd Edn.) 320 et seq., and for cases, see 37 DIGEST 186.

Cases referred to:

(1) *Beatty* v. *Gillbanks* (1882), 9 Q.B.D. 308; 51 L.J.M.C. 117; 47 L.T. 194; 46 J.P. 789; 15 Cox, C.C. 138; 15 Digest 644, *6854*.

(2) *R.* v. *Prebble* (1858), 1 F. & F. 325; 15 Digest 708, *7662*.

Case Stated by County of London Quarter Sessions.

An information was preferred by William Jones, an inspector of the metropolitan police (the respondent), against Mrs. Katherine Duncan (the appellant), under the Prevention of Crimes Act, 1871, s. 12, as amended by the Prevention of Crimes Amendment Act, 1885, s. 2, alleging that on July 30, 1934, the appellant did unlawfully and wilfully obstruct the respondent when in the execution of his duty. The appellant was convicted at Tower Bridge police court of the offence charged and was fined 40s. and five guineas for costs. From that conviction she appealed to the County of London Quarter Sessions.

On the hearing of the appeal to quarter sessions the following facts were proved or admitted:—At about 1 p.m. on July 30, 1934, about thirty people, including the appellant, collected with a view to holding a meeting in Nynehead-street, New Cross, S.E., near to the entrance to an unemployed training centre situated in that street. At the entrance to Nynehead-street the following notice was written across the roadway:—

"Sedition"

Meeting at the Test Centre
To-day (now), 1 p.m.

Speakers: R. Kidd (Council for Civil Liberties).
A. Bing (Barrister-at-Law).
E. Hanley (Amalgamated Engineers' Union).
K. Duncan (National Unemployed Workers' Movement).
Defend the Right of Free Speech and Public Meeting.

A box was placed in the roadway opposite the entrance to the training centre, on which the appellant was about to mount when the chief constable of the district, with whom was the inspector, told the appellant that a meeting could not be held in Nynehead-street, but that it could be held in Desmond-street, some 175 yds. distant. The appellant said: "I'm going to hold it," stepped on to the box, and began to address the people who were present, when the inspector immediately took her into custody to which she submitted without resistance. Nynehead-street was a cul-de-sac with houses on one side and the training centre on the other. It was not alleged on behalf of the inspector that there was any obstruction of the highway or of the access to the training centre save in the sense of the obstruction necessarily caused by the box, which was placed in the roadway, and by the presence of the people surrounding it. Neither the appellant nor any of the persons present at the meeting had either committed, incited, or provoked a breach of the peace. On May 25, 1933, however, a meeting had been held opposite the entrance to the training centre which the appellant addressed, and after that meeting a disturbance took place at the training centre. The superintendent of the training centre, who attributed the disturbance to the meeting, sent for the police to prevent a breach of the peace. Subsequently the appellant made one or more attempts to hold a meeting at the same spot, which attempts were frustrated by the police. Before July 30, 1934, the superintendent of the training centre, who feared a repetition of the previous disturbance, communicated with the police, and, by reason of that communication and of reports made by the police in the course of their duty, the chief constable of the district and the inspector apprehended that a breach of the peace would result if the meeting of July 30, 1934, were held.

It was contended on behalf of the appellant that the respondent was not acting in the execution of his duty, inasmuch as neither the appellant nor any of the persons present at the meeting provoked or incited a breach of the peace or gave the respondent cause to suspect that any of them was about to commit a breach of the peace. On behalf of the respondent it was contended that the appellant had been rightly convicted. A

The justices of quarter sessions were of opinion that the appellant must have known of the probable consequences of her holding the meeting, namely, a disturbance, and possibly a breach of the peace, and was not unwilling that those consequences should ensue; that the respondent reasonably apprehended a breach of the peace, and it, therefore, became his duty to prevent the holding of the meeting; and that, by attempting to hold the meeting, the appellant obstructed him in the execution of his duty. They B accordingly dismissed the appeal. The appellant appealed to the Divisional Court.

Pritt, K.C., and *Dingle Foot* for the appellant.

Montgomery, K.C., and *Vernon Gattie* for the respondent.

LORD HEWART, C.J. [after stating the facts and the contentions of the parties, continued:] There have been moments during the argument in this case when it ap- C peared to be suggested that the court was being confronted with a grave case involving what is called the right of public meeting. I say "called" because English law does not recognise any special right of public meeting either for a political or any other purpose. The right of assembly, as PROFESSOR DICEY puts it (LAW OF THE CONSTITUTION (8th Edn.) p. 499), is nothing more than a view taken by the courts of individual liberty of the person and individual liberty of speech. If I thought that the present case raised the D question which has been held in suspense by more than one writer on constitutional law—namely, whether an assembly can properly be held to be unlawful merely because the holding of it is expected to give rise to a breach of the peace on the part of persons opposed to those who are holding the meeting—I should wish to hear much more argument before expressing an opinion. It seems to me that this case does not even touch that important question. E

Our attention has been directed to the somewhat unsatisfactory case of *Beatty* v. *Gillbanks* (1). The circumstances of that case and the charge must be remembered, as also must the important passage in the judgment of FIELD, J., in which CAVE, J., concurred. FIELD, J., said (9 Q.B.D. at p. 314):

> "I entirely concede that everyone must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the F natural consequence of acts of the appellants they would be liable, and the justices would have been right in binding them over. But the evidence set forth in the Case does not support this contention; on the contrary, it shows that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them."

G

After referring to a well-known passage in HAWKINS'S PLEAS OF THE CROWN, Bk. I., c. 28, Part IV, s. 9, he continued:

> "In each [of the examples there given] the circumstances of terror exist in the assembly itself, either in its object, or mode of carrying it out, and there is the widest difference between such cases and the present."

H

Our attention has also been invited to other authorities, especially in Ireland, where the judgments in *Beatty* v. *Gillbanks* (1) have been referred to, but they do not carry the matter any further, although they more than once express a doubt about the exact meaning of the decision. In my view, *Beatty* v. *Gillbanks* (1) is far apart from the present case. No such question as that which arose there is even mooted here.

The present case reminds one rather of the observations of BRAMWELL, B., in *R.* v. I *Prebble* (2), where he said, in holding that a police constable had had no right to remove persons from a certain inn:

> "It would have been otherwise had there been a nuisance or disturbance of the public peace, or any danger of a breach of the peace."

The Case Stated which we have before us indicates clearly a causal connection between the meeting of May, 1933, and the disturbance which occurred after it—that the disturbance was not only post the meeting but was also propter the meeting. In my view, the deputy chairman was entitled to come to the conclusion to which he came on the facts which he has found and to hold that the conviction of the appellant for wilfully obstructing the respondent in the execution of his duty was right. I think, therefore, that this appeal ought to be dismissed.

HUMPHREYS, J.—I agree. I regard this as a plain case, raising no question of importance or novelty. It has nothing to do with the law of unlawful assembly. No charge of that sort was even suggested against the appellant. The sole question raised by the Case is whether the respondent, who was admittedly obstructed, was so obstructed when in the execution of his duty. It does not require authority to emphasise the statement that it is the duty of a police officer to prevent apprehended breaches of the peace. Here it is found as a fact that the respondent reasonably apprehended a breach of the peace. It then, as the Case rightly states, became his duty to prevent anything which in his view would cause that breach of the peace. While he was taking steps so to prevent a reasonably apprehended breach of the peace he was wilfully obstructed by the appellant. I can conceive no clearer case within the statute than that.

SINGLETON, J.—I am of the same opinion. On the facts stated in the Case I am satisfied that the respondent was acting in the execution of his duty at the material time. It also seems to me to be clear that at that time he was doing what it was his duty to do, and that, therefore, the obstruction of him by the appellant constituted obstruction of him when in the execution of his duty. Authorities in other branches of the law do not carry this matter any further.

Appeal dismissed.

Solicitors: *R. W. G. Mackay*; *Wontner & Sons.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

ASTOR *v.* PERRY (INSPECTOR OF TAXES)

DUNCAN AND OTHERS *v.* ADAMSON (INSPECTOR OF TAXES)

[HOUSE OF LORDS (Lord Atkin, Lord Tomlin, Lord Russell, Lord Macmillan and Lord Wright), February 14, 15, 18, 19, March 15, 1935]

[Reported [1935] A.C. 398; 104 L.J.K.B. 423; 153 L.T. 1; 51 T.L.R. 325; 79 Sol. Jo. 231; sub. nom. Adamson *v.* Duncan's Exors., 19 Tax. Cas. 255]

Income Tax—Foreign trust—Power to revoke trusts and claim whole income—Income payable by foreign trustee to taxpayer at taxpayer's direction—Liability to tax of whole income—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. D, Case V, r.* 1, *r.* 2—*Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 20 (1).

The appellant was a national of, and resident in, the United Kingdom. By a settlement dated Sept. 13, 1929, he transferred American stocks and shares to a trust company in New York. That company, as trustee of the settlement, was directed, after paying taxes and other expenses properly chargeable against income, to pay the balance to or for the use of the appellant during his life in such amounts and at such dates as he might from time to time direct, and on the death of the appellant to distribute the capital as the appellant should by will appoint, and in default of such appointment to transfer the capital to the issue of the appellant in equal shares per stirpes. Power was reserved to the appellant during his lifetime by instrument under seal to revoke, modify or change the settlement as he thought fit. It was agreed that the settlement was governed by A the law of New York State, and under that law the appellant had no proprietary interest, legal or equitable, either in the corpus of the trust or the specific dividends or interest, but the whole legal and equitable proprietary interest therein was vested in the trustee. The sole right which the appellant had was the right in equity to enforce performance of the trust against the trustee, and in particular to call upon him to pay over the balance of the income. Under the law of New York State, B the power of revocation of the settlement was valid, but, unless and until it was actually exercised, had no effect on the nature of the rights accruing under the settlement to the trustee and the appellant respectively. The power had not been exercised. The appellant was assessed to income tax under r. 1 of the Rules applicable to Case V in Sched. D to the Income Tax Act, 1918, on the basis that the whole of the income arising from the trust fund must be deemed to be his under C the Finance Act, 1922, s. 20 (1) (a).

Held: the income of the trust fund was the income of the trustee, i.e. the income of a foreign person not resident in this country, and not within the ambit of the Income Tax Acts, and s. 20 (1) (a) of the Act of 1922 did not apply to it, since the application of that provision was limited to income chargeable to tax under the current British Finance Act; and, therefore, the appellant was chargeable to tax D under r. 2 of Case V of Sched. D, in respect of the amounts actually received by him in the United Kingdom.

Marchioness of Ormonde v. *Brown* (1) (1932), 17 Tax. Cas. 333, approved.

Notes. The Finance Act, 1922, s. 20 (1) (a), was repealed by the Finance Act, 1938, and superseded by s. 38 (1) (a) of that Act which in turn was repealed by the Income Tax Act, 1952, and was superseded by s. 404 (1) (a) of that Act. E

Referred to: *Carter* v. *Sharon*, [1936] 1 All E.R. 720.

As to Income Tax under Sched. D, Case V, see 20 HALSBURY'S LAWS (3rd Edn.) 276 et seq.; for cases on the subject, see 28 DIGEST 79–81, *433–450*.

Cases referred to:

(1) *Marchioness of Ormonde* v. *Brown* (1932), 17 Tax Cas. 333; Digest Supp.

(2) *Colquhoun* v. *Brooks* (1888), 21 Q.B.D. 52; 57 L.J.Q.B. 439; 59 L.T. 661; 52 F J.P. 645; 36 W.R. 657; 4 T.L.R. 494, C.A.; on appeal (1889), 14 App. Cas. 493, H.L.; 17 Digest (Repl.) 305, *1121*.

(3) *Drummond* v. *Collins*, [1915] A.C. 1011; 84 L.J.K.B. 1690; 113 L.T. 665; 31 T.L.R. 482; 59 Sol. Jo. 577; 6 Tax Cas. 525, H.L.; 28 Digest 80, *441*.

(4) *Archer-Shee* v. *Garland*, [1931] A.C. 212; 100 L.J.K.B. 170; 144 L.T. 508; 47 T.L.R. 171; sub. nom. *Garland* v. *Archer-Shee*, 15 Tax Cas. 693, H.L.; Digest G Supp.

(5) *Neumann* v. *Inland Revenue Commissioners*, [1934] A.C. 215; 103 L.J.K.B. 210; 150 L.T. 481; 50 T.L.R. 246; 78 Sol. Jo. 121; 18 Tax Cas. 332, H.L.; Digest Supp.

(6) *Kirke's Trustees* v. *Inland Revenue Commissioners* (1926), 136 L.T. 582; 11 Tax Cas. 323, H.L.; Digest Supp. H

(7) *Williams* v. *Singer*, [1921] 1 A.C. 65; 89 L.J.K.B. 1151; 123 L.T. 632; 36 T.L.R. 661; 64 Sol. Jo. 569; 7 Tax Cas. 387, H.L.; 28 Digest 78, *425*.

ASTOR *v.* PERRY (INSPECTOR OF TAXES)

Appeal by the taxpayer, the Hon. W. W. Astor, from the decision of the Court of Appeal (LORD HANWORTH, M.R., SLESSER and ROMER, L.JJ.) on a Case Stated under I the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The Case Stated was as follows:

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held on March 13, 1933, for the purpose of hearing appeals, the Hon. W. W. Astor, hereinafter called the appellant, appealed against assessments to income tax in the sums of £23,809 for the year ending April 5, 1930; £23,809 for the year ending April 5, 1931; and £25,245 for the year ending April 5, 1932, made upon him by the Additional Com-

missioners of Income Tax for the Division of St. James under Case V of Sched. D of the Income Tax Acts in respect of income from possessions out of the United Kingdom.

2. The appellant is resident in the United Kingdom, and is a grandson of the first Lord Astor, and under a settlement made by the said Lord Astor dated May 25, 1916, became absolutely entitled, upon coming of age in August, 1928, to certain American stocks and shares.

3. By a settlement dated Sept. 13, 1929, the appellant transferred the said stocks and shares to the City Bank Farmers Trust Company, hereinafter called the trustee, to be held upon the trusts therein set out.

4. It was provided by the second and third clauses of the settlement that the trustee should collect the income arising from the trust estate, and, after paying the taxes and other incidental expenses and charges properly chargeable against income, should pay or apply the balance of said income to or for the use of the appellant during his life in such amounts and at such dates as he might from time to time direct, and that upon the death of the appellant the trustee should distribute the capital of the trust fund then in its possession to such persons and in such shares or amounts and on such terms and limitations as the appellant should by will or codicil appoint, and in default of such appointment to the issue of the appellant then surviving in equal shares per stirpes, and should he leave no issue to the descendants of his father living at his death in equal shares per stirpes. By the ninth clause power was reserved to the appellant at any time or times during his life by instrument under his hand and seal to revoke the settlement and the trust thereby created concerning all or any part or parts of the trust fund, whether capital or income, or to change or modify the same in any way or to any effect which the appellant might think fit or proper.

5. It was agreed for purposes of the present appeal:

(a) That the trust settlement was governed by the law of New York State.

(b) That upon a proper construction of the trust settlement under such law the appellant had no proprietary interest, legal or equitable, in either the specific assets comprising the corpus of the trust or the specific dividends or interest collected by the trustee; that the whole legal and equitable proprietary interest therein was vested in the trustee, and that the sole right in the appellant was the right in equity to enforce performance of the trust against the trustee, and in particular to call upon him to pay over (at such times as the appellant might direct) the balance of income in the trustee's hands after deducting outgoing from the dividends and interest so collected.

(c) That under such law the provision in the trust settlement reserving to the appellant a power of revocation was valid, but (unless and until such power was exercised) had no effect at all on the nature of the rights accruing under the settlement to the trustee and appellant respectively as explained in (b) above.

6. The appellant had not during the material years exercised the power of revocation reserved to him by the ninth clause of the settlement or made any appointment affecting the trust fund or any part thereof.

7. The assessments under appeal had been made under r. 1 of Case V of Sched. D on the basis that the whole of the income arising from the stocks and shares comprising the trust fund must be deemed for the purposes of income tax to be the income of the appellant under s. 20 (1) (*a*) of the Finance Act, 1922, on the ground that he could without the consent of any other person have obtained for himself the beneficial enjoyment thereof.

8. It was contended on behalf of the appellant:

(a) That the income of the trust fund was income of the trustee, who was resident abroad, and was derived from sources out of the United Kingdom, and was therefore not within the ambit of the Income Tax Acts, and s. 20 (1) (*a*) of the Finance Act, 1922, had no application to it. Reference was made to the decision in the case of the *Marchioness of Ormonde* v. *Brown* (1).

(b) That the appellant was not, or at least might not, have been able to obtain for himself the beneficial enjoyment of the income without the consent of the trustee.

(c) That s. 20 (1) (*a*) of the Finance Act, 1922, could not be applicable to the case, as the appellant was already in beneficial enjoyment of the income under the settlement without exercising any powers of revocation or other powers thereunder, whereas the subsection contemplates only persons who are not in beneficial enjoyment of the income for the time being and can only become so by exercising such a power of revocation or other power.

(d) That as from the date of the settlement the appellant was chargeable to income tax under r. 2 of Case V of Sched. D on the amounts received in the United Kingdom, and the assessments ought to be amended accordingly.

9. It was contended on behalf of the Crown:

(a) The income of which the appellant had the beneficial enjoyment under the settlement was not the income arising from the specific stocks and shares comprising the trust fund, but was income from a possession other than stocks and shares.

(b) That the appellant was able, without the consent of any other person, by means of the exercise of the power of revocation reserved by the settlement, to obtain for himself the beneficial enjoyment of the whole of the income arising from the specific stocks and shares comprising the trust fund.

(c) That such income was within the ambit of the Income Tax Acts, and under s. 20 (1) (*a*) of the Finance Act, 1922, must be deemed for the purposes of income tax to be his income.

(d) That the assessments had rightly been made under r. 1 of Case V of Sched. D, and ought to be confirmed.

10. The commissioners who heard the appeal, held that the matter was concluded by the decision in the case of the *Marchioness of Ormonde* v. *Brown* (1), and that s. 20 (1) (*a*) of the Finance Act, 1922, could not be applied so as to charge the appellant with income tax on foreign income which, under the provisions of the settlement, was income of the American trustee. They accordingly amended the assessments by substituting amounts computed under r. 2 of Case V for those computed under r. 1 as from the date of the settlement.

11. The respondent immediately after the determination of the appeal declared his dissatisfaction therewith as being erroneous in point of law and in due course required the commissioners to state a case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149.

The Court of Appeal held, reversing the decision of Finlay, J., that the power of revocation, though not in fact at present exercised, operated to bring this case out of r. 2, and to bring it within r. 1, so that the income would be income arising from stocks and shares, in which case the full amount was exigible to taxation whether received in the United Kingdom or not. The appellant having the power of revocation, the income must be deemed to be his income under the provisions of s. 20 (1) (*a*) of the Finance Act, 1922, and consequently an income arising from stocks and shares and taxable accordingly under r. 1, and was no longer income from foreign possessions, the legal and equitable interest therein, without the power of revocation, having been in the trustee under New York law.

Latter, K.C., and *Cyril Asquith* for the appellant.

The Solicitor-General (*Sir Donald Somervell, K.C.*), *J. H. Stamp*, and *Reginald Hills* for the respondent.

Duncan and others *v.* Adamson (Inspector of Taxes)

Appeal by the taxpayers, the executors of W. A. Duncan, deceased, from an order of the Court of Appeal (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), dated July 10, 1934, affirming an order of the King's Bench Division (Finlay, J.) dated June 29, 1934, upon a Case Stated by the Commissioners for the Special Purposes of the Income Tax Acts.

There was no dispute as to the facts or figures, and the question in issue, shortly stated, was whether the income of a beneficiary (resident in the United Kingdom) under a foreign settlement which, as a result of the law applicable to that settlement, was "income arising from possessions out of the United Kingdom, other than stocks, shares or rents" within r. 2 of the rules applicable to Sched. D to the Income Tax Act, 1918, ceased to be such and became "income arising from stocks, shares or rents in any place out of the United Kingdom" within r. 1 of the same rules by reason of s. 20 of the Finance Act, 1922, the settlement in question having reserved to the beneficiary an absolute power of revocation which had not been exercised.

The particular assessments in question were assessments to income tax in the sums of £1,297 5s. and £2,426 for the years ending April 5, 1932, and April 5, 1933, and were based on the application to the income arising under the settlement of r. 1 of Case V of Sched. D.

The Case Stated was as follows:

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on Oct. 31, 1933, for the purpose of hearing appeals, the executors of W. A. Duncan (deceased) (hereinafter called the appellants) appealed against assessments to income tax under Case V of Sched. D for the years ending April 5, 1932, and April 5, 1933, respectively, in respect of income from possessions out of the United Kingdom made upon the appellants by the Commissioners for the Division of the City of London.

2. The appellants are the executors of the will of the late Walter Atholl Duncan (hereinafter called the deceased), who died on Aug. 13, 1932, and who for some years prior to his death resided in the United Kingdom.

3. By a settlement dated May 20, 1926, and executed by the deceased in Paris the deceased transferred certain shares in Duncan Brothers and Co., Ltd., a company registered and carrying on business in Calcutta, to trustees to pay the income therefrom to himself during his life and after his death to his widow for her life, and subject thereto on certain trusts for his children. By cl. 14 of the settlement the deceased reserved to himself an absolute power to vary or revoke any of the trusts declared by the settlement.

4. By a declaration of trust dated March 1, 1928, the deceased transferred certain further shares in Duncan Brothers and Co., Ltd., of Calcutta, to the trustees upon the trusts of the settlement.

5. The trustees of the settlement were at all material times resident in British India, where the trust fund was situate. Stamp duty was paid on the settlement in India.

6. Until January, 1929, the income of the settled shares was remitted to the deceased in this country through Messrs. Walter Duncan and Co., of London, who accounted to the Crown, for the British income tax in respect thereof. During the two years under appeal no income was remitted by the trustees to the deceased in this country.

7. It was agreed for the purposes of the present appeal that the trust settlement was governed by the law of British India, and that upon a proper construction of the trust settlement under such law the deceased had no proprietary interest, legal or equitable, in the specific assets comprising the corpus of the trust, or in the specific dividends collected by the trustees, and that the sole interest of the deceased therein was his right to call upon the trustees, and, if necessary, to compel them to administer the trust so as to give him the income according to the terms thereof.

8. It was contended on behalf of the appellants:

(a) That s. 20 (1) (*a*) of the Finance Act, 1922, was not applicable in the circumstances of this case.

(b) That as from the date of the settlement the deceased was chargeable under r. 2 of Case V of Sched. D, on the basis of the sums remitted.

(c) That as in the two years under appeal there had been no remittances the assessments under appeal should be discharged.

9. On behalf of the Crown it was contended:

(a) That the deceased was able without the consent of any other person by means of the exercise of the power of revocation reserved by the settlement to obtain for himself the beneficial enjoyment of the whole of the income arising from the specific stocks and shares comprising the trust fund;

(b) That such income was within the ambit of the Income Tax Acts, and under s. 20 (1) (*a*) of the Finance Act, 1922, must be deemed for the purpose of income tax to be income of the deceased;

(c) That the assessments were correct in principle.

10. The commissioners who heard the appeal, held that s. 20 (1) (*a*) of the Finance

Act, 1922, did not apply to thei ncome in question, and they accordingly discharged the assessments.

Finlay, J., dismissed the appeal by the appellants on the ground that the question at issue was governed by the decision of the Court of Appeal in *Perry* (*Inspector of Taxes*) v. *Astor* (see supra), and the judgment of the learned judge was affirmed by the Court of Appeal.

Wilfrid Greene, K.C., *A. Andrewes-Uthwatt*, and *Arthur T. Macmillan* for the appellants.

The Solicitor-General (*Sir Donald Somervell, K.C.*), *J. H. Stamp*, and *Reginald Hills* for the respondent.

The House took time for consideration.

March 15. The following opinions were delivered:

LORD ATKIN.—In these two cases I have had the opportunity of reading the opinion which is about to be pronounced by my noble and learned friend, Lord Macmillan. I entirely agree with it, and find it unnecessary to add anything to it. I am requested by my noble and learned friend, **Lord Tomlin**, who, unfortunately, is unable to be here to-day to say that he also agrees with it.

LORD RUSSELL.—I, too, have had an opportunity of reading and considering the opinion about to be delivered by my noble and learned friend, Lord Macmillan, but, unfortunately, I find myself in disagreement with him and the others of your Lordships concerning these appeals. I cannot justify to myself the departure which you are prepared to make from the language used in s. 20 (1) of the Finance Act, 1922.

The words relevant to the present case are crystal clear.

> "Any income of which any person is able . . . without the consent of any other person by means of the exercise of any . . . power of revocation . . . by virtue of . . . a disposition made . . . by himself, to obtain for himself the beneficial enjoyment . . . shall . . . be deemed for the purpose of the enactments relating to income tax (including super tax) to be the income of the person who is . . . able to obtain the beneficial enjoyment thereof . . . and not to be for those purposes the income of any other person."

There must, of course, be the necessary limitation which is inherent in all our income tax legislation, namely, that what is taxed under or by virtue of this provision can only be either (i) income which is here, or (ii) income of a person resident here. So far I believe there is no difference of opinion among us; nor is it I think in dispute that, if no further limitation is placed on the words of the section, the case of Mr. Astor (for I will deal with his case in the first instance) falls precisely under those words. The income received by the trustees in the United States is income of which he is able, without the consent of any other person by means of the exercise of the power of revocation contained in the settlement made by himself, to obtain for himself the beneficial enjoyment; with the result, if the section applies, that such income is to be deemed for the purposes stated, to be his income and no one else's.

Your Lordships, however, are of opinion that the section does not apply to the case of Mr. Astor, because, in your view the section should be subjected to another and further limitation in that the income there mentioned should be confined to income already charged to tax, and that all that the section accomplishes is to shift the burden, and to substitute one person for another as the person liable to be charged in respect of income already chargeable.

The justification for so departing from the language employed is, as I understand it, of this nature: A variety of instances are given to show that if read without the further limitation the section may result in no tax being payable in respect of income which is in fact being received by a person resident here. These are said to be anomalies, and to be in conflict with the provisions of Sched. D; and because of this it is said that upon the authority of *Colquhoun* v. *Brooks* (2) we are entitled to give to the words of s. 20 (1) a meaning different from their ordinary meaning. Other parts of the section are also pointed to, as raising difficulties in their application to cases where the person in fact entitled to the income is resident abroad.

To say that the natural meaning of the words is in conflict with the provisions of Sched. D is not, in my opinion, an accurate statement. The income escapes taxation in the cases put only because the artificial facts which the legislature has created take it out of the annual profits or gains covered by Sched. D. The two enactments are not inconsistent; there is no conflict, except the conflict of facts which necessarily arises when the legislature enacts that what is not the fact is to be deemed to be the fact. In *Colquhoun* v. *Brooks* (2) the sole question was whether profits of a trade carried on exclusively abroad fell within Case I or Case V of Sched. D of the Act of 1842. As Lord Macnaghten pointed out, the wording of both cases was apt for the purpose of including the profits in question; but a consideration of various other provisions of the Act established, from the language which the legislature had used, that while profits from a trade carried on here, or partly here and partly abroad, fell under Case I, profits from a trade carried on exclusively outside Great Britain fell under Case V. Both Lord Herschell and Lord Macnaghten point out, as I read their speeches, that startling results are not of themselves sufficient to warrant a departure from the ordinary meaning of the words of a statute. *Colquhoun* v. *Brooks* (2) is not, in my opinion, an authority in point here. My noble and learned friend, Lord Macmillan, also prays Lord Loreburn in aid, and cites from his speech in *Drummond* v. *Collins* (3) an extract in which he refers to *Colquhoun* v. *Brooks* (2). I could have wished that the choice had fallen upon a passage from the same speech which exactly expresses my views in regard to the present case, and in which Lord Loreburn uses the following words ([1915] App. Cas. at p. 1018):

> "Lord Cairns long ago said that 'if the person sought to be taxed comes within the letter of the law, he must be taxed.' And though there have been cases in which the letter of the law has been disregarded in view of other statutory language, I think it can be done only in case of necessity. It must be a necessary interpretation."

I can find no necessary interpretation here. The plain words of the Act may in some cases lead to results, which to some may appear strange. That does not concern us, or justify us in altering the meaning of the plain words, in order to produce what we may consider more sensible or less anomalous results. That course is only open to us if we find it necessitated by the language employed in other parts of the statute.

One argument needs perhaps to be specifically considered. It was said that one result of reading the section as I read it would be this: That Mr. Astor would be liable to pay tax in respect of the income received by the trustees in the United States as income deemed to be his, and also liable to pay tax on the income which the trustees were bound to pay over, the latter being (within the decision in the second *Archer-Shee Case* (4)) the income springing from a foreign possession, namely, his right of action against the trustees. In my opinion no such double taxation could occur and for the reason given by Romer, L.J. Once the income which is the property of the trustees is to be deemed the income of Mr. Astor (i.e., is to be treated for the purposes of the Income Tax Acts in all respects as if it was the property of Mr. Astor), it automatically becomes impossible for the purposes of those Acts to say that he receives anything which springs from a right of action against the trustees, in respect of their income.

In view of the fact that your Lordships take a different view, I will not occupy time in dealing with the other points argued on behalf of the appellants. Suffice it to say that on consideration I can find nothing in the various provisions of the section in question, or in the consequences said to flow therefrom if construed without the suggested qualification, to induce, much less to compel, me to depart from the ordinary meaning of the language which the legislature has used.

My noble and learned friend Lord Macmillan in his opinion most properly proclaims our disability to amend the law. For myself I feel unable by reason of that very disability to allow Mr. Astor's appeal.

I agree with the decision of the Court of Appeal and would dismiss the appeal accordingly.

The same result should follow in the appeal of *Duncan and others* v. *Adamson* (*Inspector of Taxes*) (see supra), as it was conceded that the two appeals must necessarily share the same fate.

LORD MACMILLAN.—The appellant Mr. Astor is, within the meaning of the Income Tax Acts, a "person residing in the United Kingdom." In 1928 he became the owner of certain stocks and shares in the United States of America. By a settlement dated Sept. 13, 1929, he transferred these stocks and shares to a trustee resident in the United States of America. Under the trust so constituted the duty of the trustee is to collect the income arising from the trust estate, and, after paying the taxes and other incidental expenses and charges properly chargeable against income, to pay or apply the balance of the income to or for the use of the appellant during his life as he may direct. Power is reserved to the appellant to revoke the settlement and the trust thereby created in whole or in part at any time during his life.

It is agreed that the trust is governed by the law of the State of New York and that by the law of that State the appellant has no proprietary interest, legal or equitable, either in the specific stocks and shares forming the capital assets of the trust or in the specific dividends or interest collected by the trustee. The sole right of the appellant is to enforce performance of the trust, and in particular to call upon the trustee to pay over to him, as he may direct, the balance of income in the trustee's hands after deducting outgoings. It is further agreed that, according to the law of the State of New York, the power of revocation reserved to the appellant is valid, but that, unless and until exercised, it has no effect on the nature of the appellant's rights under the settlement as above described. The appellant has not exercised his power of revocation.

Had the settlement contained no power of revocation the annual profits or gains arising or accruing to the appellant from his equitable interest under the trust would have been chargeable to income tax under r. 2 applicable to Case V of Sched. D, as being income arising from a possession out of the United Kingdom other than stocks, shares or rents. Under that rule the tax would have been computed

> "on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom . . . on an average of the three preceding years. . . ."

That is the effect of the decision of your Lordships' House in *Archer-Shee* v. *Garland* (4), as applied to the facts of the present case, apart from the question of the effect of the revocation clause.

But the existence of the reserved power of revocation in the settlement is said by the Crown to alter the position. The point arises in this way. Formerly under Case V tax on income from all foreign possessions was without distinction charged only on the actual sums annually received in the United Kingdom on a three years' average. The Finance Act, 1914, however, by s. 5, introduced a distinction between income arising from securities, stocks, shares or rents in any place out of the United Kingdom and income arising from other possessions out of the United Kingdom, and provided that the former should be computed

> "on the full amount of the income whether the income has been or will be received in the United Kingdom or not."

This provision is reproduced in the present Income Tax Act, 1918, as regards securities, in r. 1 applicable to Case IV of Sched. D, and as regards stocks, shares or rents, in r. 1 applicable to Case V of Sched. D.

Then in 1922 there was enacted by the Finance Act of that year a new provision which has given rise to the question now at issue. It is contained in s. 20, which it is necessary to quote at considerable length in order to appreciate the nature of the enactment. The material parts of the section read as follows:

> "(1) Any income (*a*) of which any person is able . . . without the consent of any other person by means of the exercise of any power of appointment, power of revocation or otherwise howsoever by virtue or in consequence of a disposition made directly or indirectly by himself, to obtain for himself the beneficial enjoyment; or (*b*) which by virtue or in consequence of any disposition made, directly or indirectly, by any person . . . (other than a disposition made for valuable and sufficient consideration) is payable to or applicable for the benefit of any other person for a

period which cannot exceed six years; . . . shall, subject to the provisions of this section . . . be deemed for the purposes of the enactments relating to income tax (including super tax) to be the income of the person who is . . . able to obtain the beneficial enjoyment thereof, or of the person, if living, by whom the disposition was made, as the case may be, and not to be for those purposes the income of any other person. . . . (2) Where by virtue of paragraph (*b*) . . . of subsection (1) of this section any income tax or super tax becomes chargeable on and is paid by the person by whom the disposition was made, that person shall be entitled to recover from any trustee or other person to whom the income is payable by virtue or in consequence of the disposition the amount of the tax so paid, and for that purpose to require the commissioners concerned to furnish to him a certificate specifying the amount of the income in respect of which he has so paid tax and the amount of the tax so paid, and any certificate so furnished shall be conclusive evidence of the facts appearing thereby. (3) Where any person obtains in respect of any allowance or relief a repayment of income tax in excess of the amount of the repayment to which he would but for the provisions of paragraph (*b*) . . . of subsection (1) of this section have been entitled, an amount equal to the excess shall be paid by him to the trustee or other person to whom the income is payable or in consequence of the disposition, or where there are two or more such persons shall be apportioned among those persons as the case may require. If any question arises as to the amount of any payment or as to any apportionment to be made under this subsection, that question shall be decided by the General Commissioners whose decision thereon shall be final. . . ."

In reliance upon the combined effect of this section and r. 1 applicable to Case V of Sched. D, assessments to income tax were made upon the appellant for each of the three years 1929–30, 1930–31, and 1931–32, in respect of the whole income received in those years by the trustee in the United States in the shape of dividends and interests on the stocks and shares in the United States of which the trust estate consists. The question is whether these assessments are justified or whether, as the appellant contends, he ought to be assessed under r. 2 only on the full amount of the actual sums annually received by him in the United Kingdom from the American trustee.

The Special Commissioners held that the matter was concluded by the decision of FINLAY, J., in the case of *Marchioness of Ormonde* v. *Brown* (1), and that s. 20 (1) (*a*) of the Finance Act, 1922, could not be applied so as to charge the appellant with income tax on foreign income which under the provisions of the settlement was income of the American trustee. They accordingly amended the assessments by substituting amounts computed under r. 2 of Case V for those computed under r. 1.

The Crown appealed to the King's Bench Division, and, on the case coming before FINLAY, J., admitted that it was entirely covered by his decision in the case of the *Marchioness of Ormonde* v. *Brown* (1). The decision of the Special Commissioners was accordingly affirmed without argument. On a further appeal by the Crown the Court of Appeal unanimously reversed the decision of FINLAY, J., and upheld the original assessments.

The argument for the Crown has at first sight an attractive simplicity. Is the appellant able, by means of the exercise of a power of revocation contained in a disposition, made directly by himself, to obtain for himself the beneficial enjoyment of the income which under that disposition his American trustee collects? The answer must plainly be in the affirmative. And does that income arise from stocks and shares in a place out of the United Kingdom? The answer must again be in the affirmative. The words of s. 20 and r. 1 of Case V fit the facts precisely, and that, contends the Crown, must end the matter.

This appearance of simplicity is delusive, for if, as the Crown submits, the critical words "any income" with which s. 20 opens, are read without any qualification, territorial or other, the most startling anomalies result. Thus if the section is to be read as applicable to any income anywhere of which any person anywhere can by the exercise of a power of revocation obtain for himself the beneficial enjoyment it covers the case of a revocable disposition to an American trustee of American stocks and shares by a person resident in America under which the income is payable to a person resident in this country. In the case put, the American settlor is able by exercising his power of revocation to obtain for himself the beneficial enjoyment of the income of the stocks and shares which he has settled. That income, therefore, is to be deemed for British income tax purposes to be his income and not to be the income for those purposes of the person resident in this country who is entitled to it. Incidentally one asks how a British Income Tax Act can impute to an American citizen

> "for the purposes of the enactments relating to [British] income tax (including super tax)"

an income of which the American citizen has by the law of his own country effectually divested himself. Or suppose a resident in America makes a disposition there under which the income of American stocks and shares is payable to a resident in the United Kingdom for a period of five years. The section, read literally, as the Crown would have your Lordships read it, would have the effect, under para. (*b*), of deeming the income to be the income of the American resident who made the disposition and not the income of the beneficiary in this country. In both the cases supposed the person resident in this country would under s. 20 be entirely exempt from tax in respect of the income, however large, to which he was entitled under the American disposition, even although the whole of it were remitted to him in this country.

Perhaps the most anomalous because the simplest case that could be put is that of a person resident in this country who makes a revocable settlement of assets abroad under which another person also resident in this country is the beneficiary of the income. The settlor then goes abroad and ceases to be resident in this country. Under s. 20 the income is still, according to the Crown, to be deemed to be his income and not that of the beneficiary; the result is that neither the settlor nor the beneficiary pays any tax, although the whole of the income may be received and enjoyed by the beneficiary in this country.

But under Sched. D the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever whether situate in the United Kingdom or elsewhere are chargeable to tax. Under this, which is a cardinal provision of our income tax legislation, the income, in the three cases I have put, would be chargeable to tax while under s. 20 of the 1922 Act (which by s. 49 thereof is to be construed together with the Act of 1918 of which Sched. D is a part) the same income would be exempted from tax.

The learned Solicitor-General did not flinch from these remarkable results of his unqualified reading of the words "any income" in the Act of 1922, but to your Lordships they may well suggest a doubt as to whether these words should not be read in a sense which would avoid such a conflict.

But there are further difficulties. The section applies not only to cases where a person by the exercise of a power of revocation can obtain for himself the beneficial enjoyment of income; it applies also to cases where a person can do so by the exercise of a power of appointment. Suppose that an American resident by an American settlement of American stocks and shares conferred on a resident in this country a power of appointment of the income, which the donee of the power could exercise in his own favour. The income which he could appoint to himself would be deemed to be his income, although he had not exercised the power, but in that case his income would not be income arising from specific stocks or shares in America, but from his equitable right to the American trust income and would be taxed under r. 2 of Case V on the amount actually received by him in this country, and not under r. 1 on the whole income received by the American trustee.

Then sub-s. (2) also raises difficulties. If the Crown is right then if a person resident in this country makes a disposition of the income of American stocks and shares in favour of a resident in America for a period of five years and under s. 20 (1) (*b*) is charged with tax on that income he is under sub-s. (2) given a right to recover the tax so paid from the American beneficiary. A reading of our income tax legislation which leads to the remarkable result of imposing a liability of recoupment on an American citizen is not lightly to be accepted. Sub-s. (3) carries the matter still further, for it would in the case just figured require the person resident in this country in certain contingencies to pay to his American beneficiary sums in addition to the income which he had settled on him, which would be fair enough if under sub-s. (2) he could succeed in recovering from him the tax paid in this country, but would otherwise be quite unreasonable.

I venture to think that the conflict and the anomalies to which I have drawn attention arise, in the words of my noble and learned friend LORD TOMLIN,

> "from the fact that the amendments from time to time made to the Income Tax Acts, directed as they are to stopping an exit through the net of taxation freshly disclosed, are too often framed without sufficient regard to the basic scheme upon which the Acts originally rested"

(*Neumann* v. *Inland Revenue Commissioners* (5) ([1934] A.C. at p. 222). The enactment contained in s. 20 is intelligible and practicable where all the parties concerned are within the United Kingdom, and doubtless that was the case which the legislature had in contemplation. The possible extra-territorial effects of the section were obviously not thought out and the task which the legislature has omitted to perform is imposed upon your Lordships of reconciling the resulting conflict. But your Lordships in your judicial capacity are under a disability from which the legislature is free, for you have no power to amend the law. However anomalous an enactment may be, it must be applied by the courts according to its terms, unless these terms are susceptible, according to the accepted canons of construction, of an interpretation which avoids the anomalies.

Fortunately your Lordships are not without authoritative guidance as to the principles upon which the language of taxing statutes may legitimately be construed. In the leading case of *Colquhoun* v. *Brooks* (2) the Crown were able as here to contend that the statutory language precisely covered their case. "I think," says LORD HERSCHELL (14 App. Cas. at p. 503),

> "that giving to the language of the enactment its natural meaning the facts stated do apparently bring this case within it."

But he went on to point out that where, as here again, the words of a statute according to their natural meaning lead to "strangely anomalous" results it is legitimate to examine their statutory context in order to see whether they ought to be construed as they would be if read alone. LORD LOREBURN, L.C., says in *Drummond* v. *Collins* (3) ([1915] A.C. at p. 1017):

> "Courts of law have cut down or even contradicted the language of the legislature when on a full view of the Act, considering its scheme and its machinery and the manifest purpose of it, they have thought that a particular case or class of cases was not intended to fall within the taxing clause relied upon by the Crown. A notable instance is the case of *Colquhoun* v. *Brooks* (2) decided nearly thirty years ago and always followed."

So far as the intention of an enactment may be gathered from its own terms it is permissible to have regard to that intention in interpreting it, and if more than one interpretation is possible that interpretation should be adopted which is most consonant with and is best calculated to give effect to the intention of the enactment as so ascertained. More especially, where two sections forming part of a single statutory code are found, when read literally, to conflict, a court of construction may properly so read their terms as, if possible, to effect their reconciliation.

I now propose to examine rather more closely the actual language and structure of s. 20 as a whole in order to see whether any aid is thus afforded in ascertaining the intention of the legislature and so in interpreting the words "any income" with which the section opens. It has to be observed at the outset that the section does not provide that the power of appointment or the power of revocation is to be deemed to have been exercised. On the contrary, it assumes that the power has not been exercised and that the income will continue in fact to be applied as the disposition directs. The section does not declare that the dispositions with which it deals are to be treated as non-existent in a question between the maker of the disposition and the Inland Revenue. The scheme of the section is that the income which the settlor by his disposition has diverted from himself and conferred on another shall be notionally restored to him while in fact continuing to be applied as he has directed. Income which in fact is the income of B is to be deemed for income tax purposes to be the income of A.

The purpose is notionally to transfer B's income to A, so that A may be charged to tax on the aggregate of his own and B's income. The person to whom the income is payable under the disposition and the person who has made the disposition are to be treated notionally as a single taxpayer. The incomes of the two persons are to be amalgamated. The contention of the Crown goes much further; it proposes not to amalgamate the actual incomes of A and B, but to amalgamate with A's income, not the income which he has conferred on B, but the income which A would have had if he had never made any disposition in favour of B, and it further proposes in the process of amalgamation to change the taxable character of B's income so as to render it chargeable under a different head.

In the present case the income of the trustee is the income of a resident in America derived under an American disposition from American assets. Primâ facie the income tax authorities have no concern with it. But they have concern with the income of residents in the United Kingdom and our legislature can, of course, competently "determine the measure of taxation to be applied in the case of a person so resident" by any standard it pleases (*Colquhoun* v. *Brooks* (2) (14 App. Cas. at p. 504). If a resident in this country has possessions out of the United Kingdom the legislature has provided how he shall be taxed in respect of such possessions; if they are securities, stocks, shares, rents, he pays on the full amount of the income therefrom whether brought home or not; if they are not of this character he pays on the amount actually brought home. It is with this existing scheme that s. 20, which is to be read along with it, has to be reconciled. I have shown how on the Crown's reading these enactments come into conflict. The reconciliation is, I suggest, to be effected by reading s. 20 as designed to effect a notional amalgamation of two existing incomes both charged to income tax by the existing law. If the words "any income" are construed, as they reasonably may be, to mean any income chargeable with tax under the British Finance Act of the year, the difficulties of the Crown's interpretation to a large extent disappear. For the income of the American trustee, being the income of a foreign non-resident, is not brought into charge, while the income so far as received by the resident in this country is, consistently with the scheme of the Income Tax Acts, brought into charge under its appropriate head, in the present instance r. 2, and is by force of s. 20 amalgamated with the resident's income derived from sources within the United Kingdom.

In reaching this conclusion I have not been much moved by the argument that s. 20 rightly regarded is not a charging section and so ought not to be read as imposing a charge which is not elsewhere created. It seems to me that to say that a particular item of income which belongs to B is for income tax purposes to be deemed to belong to A is quite an effectual way of charging A with tax on the transferred income. In *Kirke's Trustees* v. *Inland Revenue Commissioners* (6) this house had before it the following words in r. 4 applicable to Cases I and II of Sched. D:

> "Where any person has received repayment of any amounts previously paid by him by way of excess profits duty the amount repaid shall be treated as profit for the year in which the repayment is received."

LORD SUMNER in construing this provision expressed the view that the word "treated" was "an apt word to impose a charge." "Deemed," in my view, is a synonym of equal efficacy. Indeed, on the reading of s. 20 which I propose to your Lordships, the section is a charging section in the sense that it charges with tax on certain income a person who would not otherwise be chargeable with tax on that income. But it is not a charging section, as the Crown would make it out to be, in the sense of charging with tax income which according to the existing law could not be charged at all except so far as received in this country. As LORD WRENBURY pointed out in *Williams* v. *Singer* (7) ([1921] 1 A.C. at p. 75):

"The two things are quite distinct; the property chargeable is one thing, the person liable to be charged is another."

The result of the process of "deeming" which the section directs is, in my opinion, not to bring into tax income not previously chargeable but to substitute one person for another as the person liable to be charged in respect of income already chargeable. To justify reading the section as on the one hand imposing a charge on income not at present subject to charge, and on the other hand as exempting from charge altogether income which is at present chargeable—for that is the result of the Crown's contention—would, in my view, require much more express and precise language than the section contains.

Some confusion is created in the present case by the circumstance that the appellant is at one and the same time the maker of the disposition in question and the person entitled to the income arising under it. I have disregarded this specially, for it is obviously merely accidental and irrelevant to the argument; but it may be pointed out that the section certainly does not in any event very well fit the case, for it would be odd that the income of the funds covered by the disposition should be "deemed" to be the income of the person whose income it is in fact. It is, however, on much more fundamental grounds that I have reached the conclusion that the Crown's contentions must fail.

The result on the whole matter is that, in my opinion, the case of the *Marchioness of Ormonde* v. *Brown* (1) and this Case were rightly decided by Finlay, J., and that the judgment of the Court of Appeal in the present case should be reversed with costs, and the judgment of Finlay, J., restored.

The appeal in the case of *Duncan and others* v. *Adamson*, also set down for consideration by your Lordships to-day, raises, as was agreed at the Bar, precisely the same question of law as that with which I have just dealt. In this instance, however, the decision of Finlay, J., was in favour of the Crown, following the judgment of the Court of Appeal in the case of *Perry* (*Inspector of Taxes*) v. *Astor*, and I propose, accordingly, that your Lordships should reverse, with costs, the judgments of Finlay, J., and the Court of Appeal, and restore the determination of the Special Commissioners.

LORD WRIGHT.—I have had the opportunity of considering in print the opinion which has just been delivered by my noble and learned friend, Lord Macmillan. I am so fully in accord with the reasoning and the conclusions of that opinion, that I have nothing to add.

Appeals allowed.

Solicitors: in the first appeal, *Janson, Cobb, Pearson, & Co.*; *Solicitor of Inland Revenue*; in the second appeal, *Sanderson, Lee, & Co.*; *Solicitor of Inland Revenue.*

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

BERRY AND ANOTHER *v.* TOTTENHAM HOTSPUR FOOTBALL AND ATHLETIC CO., LTD.

[CHANCERY DIVISION (Crossman, J.), July 9, 23, 31, 1935]

[Reported [1935] Ch. 718; 104 L.J.Ch. 342; 154 L.T. 10; 79 Sol. Jo. 642]

Company—Shares—Transfer—Registration—Refusal to register—Liability of directors to state on what grounds they act—Right to decline given by articles.

Discovery—Interrogatory—Agreement between parties that one should not be compellable to disclose information sought by interrogatory.

The first plaintiff, B., was the holder of one ordinary share in the defendant company. He transferred this share to the second plaintiff, S. Subsequently B. and S. severally requested the defendant company to register the transfer. Registration was refused. Article 16 of the defendant company's articles of association authorised the directors to decline to register any transfer of shares on four separate grounds and continued "and the directors shall not be bound to specify the grounds upon which registration of any transfer is declined under this article." The plaintiffs brought this action claiming a declaration that the company was not entitled to decline to register the transfer and rectification of the company's register accordingly, and they sought to administer to the defendant company interrogatories directed to ascertain on which of the four grounds specified in the articles the refusal to register the transfer was based.

Held: that on the true construction of art. 16 the directors were excused from naming which were the particular ground or grounds on which they had acted; the article was binding, not only on B., who was a member of the company, but also on S., who was applying to be registered; the mere fact that an action was brought and an application made to deliver interrogatories did not oust an agreement constituted by the articles between the parties and preclude the parties from relying on it; and, therefore, the company would not be bound to answer the interrogatories if they were allowed.

Sutherland (Duke) v. *British Dominions Land Settlement Corpn, Ltd.* (1), [1926] Ch. 746, distinguished.

Turney v. *Bayley* (6) (1864), 4 De G.J. & Sm. 332, considered.

Notes. As to transfer of shares, see 6 HALSBURY'S LAWS (3rd Edn.) 248 et seq., and as to discovery where there is an agreement not to disclose, see 12 HALSBURY'S LAWS (3rd Edn.) 56, 57; and as to cases, see 9 DIGEST (Repl.) 388 et seq., and 18 DIGEST 178 et seq.

Cases referred to:

(1) *Sutherland (Duke)* v. *British Dominions Land Settlement Corpn., Ltd.*, [1926] Ch. 746; 59 L.J.Ch. 542; 135 L.T. 732; Digest Supp.

(2) *The Gresham Life Assurance Society* (1872), 8 Ch. App. 446; 42 L.J.Ch. 183; 28 L.T. 150; 21 W.R. 186; 9 Digest (Repl.) 218, *1384*.

(3) *Gateshead Assessment Committee* v. *Redheugh Colliery, Ltd.*, [1924] 1 K.B. 369; 93 L.J.K.B. 499; 130 L.T. 366; 88 J.P. 25; 40 T.L.R. 169; 68 Sol. Jo. 341; 22 L.G.R. 70; on appeal, [1925] A.C. 309, H.L.; 33 Digest 399, *1100*.

(4) *Whiffen* v. *Hartwright* (1848), 11 Beav. 111; 11 L.T.O.S. 197; 50 E.R. 759; 18 Digest 143, *924*.

(5) *Re Bede Steam Shipping Co., Ltd.*, [1917] 1 Ch. 123; 86 L.J.Ch. 65; 115 L.T. 580; 33 T.L.R. 13; 61 Sol. Jo. 26, C.A.; 9 Digest (Repl.) 392, *2524*.

(6) *Turney* v. *Bayley* (1864), 4 De G.J. & Sm. 332; 3 New Rep. 695; 33 L.J.Ch. 499; 10 L.T. 115; 12 W.R. 633; 46 E.R. 947; 18 Digest 68, *259*.

Procedure Summons.

The Tottenham Hotspur Football and Athletic Company, Ltd. (hereinafter called "the company") was incorporated in 1898, and art. 16 of the company's articles of association provided that:

> "The directors may decline to register any transfer of shares made by a member who is indebted to the company or in case the transferee shall be a person of whom the directors do not approve or shall be considered by them objectionable, or the transfer shall be considered as having been made for purposes not conducive to the interests of the company, and the directors shall not be bound to specify the grounds upon which the registration of any transfer is declined under this article. . . ."

The first plaintiff, Hubert Berry, was the registered holder of (inter alia) one ordinary share of £1 in the company's capital and he transferred this share to the second plaintiff, James Arthur Stewart. On March 23, 1935, both plaintiffs wrote to the company asking the company to register the transfer. By two letters dated April 3, 1935, the company refused to register the transfer. The plaintiffs by the writ in this action claimed a declaration that the company was not entitled to decline to register the transfer, and an order that the register be rectified by the deletion of the plaintiff Berry's name as holder of the share and by the insertion in lieu thereof of the plaintiff Stewart's name.

The plaintiffs sought to administer to the company the following among other interrogatories:

"2. Did the directors refuse to register the said transfer as one made by a member indebted to the company?

"3. Did the directors in fact disapprove of the plaintiff Stewart as a transferee of the said share?

"4. Did the directors in fact consider the plaintiff Stewart objectionable as a transferee of the said share?

"5. Did the directors in fact consider the transfer of the said share as having been made for purposes not conducive to the interests of the company?"

The Master, on the matter coming before him, refused leave to administer these interrogatories, and by this summons the plaintiffs claimed to be entitled to administer them.

The plaintiffs' interrogatories had been modelled on certain interrogatories allowed by Tomlin, J., in *Sutherland* (*Duke*) v. *British Dominions Land Settlement Corpn., Ltd.* (1) The relevant article in that case provided as follows:

> "The directors may, without assigning any reason, decline to register any transfer of shares not fully paid up made to any person not approved by them or made by any member jointly or alone indebted or under any liability to the company."

In that case the learned judge held that the company was not entitled to refuse to state which of the grounds mentioned in the articles the directors had acted under, although it might refuse to say what reasons influenced the directors in exercising their discretion upon that ground.

R. E. Manningham-Buller, for the plaintiffs, contended that in art. 16 "grounds" meant the same thing as "reasons." The question was one of importance, for if it was possible to put into the articles of a company some provision which would prevent a person who wished to become a shareholder from obtaining discovery in accordance with the rules of court, that was making it possible for a company's articles to override rules of court. [He referred to Buckley On the Companies Act (11th ed.), p. 139.]

J. B. Lindon, for the company, referred to *The Gresham Life Assurance Society* (2), *Gateshead Assessment Committee* v. *Redheugh Colliery, Ltd.* (3), and *Whiffen* v. *Hartwright* (4).

R. E. Manningham-Buller in reply.—The right of discovery of a non-member of a company may be higher than that of a member, as he may not have entered into any agreement waiving his rights. [He referred to *Re Bede Steam Shipping Co.* (5).]

CROSSMAN, J. [after stating the facts:]—The first point made for the plaintiffs is that art. 16 of the company's articles of association does not prevent the questions in these interrogatories from being asked. For the purpose of deciding that point it has been agreed between the parties that the question which I shall determine is whether, if the interrogatories were allowed (assuming that they are proper to be allowed), the company would be bound to answer them, and I am not to allow the interrogatories if I am of opinion that the company would not be bound to answer them if they were allowed. The question, then, is whether the company would be bound to answer these interrogatories or whether it is excused from answering them by art. 16 of the articles of association. The plaintiffs rely upon a decision of TOMLIN, J., in *Sutherland* (*Duke*) v. *British Dominions Land Settlement Corpn., Ltd.* (1), in which the learned judge had to consider somewhat similar circumstances. [His Lordship read the relevant article in that case and continued:] TOMLIN, J., held that the plaintiffs were entitled to interrogate the defendants as to whether the transfer was to a person of whom the directors did not approve, and whether the plaintiff was in fact a person jointly or alone indebted to the company. In the course of his judgment he distinguished between the two points on which inquiry might be made, namely, the reasons upon which or for which the directors acted in declining to register, and the grounds of their objection to registration, which he regarded as two distinct things, and he shows clearly that he distinguishes between the reason for exercising the power and the grounds which give rise to its exercise. In the case before him the only thing which the directors were excused from doing was assigning a reason. The directors would never be bound in those circumstances to assign any reason, but the learned judge held that that did not excuse them from specifying under which particular branch of the article excusing them they were acting. He held that it was their duty to say under which branch they were acting, and that that would be done by answering the interrogatories which were delivered in that case.

In the present case the words in the article are not, as they were in *Sutherland* (*Duke*) v. *British Dominions Land Settlement Corpn., Ltd.* (1), "without assigning any reason." They are "shall not be bound to specify the grounds." I cannot, as a matter of construction, come to the conclusion that "specify the grounds" means the same as "assign the reasons," having regard to the statement of TOMLIN, J. I think they are two different things, and that what the directors are excused or saved from doing in the case before me is naming the species of ground under which they have acted—that is to say, the interrogatories which it is sought to administer here ask them to do the very thing which, in my judgment, on the construction of this article, it is provided that they are not bound to do. In my view, on construction of the article, that seems to me to dispose of the matter so far as regards the plaintiff, Berry, who is a member of the company; but it is contended by counsel for the plaintiffs that here I must draw a distinction between a plaintiff who is a member of the company and a plaintiff who is not, that art. 16 binds only members of the company, and that a person who is not yet a member of the company can become a member of the company under the articles, but disregard the prohibitions of art. 16. In my judgment, that is not the case. In my view, art. 16 applies to a person who is applying to be registered, because it specifies the conditions upon which he is to be registered; the directors are to register on those terms, but if the directors decline to register, then he comes in and asks to be registered under the article, and as the articles provide that they are not bound to specify the grounds, it seems, that the directors are just as much entitled to rely upon the article in the case of the plaintiff Stewart as they are in the case of the plaintiff Berry, who is a member.

That leaves one further point with which I must deal. It is suggested before me that the fact that by agreement—either by the articles or by any other agreement—persons are prevented from making any particular inquiry, does not prevent them, if they bring an action in connection with the matter on that agreement or by virtue of that agreement, from making that inquiry. It has been suggested that interrogatories are a matter arising out of rules of court and that the right to administer interrogatories is not affected by an agreement between the parties. I think *Turney* v. *Bayley* (6) is an authority to the contrary, because I think it shows that the existence of an agreement may be ground for refusing a certain sort of discovery. I do not see any reason why that should not be applied to interrogatories as it was applied there to the production of a document. It seems to me that when I have a provision that a party shall

A not be bound to produce a certain document in connection with a particular matter, the mere fact that an action is brought and an application made to deliver interrogatories, does not entirely oust that agreement and preclude the person who had the benefit from relying on it. On the whole, therefore, I am of opinion that in the circumstances the company would not be bound to answer these interrogatories if they were allowed, and accordingly in view of the agreement between the parties I do not allow them.

B

Judgment for the defendants.

Solicitors: *Margetts, Jenkins, & Hornby*; *Parker, Garrett & Co.*

[*Reported by* MISS B. A. BICKNELL, *Barrister-at-Law.*]

C

D

TRICKETT *v.* QUEENSLAND INSURANCE CO., LTD. AND OTHERS

[PRIVY COUNCIL (Lord Alness, Lord Roche and Sir Sidney Rowlatt), October 28, December 9, 1935]

[Reported [1936] A.C. 159; 105 L.J.P.C. 38; 154 L.T. 228; 52 T.L.R.
E 164; 80 Sol. Jo. 74; 41 Com. Cas. 143]

Insurance—Motor insurance—Death from accident—Insurers not liable if vehicle driven in unsafe condition—Need to prove knowledge by assured of condition of vehicle—Running warranty by assured of roadworthiness.

Under a policy of motor insurance dated Feb. 19, 1930, an assured was insured against loss through death by accident sustained in connection with a vehicle
F described in the schedule to the policy. On Nov. 17, 1930, while the assured was driving a car covered by the policy, he collided with another car and was killed. At the time of the collision the lights of the assured's car were not on, and to a claim under the policy the insurers pleaded that the case fell within an exception of their liability contained in the policy in that at the time of the accident the car was "being driven in an unsafe condition."

G **Held:** the terms of the exception were unambiguous and plain; to escape liability under it the insurers need not show that the assured was aware of the unsafe condition of the car; the law affecting the exception could not be assimilated to the maritime law of seaworthiness so that the exception would apply only where the car was in an unsafe condition at the beginning of its journey; and, therefore, the insurers were not liable under the policy.

H Reasoning in *Barrett* v. *London General Insurance Co., Ltd.* (1), [1935] 1 K.B. 238, criticised.

Notes. As to limitations in a motor insurance policy, see 18 HALSBURY'S LAWS (2nd Edn.) 559, 560; and for cases, see 29 DIGEST 404 et seq.

Case referred to:

I (1) *Barrett* v. *London General Insurance Co., Ltd.*, [1935] 1 K.B. 238; 104 L.J.K.B. 15; 152 L.T. 256; 51 T.L.R. 97; 78 Sol. Jo. 898; 40 Com. Cas. 125; Digest Supp.

Appeal from an order of the Court of Appeal of New Zealand.

The appellant, Mrs. Marjorie L'Estrange Trickett, claimed, as assignee of the rights from the personal representative of her father, Alfred John Ernest Wiggs £1,000 from the respondent company under a policy of motor insurance, dated Feb. 19, 1930, in respect of the death of her father, who was killed when driving a motor car which collided with another car on Nov. 17, 1930. By an order of the Supreme Court the

Public Trustee of New Zealand, who was appointed executor of the will of the insured, and J. S. E. Wiggs, who was co-beneficiary with the appellant under the will, were added as defendants to the action. The respondent company pleaded by way of defence that at the time of the collision Mr. Wiggs's car was being driven without lights, and so was in an unsafe condition, so that they were exonerated from liability under a clause in the policy which provided that:

> "No liability shall attach to the company under this policy in respect of any loss . . . or any personal accident to the insured occurring: (i) while any motor vehicle in connection with which indemnity is granted under this policy is: (*e*) Being driven in a damaged or unsafe condition."

The Court of Appeal of New Zealand held, affirming a judgment of the Supreme Court of New Zealand, that at and about the time of the collision the lights of Mr. Wiggs's car were not shining, and that the appellant's action therefore failed. The appellant appealed on the grounds (i) that in order to escape liability the respondent company must show that the driver was aware of the fact that the car was being driven in a damaged or unsafe condition, and (ii) that the law affecting the proviso above referred to could be assimilated to the maritime law of seaworthiness and that proviso (1) (*e*) applied only where the car was in a damaged or unsafe condition at the commencement of its journey.

Chappell, K.C., and *A. T. Denning* for the appellant.
Hon. S. O. Henn Collins, K.C., and *John Buckley* for the respondent company.

Dec. 9. **LORD ALNESS.**—This is an appeal from a judgment of the Court of Appeal of New Zealand, dated Nov. 25, 1932, affirming, by a majority, a judgment of the Supreme Court of New Zealand, whereby judgment was entered for the respondent company.

The issues in the case lie within a narrow compass. The appellant, who was plaintiff in the action, and whose title is not in dispute, is a daughter of a retired civil servant named Alfred John Ernest Wiggs. Wiggs was killed in a motor accident on the night of Nov. 17, 1930. At the time of his death he was insured with the respondent company under a policy of motor insurance; and the claim made by the appellant in the action was for a sum of £1,000, payable, as she maintained, under the said policy, in respect of the death of her father.

The question in the appeal is whether in the circumstances in which Wiggs was killed, the respondent company is exempted from liability by reason of one of the exceptions in the policy of insurance.

The policy is dated Feb. 19, 1930. The clause under which the claim is made by the plaintiff is in these terms:

> "If the insured, whilst between the ages of sixteen and sixty-five, shall be injured by an accident sustained in connection with any motor vehicle described in the schedule hereto . . . the company shall pay to the insured or his legal personal representative compensation under the following scale: (*a*) If the accident shall within three calendar months of the occurrence thereof be the direct and immediate cause of the death of the insured, the sum of £1,000. . . ."

The exception, under which the respondent company successfully resisted liability in the courts below, is in these terms:

> "No liability shall attach to the company under this policy in respect of any loss, damage or liability occurring or any personal accident to the insured occurring: (i) While any motor vehicle in connection with which indemnity is granted under this policy is—(*e*) being driven in a damaged or unsafe condition."

The circumstances under which the appellant's claim arises are as follows. About midnight on Nov. 17, 1930, a motor car was being driven by the deceased, Wiggs, in a northerly direction, on the Hutt-road, from Petone to Wellington. His car collided with another car, which was being driven in the opposite direction—that is, in a southerly direction on the Hutt-road—by a Dr. Findlater. As a result of the collision Wiggs was killed. The respondent company maintained that Wiggs's car was, at the time of the collision, being driven without lights; that it was, therefore, in an unsafe condition, and that, accordingly, under the proviso already quoted, they were relieved from liability under the policy. All the judges in the courts below held that, at and about the time of the collision, the lights of Wiggs's car were not shining. In particular, the dissentient judge in the Court of Appeal, HERDMAN, J., in the course of his judgment said:

> "The learned Chief Justice, in the court below, found that before the collision took place the condition of the car, so far as its lights were concerned, was unsafe, and that this unsatisfactory state of affairs had existed for some time, at any rate before the actual impact. The evidence justifies this finding of fact."

This finding was not challenged in argument by the appellant's counsel. Indeed, he was constrained to admit that it was correct, and justified by the evidence. Counsel, however, for the appellant, maintained these contentions: (i) That, in order that the respondent company should escape liability under the policy, it must show, not only that the car was being driven in a damaged or unsafe condition, but also that the driver was aware of that fact. (ii) That it was not established in evidence by the respondent company that the driver of the car was aware of its damaged or unsafe condition. (iii) That the law affecting the proviso referred to can be assimilated to the maritime law of seaworthiness, and that, on that analogy, proviso (1) (*e*) applies only where the car was in a damaged or unsafe condition at the beginning of its journey, or that, in other words, there is no running warranty by the driver of the roadworthiness of the car.

Their Lordships proceed to examine these contentions in their order, bearing in mind that the onus is on the respondent company to show that the case falls within an exception to the policy of insurance issued by them. This was recognised in the court of first instance, where the respondent company led in the proof. On the other hand, it must not be forgotten that the function of an exception to a policy is to limit the liability under it, and to destroy a right which, apart from the exception, would survive.

(i) Is knowledge on the part of the driver of a car of its damaged or unsafe condition an essential ingredient of proviso (1) (*e*) of the general exceptions to the policy? The appellant maintained that it is, inasmuch as the proviso is ambiguous in its terms, and is, therefore, open to the conclusion contended for by the appellant. The proviso being, as the appellant's counsel maintained, ambiguous in its terms, he compared it with exception (*d*) in the policy, under the heading of "Loss or damage to motor vehicle," and contended that, only on the view that his argument upon proviso (4) (1) (*e*) was sound, could the provisions of the two clauses reasonably be reconciled. It must be remembered that, in the present case, the defect was not a latent one, which was potentially dangerous. As to the case of a latent defect their Lordships offer no opinion. The car in the case under consideration was actually and de presenti unsafe to drive, because a necessary appliance was not functioning. It was driven after that state of affairs had developed. Unless their Lordships can assume—which they cannot—that in every case which could occur under proviso (*d*) under "loss or damage to car" the general proviso (4) (1) (*e*) would also apply and displace it, the suggested repugnancy does not arise. Their Lordships are unable to take the first step which is essential to the success of the appellant's argument, and to hold that proviso (4) (1) (*e*) is couched in ambiguous terms. On the contrary, in the judgment of their Lordships, the terms of the proviso are unambiguous and plain—indeed intractable. Their Lordships cannot find any justification for supplementing the terms of the proviso by adding to it the words "to the knowledge of the driver," as they are invited to do by the appellant, for reforming the contract into which he entered. It is not immaterial to observe in this connection that, in certain of the other provisos which are adjacent to that with which the board are concerned, the knowledge of the assured is set out eo nomine, where it is intended that that knowledge should form a condition of the contract between the parties. Their Lordships have in these circumstances no hesitation in rejecting the first contention of the appellant, and in refusing to read into the policy words which are not there.

(ii) If the views above expressed are sound, the second argument propounded by the appellant, which relates to the proved knowledge by the driver of the damaged or unsafe condition of the car, does not arise. Their Lordships, however, cannot refrain from adding that, on the evidence, they would have great difficulty in holding that the deceased was ignorant of the unlit condition of his car.

(iii) The third point argued by counsel for the appellant is quite independent of the previous two points. His contention depends for its validity on certain dicta of GODDARD, J., in *Barrett* v. *London General Insurance Co., Ltd.* (1). All that their Lordships find it necessary to say regarding that judgment is that, while not questioning the conclusion reached by the learned judge on the facts of the case, they find great difficulty in agreeing with the reasons upon which that conclusion was based. They are not able to assimilate, as did the learned judge, the position of a ship at sea with that of a motor car on land, and to apply rigidly the same code of law to both cases. For reasons which are too obvious to be stressed in detail, their Lordships think the analogue imperfect, and, indeed, misleading. They are of opinion that the argument based by the appellant on the identity of the conditions which govern the seaworthiness of a ship at sea and the roadworthiness of a car on land is unsound.

In the result, therefore, their Lordships are of opinion that the three contentions advanced on behalf of the appellant fail, that the majority judgment of the Court of Appeal falls to be affirmed, and that the present appeal should be refused. They will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors: *Montagu's & Cox & Cardale*; *Wray, Smith, & Halford*, for *Leicester, Jowett, & Rainey*, Wellington, New Zealand.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

R. *v.* MURRAY

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Macnaghten and Lewis, JJ.), November 25, 1935]

[Reported 154 L.T. 164; 100 J.P. 57; 52 T.L.R. 141; 79 Sol. Jo. 965; 25 Cr. App. Rep. 129; 34 L.G.R. 4; 30 Cox, C.C. 298]

Criminal Law—Committal—Committal to more convenient assizes—"Next assizes" unlikely to be held within a month—Criminal Justice Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 14 (1).

By s. 14 (1) of the Criminal Justice Act, 1925: "The justices before whom any person is charged with an indictable offence, may, instead of committing him to be tried at the assizes . . . for a place to which but for this section he might have been committed, commit him to be tried at the assizes for some other place . . . if it appears to them, having regard to the time when and the place where the last-mentioned assizes . . . are to be held, to be more convenient to commit the accused person to those assizes . . . with a view either to expediting his trial or saving expense: Provided that the power given by this subsection shall not be exercised—(a) unless the examining justices are satisfied at the date of the committal that the next assizes . . . to which, but for this section, he might have been committed, will not be held within one month from that date. . . ."

"Next assizes" in the proviso to the above subsection means next assizes after the date of committal, and cannot refer to assizes which have already begun at that date.

The appellant was committed for trial to Northamptonshire autumn assizes, which began on Oct. 15, 1935, by justices sitting in the county of Bedford. The day on which committal took place was Oct. 11, 1935, which was the commission day for the Bedfordshire autumn assizes.

Held: the "next assizes" for the purposes of the above proviso were in this case the Bedfordshire winter assizes, which would be held in January, 1936, and, therefore, the proviso to s. 14 (1) did not apply, and the justices were entitled to commit the appellant to the Northamptonshire autumn assizes, as being more convenient.

Notes. Section 14 (1) of the Criminal Justice Act, 1925, is now replaced by s. 10 (1) of the Magistrates' Courts Act, 1952.

As to committal for trial, see 10 HALSBURY'S LAWS (3rd Edn.) 365 et seq., and for cases, see 14 DIGEST (Repl.) 224 et seq. For Magistrates' Courts Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 416.

Appeal against conviction.

The appellant was convicted at Northamptonshire assizes of indecent assault on a woman, and was sentenced by DU PARCQ, J., to seven months' imprisonment with hard labour.

The appellant was committed for trial by justices sitting in the county of Bedford on Oct. 11, 1935, which was commission day for the Bedfordshire autumn assizes. At the trial, before the appellant pleaded to the indictment, a motion was made on his behalf to quash the indictment. It was contended that the justices had no power to commit to Northamptonshire assizes, as the proviso to s. 14 (1) of the Criminal Justice Act, 1925, applied, and that, as there was power to prefer an indictment at the Bedfordshire autumn assizes after their commencement by leave of the judge, those assizes were "the next assizes . . . to which, but for [the] section [the appellant] might have been committed," and would take place within one month of the date of committal.

DU PARCQ, J., held that the motion failed, and gave judgment in the following terms: In this case counsel has taken a point on behalf of the defendant which, I think, fails, and that the answer made by counsel for the Crown completely disposes of it. But undoubtedly it is a point well worthy of consideration.

The defendant, who has not yet pleaded to the indictment against him, was committed for trial at these assizes by magistrates in the county of Bedford. In the ordinary way, he would have been committed to be tried at the assizes for the county of Bedford, but magistrates in these days have power, in certain circumstances, to commit to assizes other than those to which they would have committed before certain legislation. [His Lordship read s. 14 (1) of the Criminal Justice Act, 1925, and continued:] In the present case the justices committed the accused man to these assizes on what is usually called the commission day of the Bedfordshire Assizes—so-called, as I understand, because it is the day upon which the judge may—and in former days habitually did—attend at the court in order that the commission might be opened and the work of the assizes begun. It was not, I think, usual ever to do much on that first day, except to open the commission, though I think that at some time it was customary to charge the grand jury upon that day, and I am told by the learned clerk of assize, who has great experience in these matters, that it is within his own recollection that as recently as 1895 the commission was opened by the judge of assize on what we now call commission day. It has become customary, for reasons of convenience, and in order to save the time of judges and others, to wait until what is commonly called the first working day of the assizes to open the commission, but I think there is no doubt that the first day of the assizes is commission day. Everybody knows that sentences are reckoned from the first day of the assizes, and that means commission day, and it may be taken as a general rule that for most purposes, at any rate, commission day is the first day of the assizes.

The question is: Were the magistrates right in thinking that the next assizes to which, but for s. 14 of the Criminal Justice Act, 1925, the accused might have been committed would not be held within one month? Counsel for the accused says that they were wrong. He says that the next assizes were the assizes which had then not begun except in the sense that Oct. 11 was their commission day. He says that the work had not begun, and that there was no reason why the magistrates should not commit to the assizes on commission day. I think that the assizes had begun, and, unless one is to read "the next assizes . . . to which . . . he might have been committed" as including assizes which have already begun, counsel's contention on that point must be wrong. He says that the assizes which had begun were assizes to which the magistrates might have committed the accused person, and he prays in aid a rule made by the Lord Chancellor under powers conferred upon him by s. 2 (6) of the Administration of Justice (Miscellaneous Provisions) Act, 1933. [His Lordship read the rule and continued:] Counsel says that, in the view, at any rate, of the Lord Chancellor who made that rule, there was nothing to prevent a committal to assizes, not only after the commission day, but after the first working day, provided that the judge gives the necessary leave for the indictment to be preferred.

In order to see what force there is in that contention, it is necessary to look a little more closely at the law, and to bear in mind the history of these matters. Counsel for the Crown has referred me to a provision of an Act of Parliament, which I think is of very great importance in this case. It was provided by s. 27 of the Indictable Offences Act, 1848, that "at any time after all the examinations aforesaid"—that is to say, the taking of evidence before the justices—

> "shall have been completed, and before the first day of the assizes or sessions or other first sitting of the court at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed."

That seems to me to make it clear that justices cannot properly commit a man for trial except at such a time as will give him that opportunity which the legislature has said he must have of procuring copies of the depositions, upon which he has been committed to be tried, and, if justices were to commit him after the assizes had begun, it would be quite impossible for the provisions of that section to be carried out. That section seems to me to throw light upon the intention of the legislature when they use the words "the next assizes" in s. 14 of the Criminal Justice Act, 1925, because I must assume that the legislature in 1925 were not forgetful of what had been provided by the legislature in 1848. I must, therefore, read "the next assizes" as meaning assizes which have not yet begun, and which will begin at some time subsequent to the committal. If that is so, the justices seem to me to have been right in thinking that the next assizes would not be held within one month from the date of the committal, and that "the next assizes" in this case meant those assizes which will take place at Bedford at the beginning of 1936.

I ought to say something about that rule made by the Lord Chancellor, to which I have been referred. The Administration of Justice (Miscellaneous Provisions) Act, 1933, was an Act which, among other things, abolished grand juries, and so made a very sweeping alteration in the law. Until 1933 it was for the grand jury to decide whether a man should be put upon his trial before the petty jury, and one has to remember that it was not essential that a man should have been committed by magistrates. Of course, by far the greater number of those who come before a court of assizes or quarter sessions have been committed for trial by magistrates; but it has always been, within certain limits defined by Acts of Parliament, the right of any of His Majesty's subjects to prefer a bill of indictment at assizes, and it used to be for the grand jury to say whether a man should be put upon his trial upon that indictment. There have been cases within the recollection of some of us where magistrates have refused to commit, and yet a grand jury have found the bill of indictment to be a true bill, and a man has been put upon his trial. I remember one fairly recent instance at the Central Criminal Court. The Act of 1933 had to make provision for cases of that kind, and did so. There are still cases in which magistrates have not committed a man for trial, and yet he may be put upon his trial before a jury. Section 2 (6) of the Act provided that the Lord Chancellor might make rules for carrying that section into effect, and in particular for making provision (a) for the manner in which and the time at which bills of indictment were to be preferred before any court, and (b) the manner in which application was to be made for the consent of a judge of the High Court or of a commissioner of assize for the preferment of a bill of indictment. It is plain, I think, that what the legislature had especially in mind were those cases where magistrates had not committed for trial, but where the new machinery provided by the Act was to be put into force in order that permission might be obtained for a bill of indictment to be preferred. There is no reason to feel any difficulty with regard to the rule made by the Lord Chancellor. The rule is in the following terms:

> "Except with the leave of the judge or chairman, no bill of indictment shall be preferred at any assizes or quarter sessions after the first working day of those assizes or sessions."

I am satisfied, having heard the arguments addressed to me to-day, that what was in contemplation when the Lord Chancellor made the rule was only the case of those indictments which have not been preceded by a hearing before magistrates and a committal by magistrates.

I will say quite frankly that on other circuits I have granted applications made to me during the pendency of an assize for leave to prefer a bill of indictment based upon a committal by justices. I am not sure whether that was a right course to take, but I am satisfied that justices ought not to commit to any assizes which have already begun, for the reason that, if they do so, they are depriving the accused person of his rights under the Act of 1848. In those circumstances, I think that the committal in this case is right. I think that the justices took the proper course, and that the preliminary objection fails.

The appellant then pleaded Not Guilty, and was tried upon the indictment, and convicted and sentenced as above stated.

By s. 14 (1) of the Criminal Justice Act, 1925:

> "The justices before whom any person is charged with an indictable offence, may, instead of committing him to be tried at the assizes or quarter sessions for a place to which but for this section he might have been committed, commit him to be tried at the assizes for some other place or (if the offence is within the jurisdiction of a court of quarter sessions) at the quarter sessions for some other place, if it appears to them, having regard to the time when and the place where the last-mentioned assizes or quarter sessions are to be held, to be more convenient to commit the accused person to those assizes or quarter sessions with a view either to expediting his trial or saving expense: Provided that the power given by this subsection shall not be exercised—(*a*) unless the examining justices are satisfied at the date of the committal that the next assizes or quarter sessions to which, but for this section he might have been committed will not be held within one month from that date. . . ."

By r. 2 of the Indictments (Procedure) Rules, 1933:

> "Except with the leave of the judge or chairman, no bill of indictment shall be preferred at any assizes or quarter sessions after the first working day of those assizes or sessions."

S. Granville-Smith for the appellant.

C. L. Henderson, for the Crown, was not called on to argue.

The judgment of the court was delivered by

MACNAGHTEN, J.—Oct. 11, 1935, was commission day for the autumn assizes for the county of Bedford. On that day justices of the peace sitting in the county of Bedford decided that the appellant should be committed to take his trial for an indictable offence, and the question arose in what county the trial should take place. [His Lordship read s. 14 (1) of the Criminal Justice Act, 1925, and continued:] It appeared to the justices that in view of the fact that Oct. 11 was commission day for the Bedfordshire assizes, it would be more convenient to commit the accused man for trial at the assizes for the county of Northampton, which were to take place within a week. At the Northamptonshire assizes on Oct. 17 the objection was taken before the judge on behalf of the appellant that the Bedfordshire justices had no jurisdiction to commit him to those assizes by reason of the proviso to s. 14 of the Act of 1925. It was said that the next assizes to which, but for the provisions of the section, he must have been committed were not the Bedfordshire winter assizes in January, 1936, but the autumn assizes for that county. The judge overruled the objection. This court has had the advantage of hearing an exhaustive argument on behalf of the appellant, but the point can be dealt with by saying that in the proviso to s. 14 the word "next" plainly means "next after the date of committal." Applying that construction in the present case, the next assizes for the county of Bedford were the assizes commencing next after Oct. 11, 1935, that is to say, the winter assizes which would be held in January, 1936. The justices were, therefore, entitled to commit the accused person to Northamptonshire assizes, it being plainly more convenient that the trial should take place there than at Bedford in January, 1936. The appeal must be dismissed. A B C

Appeal dismissed.

Solicitors: Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*] D

E

Re MAIR. RICHARDS *v.* DOXAT

[CHANCERY DIVISION (Farwell, J.), March 26, 1935]

[Reported [1935] Ch. 562; 104 L.J.Ch. 258; 153 L.T. 145] F

Trust—Administration—Administration by court—Order empowering trustees to advance capital—Effect of forfeiture clause in trust instrument—Trustee Act, 1925 (15 & 16 *Geo*. 5, *c*. 19), *s*. 57 (1).

Under the will of her father the plaintiff became entitled to be paid a one-third share of the income of a trust fund "during her life and until some event shall have happened or shall happen whereby if the same income belonged absolutely to her she would be deprived of the personal enjoyment thereof." The plaintiff, having incurred pressing debts, sought an order of the court under the Trustee Act, 1925, s. 57 (1), conferring on the trustees of the will power to advance to her a portion of the capital moneys, to carry out which arrangement the trustees had prepared a scheme. She then took out a summons asking, inter alia, whether, owing to the forfeiture clause in the will, a forfeiture of her life interest would take place if the court made the order. G H

Held: where an order was made by the court under s. 57 (1) the effect was as though the power which was being put into operation had been inserted in the trust instrument as an overriding power; if, in the present case, the trustees had been given an overriding power to raise capital sums for the benefit of the plaintiff the exercise of that power would not have brought into operation the forfeiture clause which would only operate on so much of the income as remained after the capital sum advanced had been taken out of the fund; and, therefore, the plaintiff would not forfeit her life estate in the fund if the court made the order. I

Per FARWELL, J.: If a scheme sanctioned by the court involves an agreement by the tenant for life to make payments with a proviso that, if they are not duly paid, the trustees are to pay them out of income, the failure to pay by the tenant for life will create a forfeiture, since it will be his act or omission which creates the forfeiture and not the exercise by the court of its overriding power.

Notes. Explained: *Re Downshire's Settled Estates*, [1953] 1 All E.R. 103; Referred to: *Re Rees' Will Trusts*, [1954] 1 All E.R. 7.

As to administration of trusts by the court, see 33 HALSBURY'S LAWS (2nd Edn.) 296 et seq., and for cases, see 43 DIGEST 836 et seq. For Trustee Act, 1925, see 26 HALSBURY'S STATUTES (2nd Edn.) 50.

Case referred to:

(1) *Re Salting*, [1932] 2 Ch. 57; 101 L.J.Ch. 305; 147 L.T. 432; 76 Sol. Jo. 344; Digest Supp.

Adjourned Summons

The following statement of facts is taken from the judgment of FARWELL, J.:

The testator gave his residuary estate to his trustees

> "upon trust that my trustees or trustee shall pay one-third part of the income of the said trust premises unto each of them my wife Emma Collinson Mair and my daughter Mary Cassandra French the wife of the Honourable Robert French (but as to the said Mary Cassandra French subject to the payments or retainer thereout hereinafter mentioned) during her life and until some event shall have happened or shall happen whereby if the same income belonged absolutely to her she would be deprived of the personal enjoyment thereof, or of any part thereof."

In that event the income is held upon a discretionary trust (in the events which have happened) for the two ladies and their husbands, and subject thereto the two ladies together are absolutely entitled to the fund. The scheme which is being put forward is primarily for the purpose of enabling one of the ladies to pay certain pressing liabilities. Whether or not the scheme be one which I ought to approve is a matter which I am not for the moment considering. It is enough to say that it involves payment out of capital of a very considerable sum to the former of the two ladies, the plaintiff, and the other lady, as a term of consenting to the arrangement, desires to have paid out to herself a capital sum equal to the amount raised to pay the debts. It is quite plain that this is a scheme which, even if I approve it, could not be carried out at all except under s. 57 of the Trustee Act, 1925. That section has been inserted in the Act for the purpose of enabling and permitting the court to sanction what would otherwise be breaches of trust. The question I have to determine is this. Assuming that the court thinks it right to permit something to be done which is not within the terms of the trust document, will that, if it involves payment out of a capital sum, bring into operation the forfeiture clause in the will.

The Trustee Act, 1925, s. 57, provides:

> "(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income. (2) The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order. (3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust. (4) This section does not apply to trustees of a settlement for the purposes of the Settled Land Act, 1925."

Roger Turnbull for the plaintiff, Mary Cassandra French.

L. W. Byrne, *R. C. H. Horne*, *W. S. Wigglesworth*, and *M. G. Hewins* for other parties interested.

FARWELL, J., stated the facts and continued: In my judgment, the answer to the question I have to determine must be in the negative. If and when the court sanctions an arrangement or transaction under s. 57, the effect is as though the power

A which is being put into operation had been inserted in the trust instrument as an overriding power. One may take this case. If here the trustees had been given an overriding power to raise capital sums out of the residuary estate for the benefit of either of these two ladies, it could not be suggested that the exercise of that power would have brought this clause into operation. The true effect of the two clauses combined would have been that the forfeiture clause would only have operated on so much of the income B as was from time to time payable to the ladies under the trust, and the exercise of the power, although it would have resulted in reducing the income, would not have had the effect of bringing into operation the forfeiture clause, but would have left the forfeiture clause to operate on so much of the income as was still payable.

If that be the true view, the effect of the court permitting the exercise by trustees of some power which is not in the trust document itself, and, therefore, something which C the trustees could not do except by the direction of the court, is the same as though that power had been inserted as an overriding power in the trust document, and if the court comes to the conclusion that it is proper to permit trustees to take out of capital a sum of money for a particular purpose, a forfeiture clause of this sort will only operate upon so much of the income as remains after taking out of that capital sum, and the direction of the court will not operate as an event whereby, if the income belonged D absolutely to the tenant for life, he or she would be deprived of the personal enjoyment of it. In other words such a clause operates on the income from time to time payable to the life tenant. If there is a proper exercise of an overriding power, whether it be in the instrument itself or by virtue of s. 57, the exercise of that power does not bring into operation the forfeiture clause. The forfeiture clause remains attached to the income which is payable to the tenant for life from time to time. If this be the true E view it must follow that it matters not whether the application to the court is made by or with the consent of the tenant for life.

It must, however, be remembered that if a scheme sanctioned by the court involves, as in *Re Salting* (1) an agreement or covenant by the tenant for life to pay premiums on policies or other like payments with a proviso that, if they are not duly paid, the trustees are to pay them out of income, the failure to pay by the tenant for life will create a F forfeiture, since it will be the act or omission of the tenant for life that creates the forfeiture and not the exercise by the court of its overriding power.

Solicitors: *Williamson, Hill, & Co.*; *Barry O'Brien & Co.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

WATKINS *v.* HEREFORDSHIRE ASSESSMENT COMMITTEE

[King's Bench Division (Lord Hewart, C.J., Goddard and Singleton, JJ.), December 16, 1935]

[Reported 154 L.T. 262; 100 J.P. 79; 52 T.L.R. 148; 34 L.G.R. 84; 80 Sol. Jo. 127]

Rates—Agricultural land—Land covered with water—Adjoining land occupied by farmer as agricultural land—Verbal letting of right to fish in water—Local Government Act, 1929 (19 *Geo.* 5, *c.* 17), *s.* 67 (1).

Adjoining certain agricultural land owned and occupied by a farmer were a river and brook. The farmer owned the whole bed of the river for about a furlong, its bed ad medium filum for a further furlong, and the bed of the brook for about three-quarters of a mile. The adjoining portion of land was of the same alluvial substance as the beds of the river and brook. The fishing in the above portion of the river and brook was verbally let by the farmer to another person, but the farmer himself used the river and brook for sheep-washing, and the shingle and gravel extracted therefrom for repairs to farm buildings, roads, and river banks. The assessment committee confirmed a proposal by the rating authority for the inclusion in the valuation list of a new hereditament described as "land covered with water with fishing rights," but quarter sessions reversed the assessment committee's order. On appeal by the assessment committee to the Divisional Court,

Held: the bed of the portions of the river and stream in question formed part of the land adjoining the river and stream; the adjoining land was agricultural land; and, therefore, there was material on which quarter sessions could find that the land covered by the water of the river and stream was also agricultural land, and, as such, entitled to exemption from rating under s. 67 (1) of the Local Government Act, 1929.

Notes. As to rating of sporting rights and agricultural land, see 27 Halsbury's Laws (2nd Edn.) 430, 431, 466, and for cases, see 38 Digest 458, 500. For Local Government Act, 1929, see 20 Halsbury's Statutes (2nd Edn.) 190.

Case Stated by Herefordshire Quarter Sessions.

On May 19, 1934, the rating authority for the rural district of Dore and Bredwardine, Herefordshire, served upon Mr. Charles Watkins a requisition for a return under the provisions of ss. 40 and 41 of the Rating and Valuation Act, 1925, in respect of fishing rights in the parish of Longtown occupied, owned, or leased by him. On May 24, 1934, Mr. Watkins made a return accordingly, stating that he was the owner of fishing rights situate at the Groves Farm, Longtown, and let to Mr. Moxon without written agreement at £14 for the season of 1934, and stating the annual value of such fishing rights to be £10.

On July 27, 1934, the rating authority, being aggrieved by the omission from the list of the hereditament hereinafter described, made a proposal to the assessment committee, in accordance with s. 37 of the Act, that the undermentioned hereditament be brought into assessment, that is to say:

Name of Occupier.	Name of Owner.	Description of Property.	Name of Situation.	Rateable Value.
Charles Watkins.	Self.	Land covered with water, with fishing rights.	Groves Farm.	£10.

Mr. Watkins gave notice of objection to the proposal, and the proposal and objection were heard by the assessment committee on Jan. 25, 1935.

At the hearing it was agreed that the question of value should be left in abeyance, A and, if necessary, referred back to the assessment committee for decision after the question of liability had been finally determined. The assessment committee overruled the objection, confirmed the proposal, and ordered that particulars of the hereditament be inserted in the valuation list.

Mr. Watkins appealed to Herefordshire Quarter Sessions against the decision. At the hearing before quarter sessions it was proved or admitted that Mr. Watkins was the B owner and occupier of Groves Farm, Longtown, and included in the property owned and occupied by him was the whole bed of the River Monnow for about one furlong in length and the bed, ad medium filum, of the River Monnow for a further furlong, and of the Ecsley Brook for about three-quarters of a mile. The fishing in the above portion of the river and brook was verbally let by Mr. Watkins to a Mr. Moxon for the season 1934 at a rent of £14. The Groves Farm comprised 106 acres of arable, pasture and C woodland, of which about eighty-four acres were meadow, pasture and water, and the livestock maintained thereon numbered about three horses, sixty cattle, and forty-five sheep, with their lambs. This stock was dependent upon the above portion of the river and brook for its supply of water, there being a number of drinking places therein, and slopes leading thereto. The above portion of the river and brook was used by Mr. Watkins in May of each year for the washing of sheep. The annual value of the farm D (apart from any question of loss of fishing) would be £60 per annum less if the river and brook did not exist. The beds of the above portion of the river and brook consisted chiefly of shingle and gravel which accumulate in beds and was removed in the summer when required for repairs to the farm buildings and roads and the banks of the river and brook. There were 1,376 sq. yds. of land adjoining the above portion of the river and brook and comprised in the farm, which were of the same alluvial substance as the beds E of the above portion of the river and brook. There was also a piece of land 60 sq. yds. in area which, until recently, formed part of the river bed, the river having altered its course. The area of land covered by water was subject to seasonal variation.

On behalf of Mr. Watkins it was contended (i) that the proposal on which the assessment was based was bad in law, because no grounds were specified on which the proposed amendment was supported; (ii) that the hereditament in question was agricultural land F and therefore exempt from rateability; (iii) that the hereditament was not kept or preserved mainly or exclusively for purposes of sport or recreation; (iv) that, since there was no severance of the fishing rights from the occupation of the land, the provisions of the Rating and Valuation Act, 1874, had no application to the case; (v) that the hereditament was not rateable in law.

On behalf of the assessment committee it was contended (i) that "land covered with G water" had been recognised as a separate rateable hereditament by Parliament in the Public Health Act, 1875, and the Rating and Valuation Act, 1925, Sched. II; (ii) that the "land covered with water" must be treated as a separate hereditament; (iii) that the hereditament was not "agricultural land" as defined by s. 2 (2) of the Rating and Valuation (Apportionment) Act, 1928, and was not, therefore, exempt from rates under the Local Government Act, 1929; (iv) that the user of the hereditament in conjunction H with the farm for agricultural purposes was immaterial if the hereditament was not "agricultural land" within the Rating and Valuation Acts; (v) that the value of the hereditament was enhanced by the value of the right of fishing therein if not severed; (vi) alternatively, that under the Rating and Valuation Act, 1874, the right of fishing was severed and the value of the hereditament was rightly assessed as enhanced by the value of the fishing rights under s. 6 of the Act of 1874; (vii) that "severance" within I the meaning of the Rating and Valuation Act, 1874, may be effected without a deed.

The justices found as a fact that the predominant user of the beds of the river and brook was agricultural. They were of opinion that the hereditament was agricultural land and should be subject to derating. They, therefore, ordered the assessment to be discharged and allowed the appeal. The assessment committee appealed to the Divisional Court.

By s. 2 (2) of the Rating and Valuation (Apportionment) Act, 1928, agricultural land

A is defined as "any land used as arable meadow or pasture ground only." The Local Government Act, 1929, s. 67 (1), provides:

> "No person shall, in respect of any period beginning on or after the appointed day [April 1, 1929], be liable to pay rates in respect of any agricultural land . . ."

Comyns Carr, K.C., and *Erskine Simes* for the appellants.

B *J. F. Bourke* for the respondent.

LORD HEWART, C.J.—This is a Case Stated by the court of quarter sessions for the county of Hereford, and the point contained in it may be very shortly put. There was a proposal by the rating authority of a rural district that particulars of a certain hereditament should be added to the valuation list for that district. An C objection to that proposal was made to the assessment committee for the county, and that objection was disallowed. Thereupon the owner and occupier of the land referred to appealed to quarter sessions, and the court of quarter sessions, subject to this Case Stated, allowed the appeal and ordered that the assessment be discharged. The notice which was served by the rating authority upon the owner and occupier in May, 1934, required him to make a return under the Rating and Valuation Act, 1925, in respect of D fishing rights in the parish of Longtown, occupied, owned, or leased by him, and he made a return accordingly, stating that he was the owner of fishing rights at the Groves Farm, Longtown, let to a Mr. Moxon without written agreement at £14 for the season of 1934, and he stated that the annual value of those fishing rights was £10. Accordingly, the proposal was made that the hereditament be brought into assessment in this form:

> "Name of occupier—Charles Watkins: Name of owner—self: Description of E property—land covered with water with fishing rights: Name or situation—Groves Farm: Rateable Value £10."

It was proved at quarter sessions that included in the property owned and occupied by Mr. Watkins was the whole bed of the River Monnow for about one furlong in length and the bed ad medium filum of the said river for a further furlong, and of a brook for about three-quarters of a mile, and that the fishing in that part of the river and brook F was by oral agreement let by Mr. Watkins to Mr. Moxon for the season 1934 at a rent of £14.

The main contention on the part of Mr. Watkins was that the hereditament in question, that is to say, the hereditament which was sought by the proposal to be brought into assessment, was agricultural land, and, therefore, exempt from rateability. There was a minor point whereby it was alleged that the proposal was insufficient, inasmuch G as no grounds were specified upon which the proposed amendment of the valuation list was to be supported. There is nothing, I think, in that point. As counsel for the assessment committee has said, the hereditament was not included. The proposal sought that it should be included on the ground that it was rateable. The real question was, and is, whether it was true to say that the hereditament in question was agricultural land, and, therefore, exempt from rateability. The justices of quarter sessions came H to the conclusion, and found as a fact, that the predominant user of the beds of the river and brook was agricultural. Being of opinion that the hereditament was agricultural land, they held that it was not to be included in the list.

There was a time in the course of this argument when I was impressed by the clear and forcible contention of counsel for the assessment committee, but the conclusion to which I have finally come is that we ought not to disturb the finding and the opinion of quarter I sessions. Under the Rating and Valuation (Apportionment) Act, 1928, the expression "agricultural hereditament" is defined, and that definition applies notwithstanding the more comprehensive provisions of the Act of 1929. "Agricultural hereditament," by s. 2 of the Act of 1928, means "any hereditament being agricultural land or agricultural buildings"; and by sub-s. (2) it was provided as follows: "'Agricultural land' means any land used as arable meadow or pasture ground only," &c. Is it true to say that this land, being what it was and used as it was, came within the expression "land used as arable meadow or pasture ground only"? At first blush, as is obvious, there are difficulties in contending that land covered with water is agricultural land. It is difficult to say that it is used as arable meadow or pasture ground only. Nevertheless, these justices have evidently come to the conclusion that this land was part and parcel of the farm, part and parcel of the agricultural land, and that the use for fishing to which it was put was something so entirely subsidiary and ancillary to the use of the land as agricultural land that the part was to be taken as comprised in the whole and that it could not properly be separated therefrom.

The question was suggested in argument: What would have been the true conclusion if, instead of letting to another person the right of catching fish in this water, the owner-occupier had himself fished that water? Could it then have been said that he was doing something which took that part of his premises out of the description of "agricultural land"? I do not think that that proposition could have been put forward, except for the purpose of controversy, and it seems to me to make no real difference that, instead of fishing this water himself, he let the right of fishing, by word of mouth, to another person in consideration of an annual payment. I think that the justices were entitled to come to the conclusion that, upon a fair view of the whole matter, this water being where it was and the land of the farmer being land upon both sides of the stream, the fishing in that water was a minor and subsidiary thing which did not take away from the whole hereditament the character of agricultural land. I am not prepared, on these materials, to hold that the justices were wrong, and I think, therefore, that this appeal ought to be dismissed.

GODDARD, J.—I agree. I think the case is really an ingenious, although, no doubt, quite legitimate, attempt to get round the established doctrine that incorporeal hereditaments cannot be rated, unless there has been a severance by deed. There has been no such severance in this case. This is really an attempt to rate the fishing rights. At first I was rather pressed with the difficulty that, in order to escape rateability, this land had to be shown to be agricultural land, and that "agricultural land" is defined in the Act of 1928 as "land used as arable meadow or pasture ground only." On reflection, I think the difficulty is more apparent than real. The land forming the bed of the stream belongs to the owners of the land forming the banks. The banks are for a certain distance owned by one person, who for that distance owns the whole of the bed of the stream. Beyond that point the respective owners of the banks own the bed up to the middle of the stream as part of their land. Therefore, it seems to me that the bed of the stream is part of the field which adjoins the stream. If the field which adjoins the stream is either arable, meadow or pasture land, then I think the bed forms part of that field. I do not think the fact that water runs over it makes any difference, because it is hardly arguable that if one has a pond in a field that pond is not part of the field. The pond may be formed artificially as a new pond, or it may be a pond which is formed merely by a depression in the land in which water collects and which may dry up in time. Such a pond would, I think, be part of the field upon which the pond is situate. So here I think that the bed of the stream is part of the field which borders it, and that, as that field was undoubtedly agricultural land, there was evidence upon which the justices could find that the hereditament in question is agricultural land, and, therefore, de-rateable. I agree, therefore, that the appeal should be dismissed.

SINGLETON, J.—I am of the same opinion. Until the year 1934 Mr. Charles Watkins, as owner of the Groves Farm, was exempt from rating in respect of the farm which he occupied. That was because of s. 67 (2) of the Local Government Act, 1929, which is in these terms:

> "For the purpose of valuation lists in force at the appointed day agricultural land and agricultural buildings shall be deemed to have no rateable value, and, notwithstanding anything contained in the enactments hereinbefore in this section mentioned, no particulars with respect to such land or buildings shall be included in any subsequent valuation list."

Included in the property owned and occupied by Mr. Watkins was the whole bed of the River Monnow for about one furlong in length (during which length it ran through his land on both sides) and the bed ad medium filum of the River Monnow for another furlong and of the Ecsley Brook for about three-quarters of a mile. Those portions of the river were treated originally as part of the farm which he occupied and as part of an agricultural hereditament, just as any pond in any field or on any farm is normally treated. In May, 1934, the rating authority served upon him a request for a return under the provisions of ss. 40 and 41 of the Rating and Valuation Act, 1925, and they desired to know what the fishing rights in the river were and what he did with them. He returned a statement, in accordance with the facts, that he was the owner of fishing rights situate at the Groves Farm, Longtown, and let to Mr. Moxon without written agreement at £14 for the year 1934, himself giving the value of those fishing rights as £10. Thereupon, in July, 1934, the rating authority served a proposal to amend the valuation list by inserting a new hereditament, and that new hereditament, which was said to be occupied and owned by Mr. Watkins, was placed under the description of "Land covered with water with fishing rights." It is quite clear that what the rating authority was trying to do was to get some rateable value in respect of those fishing rights. The matter was considered by the assessment committee, who agreed with the contention of the rating authority, and in the result there was an appeal to quarter sessions.

With regard to the facts of the case, it is important to notice that included in the property owned and occupied by Mr. Watkins is the whole bed of the River Monnow for some part and half for another part: that was owned and occupied by him as part of the agricultural hereditament. Further, the annual value of the farm would (apart from any question of loss of fishing) be £60 per annum less if the said river and brook did not exist, and it is stated that "The area of land covered by water is subject to seasonal variation." It seems to me that quarter sessions, who allowed the appeal against the decision of the assessment committee, must be taken as finding that there was no separate hereditament created at all, in other words, that the river bed is occupied by the farmer as part of his farm.

Counsel for the assessment committee, in the course of his argument, relied on the Rating and Valuation (Apportionment) Act, 1928, and, in particular, on the definition of "agricultural hereditament" and of "agricultural land" contained in s. 2 of that Act. The commencing words of sub-s. (2) are: "'Agricultural land' means any land used as arable meadow or pasture ground only." I am bound to say that, for myself, I think that, if a farmer has a small area of land which happens to have water upon it but which is used as a drinking place by beasts upon that farm, that is part of the pasture ground. The animal that eats also needs to drink. The finding of the justices means, I think, that they were satisfied that the portions of the river with which they were dealing were occupied by the farmer as part of the lands used by his beasts and formed a very considerable part of the agricultural land.

Counsel also sought to put the case forward as one of a separate occupation or a separate hereditament being created by reason of there being an enhancement on account of the fishing rights. He agreed that his argument was in no way dependent upon the fact that the farmer received £14 a year because he had agreed to let someone else fish in the river, and he said that the position would be just the same if the farmer kept the fishing rights in his own hands. I think that quarter sessions were in this case justified in finding that the real value of the farm was agricultural. If there is created or there can be said to be a separate hereditament which is land covered with water with fishing rights, I see no reason at all why the value of that hereditament should be confined to the value of the fishing rights. If that argument is right, a very considerable portion of the rights of any occupier of agricultural land would disappear. I think that the argument of counsel for the assessment committee fails, and that quarter sessions must be taken to have decided that there is no separate hereditament in the circumstances of this case.

Appeal dismissed.

Solicitors: *Whitelock & Storr*, for *Moore & Symonds*, Hereford; *E. & J. Mote*, for *T. P. H. Watkins*, Pontypool.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

Re DEBTOR (No. 24 of 1935)

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.), December 17, 18, 1935]

[Reported [1936] Ch. 292; 105 L.J.Ch. 364; 154 L.T. 234; 80 Sol. Jo. 54; [1936–7] B. & C.R. 93]

Bankruptcy—Partnership—Notice—Service on only one partner.

Petitioning creditors presented against the debtor a bankruptcy petition which was founded on an unsatisfied bankruptcy notice addressed to a firm in which the debtor was a partner. The notice was served on the debtor, but not on the other partner in the firm.

Held: the notice must be taken to have been addressed to each individual member of the firm; the debtor was jointly and severally responsible for all the firm's debts, each of which could be enforced against him individually; and, therefore, the notice was not bad by reason of the fact that it had not been served on both partners.

Notes. As to non-compliance with a bankruptcy notice, see 2 HALSBURY'S LAWS (3rd Edn.) 272 et seq., and for cases, see 4 DIGEST 86 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

(1) *Re Low, Ex parte Gibson*, [1895] 1 Q.B. 734; 64 L.J.Q.B. 362; 72 L.T. 450; 59 J.P. 292; 43 W.R. 405; 11 T.L.R. 298; 39 Sol. Jo. 348; 2 Mans. 169; 14 R. 371, C.A.; 4 Digest 89, *805*.

(2) *Re Wenham, Ex parte Battams*, [1900] 2 Q.B. 698; 69 L.J.Q.B. 803; 83 L.T. 94; 48 W.R. 627; 44 Sol. Jo. 609; 7 Mans. 309, C.A.; 4 Digest 89, *806*.

Appeal by the debtor from an order of a Divisional Court in Bankruptcy (CLAUSON and LUXMOORE, JJ.).

The facts appear from the headnote and the judgment of the MASTER OF THE ROLLS.

B. M. Cloutman for the debtor.

J. B. Blagden for the petitioning creditors.

LORD WRIGHT, M.R.—This is an appeal from an order of the Divisional Court, who reversed an order of the registrar made in certain bankruptcy proceedings. The registrar had refused to make an order on the creditors' petition under s. 5 (3) of the Bankruptcy Act, 1914, which says that the court may dismiss a petition if for sufficient cause no order ought to be made. The question is whether the discretion vested in the registrar was correctly exercised. The Divisional Court has held that it was not correctly exercised, and that the petition ought not to have been dismissed, and this court has now to decide whether the Divisional Court was or was not right. The position has become very complicated in the process of time and in its progress through different courts, but certain questions have emerged, and they are the only questions which I intend to deal with in this judgment. It is because of the view I have formed on these matters that I have come to the conclusion that the judgment of the Divisional Court was right, and that it should be affirmed.

The first question which I have to consider has reference to the form of the bankruptcy notice considered along with the other relevant proceedings in the case. Having come to a conclusion on that, I shall deal with the second question—or, perhaps, the second and third questions are really one—and that is whether there was sufficient cause for dismissing the petition in the conduct of the petitioning creditors in connection with their antecedent dealings with the debtor—whether there has been any misconduct or extortion in regard to the debt in question.

The debtor, George Frederick Wyatt, before any bankruptcy proceedings were commenced, was trading in partnership as Robert Jackson and Co. I do not know who the other partners were. The firm got into financial difficulties. They were seeking to develop a sort of mail order tea business. They had accepted a great many orders from customers; they had bought a lot of tea from the petitioning creditors, and they were unable to pay for the tea which had been supplied to them. This all happened about the latter part of 1932. In November, 1933, they entered into an agreement about which no question arises here. It was an agreement under which, in order to work off the debt, they were to act as canvassers and agents for the petitioning creditors in connection with what I may call the business that they had established. They were to be employed in the capacity of tea salesmen for a minimum period of one year, and there should be deducted from the commission that they were earning the balance of the debt. In November, 1933, a judgment had been signed against the firm, some days before the agreement that I have mentioned, and that judgment remained entirely unsatisfied. A petition was presented by the petitioning creditors on June 11, 1934. The proceedings in that petition seem to have gone on until October, 1934. An agreement was entered into which is embodied a consent order of the court. It is dated Oct. 15, 1934, and in effect it provided for adjournments at the cost of the petitioning creditors for a certain period, and it provided, on the petitioners consenting, that the debtor should deliver up within twenty-four hours the books of the business with the list of customers, and if the debtor should pay the amount owing to the petitioners within three weeks together with the costs, by agreement or to be taxed, the petitioning creditors then undertook, in effect, not to interfere with the goodwill of the debtors' business, not to solicit orders from their customers, and to forward to the debtors orders received from such customers. It appears that, in pursuance of the conditions of the order that the costs were to be agreed, or taxed in default of agreement, the parties agreed that the costs should be taken at the sum of £150, and that £150 is a figure which must be borne in mind because it becomes important when we come to the next document in the case. That is an agreement of Feb. 5, 1935, which provides:

> "In consideration of your having agreed to the dismissal of the petition herein upon payment of the sum of £150, the agreed costs of the bankruptcy notice and petition, of which amount you have received £135, I hereby agree and undertake to pay to you the balance of £15 apart from the judgment debt and costs."

Thereupon that petition was dismissed. The next petition was presented on May 25, 1935, the debtor having failed to carry out the terms of that letter of Feb. 5, 1935. It is said that the proceedings up to and including the letter of Feb. 5, 1935, constituted extortion and misconduct which would justify the court in dismissing the petition now in question. That is a matter which I shall deal with anon.

Let me now consider the form of the documents relating to the petition now in question, and I must refer to certain authorities in that connection. Judgment, as I have already said, was obtained against the firm. A bankruptcy notice based on that judgment dated April 4, 1935, was issued. It followed the terms of the judgment, was addressed to Robert Jackson & Co. (a firm), it was served on the debtor, and it said:

> "Take notice that within seven days after service of this notice on you . . . you must pay to [the petitioning creditors or their agents] the sum of £459 10s. 11d. . . . as being the amount due on a final judgment obtained by them against you in the High Court of Justice, King's Bench Division, dated Nov. 21, 1933, whereon execution has not been stayed or you must secure or compound for the said sum to their satisfaction or to the satisfaction of their said agent or to the satisfaction of this court."

That notice was served on the debtor, Wyatt. It was not complied with, and it was followed by the petition dated May 29, 1935, addressed to Wyatt, formerly trading in partnership as Robert Jackson & Co. and lately carrying on business at an address in Southwark. It recites that the debtor, George Frederick Wyatt,

> "failed to comply before Wednesday, the 1st day of May, 1935, with the requirements of a bankruptcy notice duly served upon him on Tuesday, the 23rd day of April, 1935."

The petition was served upon Wyatt personally.

The question which has been raised is this. It is said that the notice was invalid because it ought to have been served upon both partners, whereas it was only served upon one partner, namely, the debtor. Certain authorities have been referred to, but before I deal with them I should like just to refer to the terms of the Act, which define what constitutes an act of bankruptcy. Section 1 of the Bankruptcy Act, 1914, says this:

> "A debtor commits an act of bankruptcy in each of the following cases:—(g) If a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England . . . a bankruptcy notice . . . and he does not, within seven days after service of the notice, in case the service is effected in England . . . either comply with the requirements of the notice or satisfy the court that he has a counterclaim . . ."

Those are the conditions which constitute an act of bankruptcy. If we regard those conditions, and apply them to the circumstances of this case, we find that there has been a final judgment or order against the debtor. It is perfectly true that in form the judgment was against a firm of Robert Jackson & Co., of whom the debtor was a partner, but none the less it is a judgment against the debtor in his several capacity as a partner. He is jointly and severally responsible for all the debts of the firm; each debt including this judgment debt may be enforced against him individually; and, therefore, there is a final judgment against him, even though it is also a judgment against the firm. Execution has not been stayed. There has been served upon that debtor a bankruptcy notice, and he has not, within seven days after service of the notice, complied with its terms in any way. It seems, therefore, on that analysis of the position that the matter was complete and in order. Section 2 of the Act provides:

> "A bankruptcy notice under this Act shall be in the prescribed form [which this notice was] and shall require the debtor to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order, or to secure or compound for it to the satisfaction of the creditor or the court, and shall state the consequences of non-compliance with the notice, and shall be served in the prescribed manner."

The form in this case, beyond question, is as prescribed. It is said, however, that it is not in order because, the judgment being against joint debtors, that is, against the firm, the bankruptcy notice ought to be served on each of those debtors individually. No authority has been produced for that proposition, and, as I have already indicated, there does not seem to be any foundation for it in the terms of the Bankruptcy Act.

So far as authority goes I find in *Re Low, Ex Parte Gibson* (1), an authority which, though not dealing with partnership but dealing with joint-debtors, seems to me to point to the directly opposite conclusion. In that case there was an application to set aside a bankruptcy notice. It appeared that an action had been brought against the debtor and five other persons and judgment recovered against the debtor and three of his co-defendants, so that there was judgment against four debtors. A bankruptcy notice served on the debtor stated that the judgment had been recovered against the debtor and all the five co-defendants. That was an irregularity which could be cured, and I cast that aside. But there was a further point. It was held there that

> "where judgment has been recovered against several persons jointly, a bankruptcy notice may be issued against one of the joint-judgment debtors without including the others."

LORD ESHER, Master of the Rolls, said this ([1895] 1 Q.B. at p. 736):

> "The other point raised is not one on which the notice should be set aside. It is said that where the judgment is a joint one against several defendants, a bankruptcy notice cannot be effective except it is drawn up against all the defendants, although it need only be served on the one whom it is desired to make bankrupt. I fail to see what good it can do that one to have the names of the others put in the notice when there is absolutely no necessity for serving it on them. This is a technicality to which we ought not to listen."

A RIGBY, L.J. ([1895] 1 Q.B. at p. 737), said:

> "I do not see that any substantial injustice has been done to the person served with the notice, or that he can be in any way deceived by it. If so, it ought to be amended."

That is the other point which I am not concerned with. "As to the other point raised" B —that is the point which is material here—

> "I cannot understand why it should be obligatory on a judgment creditor to add to the bankruptcy notice the names of all the persons against whom the judgment was recovered, when it is not his intention to follow it up against any of those persons except the one whom he proposes to serve."

That obviously is not quite in point here because the names of all the debtors were set C out in the bankruptcy notice, but it was only served upon the debtor against whom it was the creditors' intention to follow it up. It follows eventually that the Court of Appeal there are taking the view that all that is material is that the person against whom it is intended to proceed in bankruptcy should have the bankruptcy notice served upon him, and that was done in this case.

The other case which has also been relied upon is *Re Wenham, Ex parte Battams* (2). D There there were two persons who had been carrying on business in partnership. A writ had been issued and served against each of those partners, and the bankruptcy notice, following the judgment, was addressed to Wenham Brothers. It was served personally on each of the partners. Then a question was raised which is dealt with by WRIGHT, J., in this way ([1900] 2 Q.B. at p. 701):

> E "Was it possible to issue a good bankruptcy notice against the firm, the partnership having been dissolved? The bankruptcy notice followed the judgment, being addressed to the firm by the firm name. In the bankruptcy rules there is no express provision dealing with the case, nor is there any decision since R.S.C., Ord. 48A was passed. The point would be one of some difficulty, but for two circumstances: first, the bankruptcy notice followed the form of the judgment; and F secondly, it was served upon John Wenham [the debtor] personally. Looking at the substance of the matter, I think we ought to hold that enough has been done here—that in such a case as the present a bankruptcy notice which follows the form of the judgment is good if it has been served upon the person sought to be affected by it. If the bankruptcy notice be good, there is no reason why a bankruptcy petition should not be presented against either of the brothers Wenham."

G The learned judge there is in express terms, though it was not necessary for his judgment, treating the service upon the debtor whom it was sought to make bankrupt as being all that was necessary; and that agrees, in my judgment, with the view which is expressed, or if not expressed, is certainly implied, in the passages which I have read from *Re Low* (1).

It is perfectly true that if the law is so, as I think it is, the form which is used is not H altogether apt. It is a little difficult to construe the petition precisely, but I do not think that these difficulties affect the substance of the matter. I rely on the law as stated in *Re Low* (1) as applying to the facts of a joint debt as embodied in the sections of the Act which I have read, and I think that that view of the law is in consonance with the authorities which I have referred to, and it certainly is in consonance on the ground of business efficacy. Certainly it can be pointed out that the terms of the I petition are a little difficult to apply, and indeed so are the terms of the bankruptcy notice. The bankruptcy notice is addressed to two people—Robert Jackson & Co.—and says: "Take notice that within seven days after service of this notice on you." It was not served on the firm because at the material date it seems it did not exist, and, anyhow, had no principal place of business. It could be only served on one or other of the debtors, or both of the debtors, if they could be caught together at the same time.

> "Take notice that within seven days after service of this notice on you, excluding the day of such service, you must pay"

the amount. It may perfectly well be said, what is the position if the debtor who is not served actually pays the debt within seven days? That, I think, is a simple case, because then there would be no debt and the notice would have become abortive. A more difficult position, however, would arise if the other debtor on whom the petition was not served had secured the sum to the creditors' satisfaction, or to the satisfaction of the court. That difficulty, I think, could be only met by saying that in that case the debtor on whom the notice was served would be entitled to rely on what had been done by his co-debtor. Each is a debtor, and each is separately and severally liable for the debt: but each is entitled to rely on what his co-debtor has done. There are, perhaps, some other difficulties, but there are many other difficulties in dealing with the matter on any other footing, and I think that the bankruptcy notice here, and the petition founded upon it, were in order, and that no objection can be raised on that ground.

[His Lordship also considered the question whether the Divisional Court in bankruptcy were right in holding that the discretion of the registrar under s. 5 (3), to dismiss a petition for other sufficient cause had been wrongly exercised as there, in fact, had been no misconduct or extortion on the part of the petitioning creditors in regard to the debt, and held that the Divisional Court were right.]

ROMER, L.J.—I agree entirely and I only desire to add this. In *Re Low, Ex parte Gibson* (1), where a judgment had been obtained by the petitioning creditor against several joint debtors, the bankruptcy notice was addressed to one only of those joint debtors. The debtor, on the petition coming on, took the objection that the bankruptcy notice ought to have been addressed to all the joint debtors. Mr. Muir Mackenzie, who was a great authority on bankruptcy law, in the course of his argument on behalf of the debtor, said this:

> "The notice should be directed to the debtor and all the other joint judgment debtors, although it need not be served on those against whom it is not intended to proceed";

and LORD ESHER, as I read the passage in his judgment, which has been already read by the MASTER OF THE ROLLS and which I need not repeat, in my opinion affirmed the accuracy of that argument on the part of Mr. Muir Mackenzie to this extent, that if all the joint debtors had been mentioned in the notice, and the notice was directed to them all, it was only necessary to serve the one against whom it was intended to proceed. Apart from that altogether it appears to me in the present case that every single condition that is mentioned in sub-s. (1) (*g*) of s. 1 and in s. 2 of the Bankruptcy Acts as essential to the establishment of an act of bankruptcy under that sub-s. (*g*) have been fulfilled. So far as regards the allegation of extortion or improper conduct on the part of the petitioning creditor when he withdrew or allowed to be dismissed his earlier petition, I only want to say this: It does not appear to me that it was a term of the withdrawal of that petition that the judgment debtor should discontinue his action against the petitioning creditor in the King's Bench Division. Had that been a term of the withdrawal of that petition, speaking entirely for myself, I think I should like to have taken further time to consider the matter. As it is, I agree that this appeal fails.

GREENE, L.J.—I agree, and, although at one stage in the argument I felt some little doubt on the question of the bankruptcy notice, on careful consideration I have come to the conclusion that that doubt is without foundation. It appears to me that the bankruptcy notice, when properly construed, must be taken as a notice addressed to each individual member of the firm, and it is, I think, completely accurate to say that the individual on whom it was in fact served has failed to comply with the requirements of the notice, in so far as it related to his own actions which under it he was required to perform. If, in point of fact, his partner, not having been served, had nevertheless paid the debt, it appears to me that even then that would have been a compliance by the debtor, who was in fact served, and the result of that would have been that the allegation that he, namely, the debtor, against whom the petition was presented, had failed to comply with the notice could not have been made, because payment by the other partner would have been a payment by the debtor in question. For these reasons the doubts which I at one time felt appear to me to disappear and I agree entirely with the judgment which has been delivered.

Appeal dismissed.

Solicitors: *Stanley S. Levene*; *Ankin & Co.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re LOVEGROVE. Ex Parte APPLESTONE AND ANOTHER *v.* THE TRUSTEES

[COURT OF APPEAL (Lord Hanworth, M.R., Romer and Maugham, L.JJ.), February 11, 1935]

[Reported [1935] Ch. 464; 104 L.J.Ch. 282; [1934–5] B. & C. R. 262; 152 L.T. 480; 79 Sol. Jo. 145; 51 T.L.R. 248]

Bankruptcy—Assignment of future book debts—Bill of sale—Assurance of personal chattels by way of security—Sale of goods to company—Payment by company to manufacturer of part of purchase price—Re-sale to manufacturer's customers—Payment by customers of full price to company—Bills of Sale Act, 1878 (41 *&* 42 *Vict., c.* 31), *s.* 4—*Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 43 (1).

By an agreement in writing it was provided that L., who was in need of ready money in his business, should sell all his products to a sales company which would forthwith pay him ninety per cent. of the purchase price and then re-sell the goods to L.'s customers, receiving from those customers the full purchase price and retaining it. The agreement provided that, if the customers failed to pay any part of the purchase price, L. would pay to the company the amount of the deficit, and that, if the company made a net profit under the agreement in excess of £2,500 during the twelve months after the date of the agreement, the company would pay to L. the amount of that excess. On Feb. 5, 1934, a receiving order was made against L., and on Feb. 19 he was adjudicated bankrupt. On a motion by the trustees in the bankruptcy for a declaration that the agreement was void against them and that all debts due from customers at the beginning of the bankruptcy formed part of L.'s estate,

Held: the transaction evidenced by the agreement was an honest transaction representing the true intention of the parties and the sales by L. to the company and by the company to L.'s customers were real sales and not fictitious transactions concealing loans made by the company to L. of ninety per cent. of the purchase prices secured on L.'s book debts; the agreement was not an assurance of personal chattels within s. 4 of the Bills of Sale Act, 1878, nor was it an assignment of future book debts within s. 43 of the Bankruptcy Act, 1914; and, therefore, the agreement was not void as against the trustees under that section or as an unregistered bill of sale.

Notes. As to avoidance of bills of sale, see 3 HALSBURY'S LAWS (3rd Edn.) 306 et seq., and as to the avoidance of an assignment of book debts, see 2 HALSBURY'S LAWS (3rd Edn.) 323, 324; and for cases, see 7 DIGEST 105 et seq., and 5 DIGEST 694 et seq. For Bills of Sale Act, 1878, and for Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 557, 321, respectively.

Cases referred to:

(1) *North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1887), 35 Ch.D. 191; 56 L.T.Rep. 755; affd. (1888), 13 App. Cas. 554; 58 L.J.Ch. 219; 59 L.T. 730; 37 W.R. 305; 4 T.L.R. 728, H.L.; 7 Digest 4, *6*.

(2) *Woodgate* v. *Godfrey* (1879), 5 Ex.D. 24; 49 L.J.Q.B. 1; 42 L.T. 34; 28 W.R. 88, C.A.; 7 Digest 7, *24*.

(3) *Charlesworth* v. *Mills*, [1892] A.C. 231; 61 L.J.Q.B. 830; 66 L.T. 690; 41 W.R. 129, H.L.; 7 Digest 5, *7*.

(4) *Re Watson, Ex parte Official Receiver in Bankruptcy* (1890), 25 Q.B.D. 27; 59 L.J.Q.B. 394; 63 L.T. 209; 38 W.R. 567; 6 T.L.R. 332; 7 Morr. 155, C.A.; 7 Digest 6, *14*.

Appeal by Alfred Applestone and G. Lovegrove & Co. (Sales), Ltd., from an order of Farwell, J., dated Nov. 26, 1934, in which his Lordship had declared that an agreement dated Sept. 1, 1933, made between the appellant company and the bankrupt, George Lovegrove, was void as being an unregistered bill of sale.

Lovegrove carried on business at High Wycombe as a manufacturer of furniture under the name of George Lovegrove & Co. Shortly before Sept. 1, 1933, being short of liquid capital, he approached the appellant Applestone, who agreed to assist him in two ways, namely (i) by advancing £5,094 on the security of existing book debts, and (ii) by forming a sales company which should purchase from Lovegrove at a discount of ten per cent. of the invoiced price all goods which from time to time he contracted to sell to his customers, the sales company then re-selling the goods to the customers and receiving payment from them at the due date.

To carry out that scheme G. Lovegrove & Co. (Sales), Ltd. (hereinafter called the sales company), were incorporated on Sept. 1, 1933, with a capital of 100 £1 shares. Ninety-eight of those shares were allotted to Applestone, one to Applestone's clerk, and one to Lovegrove. On the same day Lovegrove mortgaged to the sales company existing book debts specified in a schedule to the mortgage to secure a loan of £5,094 then made by the sales company to him. Applestone put the sales company in funds to make that loan. All the debts comprised in that mortgage were in due course collected by the sales company before the beginning of Lovegrove's bankruptcy, and that agreement was not challenged by the trustees.

A second agreement, made on the same day, provided, by cl. 2:

> "The company shall purchase from the manufacturer and the manufacturer shall sell to the company from time to time all such goods manufactured by the manufacturer as the company may require for its business, and the following provisions shall have effect with regard to the price and delivery thereof and payment therefore; (i) the price to be paid for any goods purchased from the company by customers on the list shall be the price as hereinafter defined less ten per cent. thereof and for any other goods purchased from the company the price as hereinafter defined; (ii) . . . 'the price' shall mean the price at which goods are invoiced to any customer; . . . (4) payments for any goods so purchased shall be in the case of goods purchased from the company by customers on the list as soon as conveniently possible upon the company agreeing to sell the same and in the case of customers other than customers on the list as and when the company shall receive from them the final instalment of the purchase price thereof. . . . Provided that if and so long as the total of the purchase prices owing from time to time to the company by customers on the list shall exceed £5,000 all sales by the company to customers on the list in excess of £5,000 shall at the option of the company be deemed to be sales to customers other than customers on the list unless the manufacturer shall on or before Sept. 30, 1933, have given notice in writing to the company that he desires the said limit of £5,000 to be increased to an amount up to but not exceeding £7,000, in which case this clause shall be altered accordingly and such increased amount shall be substituted therein in place of the said sum of £5,000."

By cl. 3 it was provided that, if a customer failed to pay any part of the price of goods bought by him, the manufacturer should repay to the company the amount of such deficit. By cl. 5 the manufacturer undertook to provide all accommodation and clerical and other services required by the company for the carrying on of its business. By cl. 7 the manufacturer covenanted not to sell furniture to any one other than the company. By cl. 13:

A

> "If the company shall during the twelve months following the date of this agreement make a net profit under this agreement in excess of £2,500 then the company shall pay to the manufacturer a sum equal to the amount of such excess."

On the same day, Sept. 1, 1933, a circular was sent to all the existing customers of Lovegrove informing them that, in future, goods ordered by them would be invoiced to them by the sales company. B Thereafter the course of business was that when goods were ready for delivery they were invoiced to the purchasers in the name of the sales company, and when a sufficient number of such invoices had been sent a list of them would be forwarded to Applestone, in his capacity of secretary of the sales company, and that company would send to Lovegrove a cheque for ninety per cent. of the total appearing on the list. When the accounts were due for payment the customers paid the full amount, less cash discount, to the sales company.

C

On Feb. 5, 1934, a receiving order was made against Lovegrove, and on Feb. 19 he was adjudicated a bankrupt. At the beginning of the bankruptcy considerable sums were due from customers for goods supplied, and those sums, totalling about £7,000, were partly collected by the sales company and partly by the trustees in bankruptcy, and partly were by arrangement paid into a joint account.

D The trustees moved before FARWELL, J., for a declaration that the second agreement was void against them as being, inter alia, an unregistered bill of sale, and that all debts due from customers at the beginning of the bankruptcy formed part of Lovegrove's estate. FARWELL, J., held that the agreement was a bill of sale, and made the declaration asked. The sales company and Applestone appealed.

By the Bills of Sale Act, 1878, s. 3:

E

> "This Act shall apply to every bill of sale . . . (whether the same be absolute, or subject or not subject to any trust) whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale."

By s. 4:

F

> "In this Act . . . the expression 'bill of sale' shall include bills of sale, assignments, transfers . . . and other assurances of personal chattels."

By the Bankruptcy Act, 1914, s. 43 (1):

> "Where a person engaged in any trade or business makes an assignment to any other person of his existing or future book debts or any class thereof, and is subsequently adjudicated bankrupt, G the assignment shall be void against the trustee as regards any book debts which have not been paid at the commencement of the bankruptcy, unless the assignment has been registered as if the assignment were a bill of sale given otherwise than by way of security for the payment of a sum of money. . . .
>
> "Provided that nothing in this section shall have effect so as to render void any H assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts. . . ."

C. Tindale Davis and *V. R. Aronson* for the appellants.
Croom-Johnson, K.C., and *Stable, K.C.*, for the trustees in bankruptcy.

LORD HANWORTH, M.R.—The point to be considered is whether or not a deed of I Sept. 1, 1933, is valid and effective as against the trustees in bankruptcy of George Lovegrove, who is now a bankrupt. The appeal is put down in relation to two motions, the one anticipating the other, the first being a motion by Alfred Applestone and G. Lovegrove & Co. (Sales), Ltd., for a declaration that the deed in question is valid. In the other the useful but exceptional course was taken of ordering that there should be pleadings, and thus we have in those motions points of claim and points of defence telling the story and raising the question which has to be decided.

For the purpose of this judgment the matter can be put quite shortly by recounting a very few dates. On Jan. 27, 1934, an act of bankruptcy was committed by Lovegrove, who gave notice of the suspension of his ability to pay his debts. A petition was presented on Jan. 30, and on Feb. 5 a receiving order was made against him, and subsequently he was adjudicated a bankrupt. On Sept. 1, 1933, certain agreements had been entered into. Lovegrove was engaged in business in High Wycombe as a manufacturer of furniture, and his business was a high-class one. It is just and fair that I should recall the words used in respect of him by the learned judge, who said:

> "He was carrying on business as a manufacturer and wholesale dealer in furniture, and had apparently been a person of considerable ability in his own business, because he started quite a small business with a capital of some £1,000 in or near London, he transferred his business to High Wycombe, and in 1933 the business had grown to very considerable dimensions, the turnover in that year being somewhere in the neighbourhood of £100,000. The business, therefore, was a highly successful one. One of the witnesses in the witness-box said it was one of the best businesses of its kind in the country, a first-class and a high-class business, and obviously Mr. Lovegrove was a person of integrity and ability."

At a time previous to Sept. 1, 1933, Lovegrove was being pressed by one substantial creditor and he was in difficulties how to meet the situation which had occurred. He went to Applestone, a friend who was prepared to assist him on business lines, and Applestone did so by entering into the agreement which is now in question, namely, the second agreement of Sept. 1, 1933. A company called G. Lovegrove & Co. (Sales), Ltd., was formed and registered on the same day. It was a company with a very small capital, and it was, no doubt, a device to have a separate entity apart from the business of G. Lovegrove as carried on at High Wycombe. The agreement entered into must be carefully examined. It is an agreement made between Lovegrove, who is called "the manufacturer," and G. Lovegrove & Co. (Sales), Ltd. The sales company had been formed by Applestone, who held substantially all the shares, so that the sales company represents Applestone. The agreement entered into was that Lovegrove was to continue to manufacture the furniture and to go on with his business in the ordinary way. He covenanted that he would not sell any furniture manufactured by him otherwise than to the sales company, nor was he to cease manufacturing furniture as an independent person. The company covenanted that it would not, during the existence of the agreement, purchase any article of furniture except from the manufacturer. We have thus got the nexus between the manufacturer and the company under this agreement, which was to last for twelve months certain and thereafter continue unless determined by three months' notice in writing given at any time after May 1, 1934.

The procedure after the manufacturer had made the furniture and had sold it to the sales company was as follows. By cl. 2 of the agreement:

> "The company shall purchase from the manufacturer and the manufacturer shall sell to the company from time to time all such goods manufactured by the manufacturer as the company may require for its business."

Those words, "as the company may require for its business," seem to leave an act of volition on the part of the sales company to say whether it will take every piece of furniture manufactured by the manufacturer. Those words could easily have been left out, and if they had been left out there could be no question but that every piece of furniture manufactured would be sold to and taken over by the sales company, but when those words are added there is a limit beyond which the company is not bound to go. Two lists were to be made: lists of the customers of Lovegrove, and the business was to go on, with the result that there would be, in the ordinary course, a demand made by the customers for the furniture which they required, and the usual course of Lovegrove's business would be followed.

But Lovegrove was in the position that he could not wait for any considerable time for payment from these customers, and so the following system was established under the agreement. When the customer asked for goods, or when Lovegrove found a customer for particular goods, there was to be a sale which was to be carried out by an invoice, which was undoubtedly an invoice bearing the name of the sales company, and the sales company sold the goods to the customer, and after that Lovegrove dropped out. He had, as an agent for the company, secured the customer. He had brought the sales company, who was selling, into touch with the customer, and he dropped out. The sales company sold to the customer and the customer was to pay the sales company, but, that Lovegrove might not be held up by delay in payment by the customer, the sales company was immediately to pay to Lovegrove ninety per cent. of the value of the invoice of the goods. The effect of that was that Lovegrove got immediate payment from the sales company. The sales company, who had possibly to wait some time for its money, obtained an advantage in that it secured the balance, the ten per cent., for its profit. Otherwise, the business went on as before, with this definite alteration, that the seller to all the customers was no longer to be Lovegrove but the sales company. It is no use saying: "Oh, the sales company was Applestone, so that one must treat the company as merely being a device or stratagem." The sales company was a definite entity, and it is in law entitled to be respected as such. Equally, Lovegrove, having regard to the testimonial given him by the learned judge, is entitled to say that he is an honest manufacturer with a good business, but at the moment—he hoped only temporarily—in financial difficulties.

That being the system, the sales company effects the sales to the customer, but the company then has, as any other seller has, to pay the source from which it has obtained the goods with which to fill the contract made between it and the customer, and so the company pays Lovegrove. The company does not get or hold the goods, it does not deal with the goods until the contract has been made on its behalf by the agent, Lovegrove, and it is then that the invoice records the true nexus between the seller and the customer, and the sales company has to pay for the goods which it requires. There is, therefore, no time at which the sales company is holding the furniture as security. It does not want the goods until it has the contract to fulfil, but it then requires the goods and has to pay for the goods that are so taken.

Our attention was drawn to a document which appeared in the correspondence. It was a circular sent out by the sales company, and signed by the sales company, to the customers announcing to them that

> "a new company has been formed under the name of G. Lovegrove & Co. (Sales), Ltd., and in future all sales will be made through this company and all payments should be made to it."

That is signed by the sales company, and it contains this sentence:

> "By forming an entirely separate sales unit we hope to be able to improve upon our service to you."

It is quite true that that document may be ineffective for what is implicit in it, namely, that the sales company in future are to represent Lovegrove & Co.—because it is not signed by Lovegrove & Co., but, taken at its face value, it seems to be a clear indication by the sales company that in future the sales are to be made through that company and that they are to receive the value of the invoice.

Other documents to which we have been referred are the invoice, which is undoubtedly from the sales company, and two documents, a delivery note and a signature note, which do not contain the sales company's name. They are subsidiary documents to the invoice; the primary document, which contains the contract, is the invoice. It might have been wiser, or it might have been better, that the sales company's name should have appeared on the delivery note and the signature note, but that matter is easily overcome by the fact that Lovegrove was acting in this matter as agent for the sales company. What is the objection to that method of doing business? This is not a case in which some document is put forward to mask a device or stratagem for deceiving persons; it really is an agreement entered into for the purpose of enabling Lovegrove to have money more quickly and more certainly on the sale of his goods, and one ought not to look at such a document with a sinister eye.

Farwell, J., found great difficulty in the case, and I share those difficulties; but I have come to a different view from that which he took, because, after the advantage which we have had of the discussion on both sides, it appears to me that the definition in the Bills of Sale Act, 1878, which we have to consider, does not cover this document.

The definition which is said most nearly to cover it is that in s. 4 of the Act of 1878, A which contains the interpretation to be given to the expression "bill of sale." But it is important to remember s. 3 of the Act of 1878, which is as follows:

> "This Act shall apply to every bill of sale executed on or after the first day of January one thousand eight hundred and seventy-nine (whether the same be absolute, or subject or not subject to any trust) whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such a bill of sale." B

That section stands, even after the amending Act of 1882 had been passed. We have, therefore, to bear in mind that the real purpose of requiring bills of sale to be made subject to a strict Act of Parliament was the danger that there should be some secret C document whereby there could be a power in some person unknown to seize or take possession of personal chattels which were claimed under a bill of sale. The words which are said to cover the present case are "assurance of personal chattels" (in s. 4 of the Act of 1878). The words are to be found in

> "inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels." D

Is the document in question an assurance of personal chattels? Where is the assurance given of personal chattels? It does provide a code by which the sales in the future of the manufactured articles of Lovegrove are to be carried out, but there is, in fact, no assurance given to the sales company on the actual goods themselves. On the question of what is an assurance see *North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1). E BOWEN, L.J., dealing there with some of the various cases whether the transaction was defeated if the bill of sale was avoided, said this (35 Ch. Div. at p. 212):

> "In my opinion, they [the Court of Appeal in *Woodgate* v. *Godfrey* (2)] reverted to the older view, and I think the sounder view, and again unmistakably laid down, as it seems to me, the true doctrine, that a document was really not a bill of sale unless it was an assurance." F

Later he said:

> "Now if a receipt was an assurance of personal chattels, it was struck by the older Act under the general words. If it is not an assurance of personal chattels, it is not struck by this Act. The truth is, I think, that the draftsman had in his mind fictitious transactions, where receipts were used to give a colour of assurance, for assurance there was, properly speaking, none, because the document was not intended to have any effect unless the transaction was revealed to the eye of the world, and in his anxiety to bring within the operation of the Act fictitious assurances, he treats them as if they were real assurances." G

I think one has to test the application of s. 4 by asking oneself: Is the document one H whereby some real assurance in respect of personal chattels was given by Lovegrove to the sales company? And after a careful examination of the document I answer the question "No." I come, therefore, to the conclusion that the document cannot be avoided as coming within the ambit of the Bills of Sale Acts.

There is one more claim suggested. It is asserted in the pleadings that s. 43 of the Bankruptcy Act applies to avoid this assignment of book debts and that this might be I treated as an assignment of future book debts. That point was not much insisted on by the learned judge, and, indeed, in his judgment, he says:

> "There were, no doubt, from his [Applestone's] point of view, objections to taking a charge upon future debts because a difficulty might arise in the event of the subsequent bankruptcy of Lovegrove, and this device was adopted in order to enable loans to be made to Lovegrove by Applestone, security being given to Applestone by a charge on the chattels of Lovegrove, chattels remaining in the possession of Lovegrove until they actually passed into the hands of the ultimate purchaser."

A So that the learned judge, in so far as he deals with this point at all, records that, whereas there was a choice of two methods of doing it, the particular method actually adopted was chosen to avoid the possible danger of taking a charge on the future debts.

I think one must consider the application of s. 43 of the Bankruptcy Act, 1914, after taking full note of what our decision is on the bill of sale point and the reason for the transaction. When one comes to consider the purport, meaning, and intention of B the agreement of Sept. 1, 1933, there does not seem any just or sufficient ground for saying that it is an assignment of future book debts. The agreement is made for twelve months, and we were told that there was evidence which described how that figure of £2,500, which was to be the effective limit of the rights of the sales company to its interest in the sales which took place, was arrived at. There was to be that limit because a figure was given by Lovegrove as the ordinary result of his trading for twelve months, C which was the first limit fixed for the duration of the agreement. It might be said that, inasmuch as there was a reverter of a sum beyond £2,500 to Lovegrove, there was some ground for suggesting that this was really in effect a mortgage of the future book debts, but that seems a little artificial, and, after all, it is a case in which the trustees have to make out their case and to establish that the effect of the deed is that it is a charge or mortgage on future debts within s. 43.

D To my mind, when one has come to the conclusion that the deed is an honest one, that the transaction was not intended to cloak some improper stratagem, but was made by honest persons in the course of a high-class and honest business, and that the Bills of Sale Acts do not apply to ruin the document, it follows that the real purport of the document ought to be accepted, namely, that it was for the purpose of enabling Lovegrove to obtain an earlier payment of the aliquot part of the purchase price paid for E the furniture, and not for any other purpose. In these circumstances it appears to me that the trustees have not established that the document is within s. 43, and their case fails on that point also, although I quite agree that it was open to them to take it.

On these two grounds I have come to the conclusion that the document is not avoided, and the appeal must be allowed, with costs.

F **ROMER, L.J.**—I have come to the same conclusion. To appreciate the true meaning and effect of the documents with which we have to deal in this appeal it is essential to bear in mind the circumstances in which Lovegrove found himself on the date when they came into existence. Lovegrove was a manufacturer of furniture, carrying on business on a fairly extensive scale at High Wycombe. The customers who bought his furniture, however, were people who, for the most part, expected to obtain from him a rather G extensive credit—three months, I think, was the usual credit which they expected and in fact obtained from him. The result was that Lovegrove at times found himself rather short of liquid resources, and by Sept. 1, 1933, he was undoubtedly in financial difficulties, arising from the cause which I have mentioned, and he approached Applestone with a view to obtaining financial assistance from him. Applestone was prepared to make advances of some £5,000 on security of the then outstanding book debts of Love- H grove, amounting to £5,000 odd, and on Sept. 1, 1933, a mortgage of these existing book debts was effected to secure to Applestone the repayment of this £5,000 odd, which he then advanced to Lovegrove.

It was apparent, if Lovegrove's business was to continue in the future, that the customers would still require this inconveniently long credit, and that Lovegrove must make some provision for obtaining advances pending the expiration of the credit if his I business was to be carried on, otherwise he would shortly find himself again in the same difficulties as before. Applestone, again, was willing to help him, and Applestone's assistance could be provided for in one of two ways. The first and obvious way was for Applestone to agree that as and when Lovegrove entered into a contract with any customer for a sale to that customer of furniture Applestone should then and there advance to Lovegrove, say, ninety per cent. of the purchase price, taking a charge on the purchase price to secure the money which he advanced to Lovegrove. There were obvious disadvantages attached to that course which were only too clearly seen and realised by the solicitor advising the parties at the time. If Lovegrove should subsequently go bankrupt, s. 43 of the Bankruptcy Act, 1914, might have the effect of avoiding the whole transaction—and, indeed, really did, in the opinion of FARWELL, J. —and so the parties deliberately adopted the alternative course.

The alternative course was obvious. When Lovegrove found the customer for his furniture, he could get Applestone to enter into a contract with the customer for the sale of the furniture to the customer, giving the customer the ordinary three months' credit, and to enable Applestone to complete his contract with the customer Lovegrove at the same time entered into a contract with Applestone to sell that furniture to Applestone, say, at ninety per cent., payable at once. In that way Lovegrove would get his £90, and Applestone would be repaid his £90, with something representing interest, when he received the £100 from the customer. Applestone was willing to adopt that scheme, subject, however, to certain conditions. One condition was—I do not know whether it was imposed by Applestone more than by Lovegrove, but it was obviously a condition which had to be imposed, because it was no good Lovegrove running round and trying to find customers to buy his furniture from Applestone because the parties did not know Applestone. If, on the other hand, a company was formed preserving the name of Lovegrove, the customers might be willing to continue to give orders to that company, and so a company was formed to take the place of Applestone in the transaction. It was a perfectly innocent thing to do. The use of that name by the company preserved the connection which was necessary to be preserved in order that Lovegrove might get the contracts.

Another condition made by Applestone appears to have been that, if he were going to purchase these goods from Lovegrove and sell them to the customers, the customers might make default, and so Applestone said in effect: "I shall not be getting the customers, but you, Lovegrove, will, and you ought to be responsible for their solvency. You must guarantee the payment of the purchase price by the customers to whom I agree to sell the furniture." Another condition made by Applestone was this: "I am going to run some risk in this matter, and therefore I ought to have some assurance from you, Lovegrove, that the sales which you effect, and which I enter into with the customers found by you, are not to be less than a certain sum in the year." Not in opposition to it, but at the same time as that condition was made by Applestone, Lovegrove himself made a condition, namely: "You will make a profit out of these transactions, and the profit may be a very large one, depending on the amount of the sales to the customers I find." So Applestone agreed with Lovegrove that the profit coming to him (Applestone) out of the transaction should not exceed £2,500 in the year.

If the sale by Applestone to the customer was a real sale and the sale by Lovegrove to Applestone was a real sale, the trustees in bankruptcy could not in any way object to the transaction. It is, however, said by the trustees in bankruptcy that these were not real sales at all; that the documents, to which I will refer in a moment, merely pretended to effect a sale, but that the real substance of the transaction was that Applestone was lending to Lovegrove ninety per cent. of the purchase price. If one looks at the document, on the face of it it provides for real sales, and, indeed, if it were not for the conditions to which I have referred being inserted in the document, I do not think that we should have heard the trustees contending in this case that the transaction was not a real sale by Lovegrove to Applestone. I cannot, myself, attach to nor derive from the fact that those conditions were inserted the conclusion that the sales were not real sales. They were real sales if the conditions were not there, and the imposition of the conditions does not, in my opinion, prevent them from being real sales.

Supposing the trustees were right, and that, so far as the sales to Applestone by Lovegrove were concerned, it was merely a scheme by which Applestone was to advance money up to ninety per cent. of the purchase price to Lovegrove, I still fail to see how in any sense it can be said that the sales company has obtained a charge on any single stick of furniture manufactured by Lovegrove. I asked counsel for the trustees if he could suggest any circumstances in which the sales company could seize any part of the furniture which had been the subject-matter of the sale for the purpose of enforcing the payment to Applestone of the moneys which, according to this hypothesis, Applestone had lent to Lovegrove. Counsel was unable to tell me of any circumstance in which such a right to seize the furniture appeared, and, indeed, there was no such thing. So even if this were not a real sale, but merely a scheme by which Applestone was to advance money to Lovegrove, no charge was created on the furniture, and, therefore, no bill of sale on the furniture avoided by the Act of 1882.

Supposing the true effect of this transaction was that Applestone was advancing ninety per cent. of the purchase money from time to time to Lovegrove, this might be said: This transaction was effected for the purpose of bringing into existence book debts which, though in the name of the sales company, would have been held by the sales company, when received, as trustees for Lovegrove, subject only to the sales company repaying itself out of the book debts the moneys which it had advanced. There are, indeed, in the conditions to which I have referred, circumstances which may give rise to the suggestion that the whole transaction was no more than that, but I have already stated that, in my opinion, if those circumstances really be considered, they are not sufficient to induce the court to disregard the form of the document and to hold that the substance was something different from the form.

In my opinion, the trustees have not succeeded in discharging the onus which lies on them of showing that the form which the transaction took on Sept. 1, 1933, was not in truth the substance, but that the substance was something else, and I have come to the conclusion that this appeal must be allowed.

MAUGHAM, L.J.—I am of the same opinion. In the first instance, it is important to remember the object of the Bills of Sale Acts of 1878 and 1882. Lord Halsbury, L.C., said in *Charlesworth* v. *Mills* (3) ([1892] A.C. at p. 235) that the object of the earlier Acts (Bills of Sale Acts, 1854 and 1878) was

> "to prevent false credit being given to people who had been allowed to remain in possession of goods which apparently were theirs, the ownership, however, of which they had parted with."

He added:

> "The Acts intended, in a case with creditors, that if people were allowed to remain in possession of goods of which nevertheless the ownership was no longer theirs, those goods and chattels should be subject to the execution of bona fide creditors who ought not to have been induced to give credit by the apparent ownership of the goods being in those persons."

He also pointed out that the Act of 1882 was directed to a totally different subject-matter—namely, to protect impecunious debtors—and therefore insists on a particular form of words which would plainly express the nature of the contract as to the loan and the security for the loan. I think it may be useful, as I have said, to bear that in mind, because essentially the transaction here was not one within the Act at all. Of course, it might come within the Act for technical reasons, but essentially it really was not within the Act.

The transaction here, reduced to its simplest form, and considering it only in relation to a particular piece of furniture, is no other than this. Lovegrove, who was manufacturing some furniture, had a customer who was willing to give a particular price for it on credit terms. Lovegrove agreed with Applestone that when the furniture was ready he would sell it to Applestone—because for this purpose I am going to leave out the company altogether—for the price which the customer was willing to give for it less ten per cent., but on the term that Applestone should pay immediate spot cash. Thereupon Applestone was to sell the furniture on credit terms to the customer at a profit, say, of ten per cent. To that transaction, so far as I can see, there is no objection at all from the point of view either of the Bankruptcy Act or of the Bills of Sale Acts. It would not be a transaction by which false credit was given to Lovegrove by people who supposed him to be in possession of the furniture at a time when the furniture was no longer his. The essence of it would be that at the moment when Lovegrove parted with the furniture he would get cash for it. That is no more objectionable than any other ordinary contract of sale and purchase entered into by a trader. To my mind, it would be none the worse from the point of view of those Acts if Lovegrove agreed that, if the customer did not pay Applestone, he himself would pay, and it would be quite consistent with the fact that if Lovegrove was the man who was finding the customer he ought to find a good one. I do not shrink from saying that the obvious intention of the whole transaction such as I have mentioned was to enable Lovegrove to go on carrying on his business, and Applestone might well be influenced by friendly feelings in agreeing to assist Lovegrove.

I agree that the agreement by which the more elaborate transaction which is involved in this case was carried out is an agreement which required very careful consideration at the hands of the court. It was dated Sept. 1, 1933, and by a document of even date there was a transaction by which, beyond all doubt, Lovegrove borrowed a sum of £5,000 odd on the security of the existing schedule of book debts or list of book debts. The learned judge seems to have thought that, because that transaction bore on the face of it the nature of a mortgage, that was some reason for thinking that the second transaction, that which purported to be a sale and purchase, might also be considered to be a mortgage. But, with all respect, I do not think that there is any true weight to be attached to that argument. The two documents are, it is true, of even date, but I think that on the face of them they were, and were intended to be, very different transactions.

The essence of the agreement of Sept. 1, 1933, so far as sales and purchases by the sales company are concerned, is that there should not be a sale to that company until the purchaser, the customer found by Lovegrove, was ready to purchase at an agreed price. What was contemplated, and, so far as I know, what was carried out, was that, when the furniture was ready and the purchaser required delivery, the company should send an invoice accompanying the goods purporting to represent a sale by the company to the customer, at the larger price, but on credit terms. The smaller sum then became due from the company to Lovegrove.

There are several clauses in the agreement. One is the clause at the end of para. 5 by which Lovegrove agreed that the total of the prices for goods purchased from the company should not be less than a certain sum. Two others are cls. 7 and 8, and finally there is the beginning of cl. 13, all of which do require consideration and are certainly most unusual clauses to find in a contract of sale and purchase between a trader and an ordinary purchaser. I do not hesitate to say that this transaction was unusual, and was in effect a transaction by which Lovegrove was financed by Applestone or his company—it matters not which—so that he was able to carry on the business. But when it is considered that the mischief aimed at by the Bills of Sale Act or of the Bankruptcy Act was not being brought into play by anything that was done, I for my part do not see why we should be astute to come to the conclusion that this was anything other than an unusual form of sale and purchase between Lovegrove and the company, the intention being that the company should never hold the furniture in its own possession, but should immediately cause a re-sale to be made to the old customers of Lovegrove, so that he would be re-paid out of the purchase price. It is beyond all doubt that in a case such as this one does not look merely at the form of the document which is alleged to be a bill of sale. The true nature, not the form of the transaction, must be regarded, and if the document itself purports to be only a cloak for what is really a mortgage of chattels or a pledge of chattels, it may be disregarded.

The matter was elaborately considered by this court sitting with five learned Lords Justices in *Re Watson, Ex parte Official Receiver in Bankruptcy* (4). Whether a transaction purporting to be a sale and purchase of goods is no more than it appears to be on its face, or whether it really is a loan on security, and, therefore, a document which might be hit by the Bills of Sale Acts, is a question to be determined by ascertaining the true intention of the parties. That true intention may appear either from the document itself, because, although it uses the language of sale and purchase, it might very well on its mere words appear to be nothing other than a loan on security, or it may appear from any collateral agreement or other document which would show that the true intention was a loan on security, or finally the fact might be ascertained by parole

A evidence, more especially parole evidence which would suggest some fraud on the part of the person who was either the vendor or the borrower, whichever view the court should take.

In the present case on the agreement itself I see no reason for coming to the conclusion that the transaction was anything but a somewhat unusual sale and purchase—a sale by Lovegrove and a purchase by the company. The learned judge in his careful judgment B has told us that Lovegrove was a very frank and honest witness, and the circumstances in which he negotiated this agreement have already been detailed by the MASTER OF THE ROLLS. They are perfectly credible and honourable to him, and there was nothing, as I have said, in the real nature of the transaction which suggests in the remotest degree any intention to defraud anybody.

Accordingly, I think that the learned judge was wrong in thinking that there was C anything which ought to be regarded with suspicion or which should be treated as being a cloak for the true transaction. I come to the conclusion that, unusual as the agreement of Sept. 1, 1933, was, it represented the true intention of the parties. If that is so, that seems to me to be the end of the argument that it is a bill of sale, because in terms it is not.

The question which I think might have presented more difficulty was the question D with regard to the possibility of the agreement being one for a loan from the company with security on the purchase price of the goods. On the whole, I do not think it is necessary to add anything to that matter beyond what has already been said. It was not, I think, a point greatly relied on by the trustees, but in any case the onus of establishing such a proposition would lie on the trustees, and that, I think, they have failed to establish. Moreover, for the reasons which I have already given, I think that the true E nature of the transaction must be taken to be that actually expressed in the document. For these reasons, in addition to those given by my brethren, I think that the appeal must be allowed.

Appeal allowed.

Solicitors: *Alec Woolf & Co.*; *Wordsworth, Marr, Johnson, & Shaw.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

THE BELDIS

[COURT OF APPEAL (Sir Boyd Merriman, P., Scott, L.J., and Swift, J.), October 17, 18, November 4, December 19, 1935]

[Reported [1936] P. 51; 106 L.J.P. 22; 154 L.T. 680; 52 T.L.R. 195; 18 Asp. M.L.C. 598]

Admiralty—County court—Action in rem—Competence—Action based on arrest of property of defendants other than that in respect of which cause of action arose—Jurisdiction—"Claim arising out of agreement made in relation to use or hire of ship"—Claim on award made in arbitration under charterparty—County Courts (Admiralty Jurisdiction) Amendment Act, 1869 (32 *and* 33 *Vict., c.* 51), *s.* 2 (1).

By a charterparty entered into between the plaintiffs and the defendants, owners of the steamship *Belfri*, on July 13, 1933, the plaintiffs chartered that vessel from the defendants. The charterparty contained an arbitration clause in the usual terms, and, a dispute having arisen as to an amount which the plaintiffs claimed they had overpaid by way of hire, the matter was referred to arbitration. On Jan. 24, 1935, the arbitrator made his award directing that the defendants should pay the amount in question to the plaintiffs with costs. The payment was not made and the plaintiffs thereupon arrested another vessel belonging to the defendants, namely, the steamship *Beldis*, and on April 5, 1935, brought an action in rem against that vessel in the county court to enforce the award. The defendants did not enter an appearance, and judgment was given against them by default. After judgment mortgagees of the steamship *Beldis* intervened and claimed that the arrest of the *Beldis* was illegal and that the proceedings were wrongly taken in rem, and they contended that the judgment signed in the action should be set aside. An issue for submission to the county court judge was agreed between the plaintiffs and the interveners in the following terms: "Whether the plaintiffs' action in rem against the steamship *Beldis* is maintainable in view of the fact that the plaintiffs' claim in this action arose out of a charterparty of the steamship *Belfri* being a ship belonging to the same owners."

Held: (i) an action in rem in a county court having Admiralty jurisdiction could not be based on the arrest of property of the defendant owners other than that in respect of which the cause of action arose, and, therefore, the plaintiffs' action was not maintainable.

Observations in *The Heinrich Bjorn* (1) (1885), 10 P.D. 44, criticised.

(ii) on a point taken by the Court of Appeal, a claim based on an award made in an arbitration held under an arbitration clause in a charterparty was a claim on the award and not a claim arising out of an "agreement made in relation to the use or hire of a ship" within s. 2 of the County Courts (Admiralty Jurisdiction) Amendment Act, 1869; the present action was founded on the award and had no relation to the original dispute which gave rise to the arbitration; and, therefore, the county court had no jurisdiction to entertain it.

Notes. The County Courts (Admiralty Jurisdiction) Amendment Act, 1869, was repealed by the County Courts Act, 1934, s. 2 of the earlier Act being reproduced by s. 56 (1) (g) (i) of the Act of 1934. As to the limit of the jurisdiction of the county court, see now County Courts Act, 1955, s. 3 (1).

As to Admiralty actions in rem, see 1 HALSBURY'S LAWS (3rd Edn.) 72 et seq., and for cases, see 1 DIGEST 104, 105, and 158 et seq. For County Courts Act, 1934, see 5 HALSBURY'S STATUTES (2nd Edn.) 11, and for County Courts Act, 1955, see 35 ibid., 24.

Cases referred to:

(1) *The Heinrich Bjorn* (1885), 10 P.D. 44; 54 L.J.P. 33; 52 L.T. 560; 33 W.R. 719; 1 T.L.R. 266; 5 Asp. M.L.C. 391, C.A.; affd. (1886), 11 App. Cas. 270, H.L.; 1 Digest 104, *65*.

(2) *The Pieve Superiore* (1874), L.R. 5 P.C. 482; 43 L.J. Adm. 20; 30 L.T. 887; 22 W.R. 777; 2 Asp. M.L.C. 319; 1 Digest 148, *545*.

(3) *The Clara* (1855), Sw. 1; 26 L.T.O.S. 165; 2 Jur. N.S. 46; 4 W.R. 180; 1 Digest 223, *1492*.

(4) *The Dictator*, [1892] P. 64, 304; 61 L.J.P. 73; 67 L.T. 563; 7 Asp. M.L.C. 251; 1 Digest 224, *1499*.

(5) *The Ripon City*, [1897] P. 226; 66 L.J.P. 110; 77 L.T. 98; 13 T.L.R. 378; 8 Asp. M.L.C. 304; 1 Digest 105, *70*.

(6) *The Bold Buccleugh* (1852), 7 Moo. P.C.C. 267; 19 L.T.O.S. 235; 13 E.R. 884, P.C.; 11 Digest (Repl.) 551, *1580*.

(7) *The Gemma*, [1899] P. 285; 68 L.J.P. 110; 81 L.T. 379; 15 T.L.R. 529; 8 Asp. M.L.C. 585, C.A.; 1 Digest 224, *1500*.

(8) *The Joannis Vatis* (No. 2), [1922] P. 213; 91 L.J.P. 196; 127 L.T. 494; 38 T.L.R. 566; 16 Asp. M.L.C. 13; 21 Digest 470, *512*.

(9) *The Sheaf Steamship Co.* v. *Compania Transmediterranea* (1930), 36 Ll.L.R. 197.

(10) *The Alina* (1880), 5 Ex.D. 227; 49 L.J.P. 40; 42 L.T. 517; 29 W.R. 94; 4 Asp. M.L.C. 257, C.A.; 1 Digest 244, *1715*.

(11) *The Zeta*, [1893] A.C. 468; 63 L.J.P. 17; 69 L.T. 630; 57 J.P. 660; 9 T.L.R. 624; 7 Asp. M.L.C. 369; 1 R. 307, H.L.; 1 Digest 245, *1728*.

(12) *R.* v. *Judge of the City of London Court*, [1892] 1 Q.B. 273, C.A.; 66 L.T. 135; 1 Digest 105, *74*.

(13) *The Charkieh* (1873), L.R. 4 A. & E. 59; 42 L.J.Adm. 17; 28 L.T. 513; 1 Asp. M.L.C. 581; 1 Digest 49, *393*.

(14) *The Alexander Larsen* (1841), 1 Notes of Cases, 185; 1 Wm. Rob. 288, 346; 5 Jur. 1066; 1 Digest 104, *59*.

(15) *Warner* v. *Wheler*, 1 Marsden's Select Pleas in the Court of Admiralty 220.

(16) *The Milan* (1861), Lush. 388; 31 L.J.P.M. & A. 105; 5 L.T. 590; 1 Mar. L.C. 185; 1 Digest 140, *481*.

(17) *The Port Victor*, [1901] P. 243; 70 L.J.P. 52; 84 L.T. 677; 49 W.R. 578; 17 T.L.R. 538; 9 Asp. M.L.C. 182, C.A.; 1 Digest 111, *149*.

(18) *The Champion*, [1934] P. 1; 103 L.J.P. 9; 150 L.T. 318; 18 Asp. M.L.C. 453; 50 T.L.R. 39, D.C.; Digest Supp.

(19) *Jones* v. *Williams* (1839), 11 Ad. & El. 175; 4 Per. & Dav. 217; 113 E.R. 381; 2 Digest 568, *1992*.

Appeal from an order of the county court judge sitting at Newport, Mon., in Admiralty.

The plaintiffs, the Anglo-Soviet Shipping Co., Ltd., chartered from the defendants the steamship *Belfri* upon the terms of a charterparty dated July 13, 1933. A dispute arose in regard to the charter hire, in respect of part of which the plaintiffs claimed a refund. The matter was referred to arbitration under the arbitration clause in the charter, and on Jan. 24, 1935, an award was made in favour of the plaintiffs with costs. The defendants failed to make the payment provided by the award, and the plaintiffs thereupon arrested another vessel belonging to the defendants, the steamship *Beldis*, and sued the defendants in rem to enforce the award. The defendants failed to appear, and judgment was entered by default in favour of the plaintiffs for the amount claimed with costs. After judgment, Lambert Brothers, Ltd., who held a mortgage on the *Beldis*, obtained leave to intervene, and it was agreed between them and the plaintiffs that one issue only should be submitted to the county court judge, namely, whether the action in rem against the *Beldis* was maintainable. The county court judge decided that it was and gave judgment for the plaintiffs with costs. The interveners appealed.

At an early stage of the hearing the Court of Appeal raised the question whether, apart from the point for decision in the agreed issue, they were not also called upon to decide whether a claim on an award was a "claim arising out of an agreement made in relation to the use or hire of a ship" within the meaning of s. 2 (1), of the County Courts (Admiralty Jurisdiction) Amendment Act, 1869, and was, therefore, a cause which could be prosecuted in rem. On this point the plaintiffs contended that, although the charterparty related to the steamship *Belfri* and not to the steamship *Beldis*, the action between the plaintiffs and the defendants, being for money due under an arbitration award in respect of a charterparty, was a claim arising out of an agreement for the use or hire of a ship within the meaning of s. 2 (1) of the 1869 Act. The words "arising out of" gave a very wide scope to the section. The statute enlarged the jurisdiction of the county courts and, according to the general rule, it ought, in the words of SIR MONTAGUE SMITH in *The Pieve Superiore* (2) ((1874), L.Rep. 5 P.C. at 492), "to be construed liberally so as to afford the utmost relief which the fair meaning of the language will allow." Counsel for the interveners was not called upon on this point.

As to the question raised in the issue submitted to the county court judge, it was contended by counsel for the interveners that there had been no reported instance, either in the High Court or in the county court since these courts were given Admiralty jurisdiction, of the arrest, in order to found an action in rem, of any property of a defendant other than the res in respect of which the cause of action arose. He referred to *The Clara* (3), *The Dictator* (4), *The Ripon City* (5), *The Bold Buccleugh* (6), *The Gemma* (7), *The Joannis Vatis* (No. 2) (8), and *The Sheaf Steamship Co.* v. *Compania Transmediterranea* (9), &c.

On behalf of the plaintiffs, it was argued that the decision of the county court judge based on the dictum in *The Heinrich Bjorn* (1) was entirely reasonable. Even if (contrary to the plaintiffs' contention) the right of arrest in an action in rem were limited in the High Court to the actual res, that need not necessarily apply to the county court. It is purely a matter of the construction of ss. 2 and 3 of the County Courts (Admiralty Jurisdiction) Amendment Act, 1869, and it may be that in that matter the county court had wider jurisdiction than the High Court, as it undoubtedly had in charterparty cases: see *The Alina* (10). Proceedings in rem might be instituted both against the property subject to the maritime lien, where there was such a lien, and, where there was no maritime lien, against the property of the defendant within the jurisdiction, for the enforcement of rights against the person, as in necessaries cases. In the present case, the matter in issue was a debt of the shipowner and it was immaterial which property of the debtor was proceeded against. The dictum in *The Heinrich Bjorn* (1) was not obiter and was not disapproved by the House of Lords. It was also quoted with approval by the author of CARVER'S CARRIAGE OF GOODS BY SEA, in the argument which he propounded to the House of Lords in *The Zeta* (11) ([1893] A.C. at 475).

The county court judge, as stated above, held that the action in rem against the *Beldis* was maintainable and gave judgment for the plaintiffs, and the interveners appealed.

The further contentions of counsel before the Court of Appeal appear from the judgments, which also contain an exhaustive review of the history of Admiralty jurisdiction both before and since the passing of the Admiralty Courts Act, 1840.

Owen Bateson for the interveners.
Miller, K.C., and *Norman Richards* for the plaintiffs.

Cur. adv. vult.

Dec. 19. The following judgments were read.

SIR BOYD MERRIMAN, P.—This is an appeal from the judgment of HIS HONOUR JUDGE THOMAS, sitting in Admiralty in the Newport County Court. On April 5, 1935, proceedings in rem were taken in that court by the Anglo-Soviet Shipping Co., Ltd., against the owners of the steamship *Beldis*, then lying in Newport Docks, for the sum of £27 4s. 6d. payable by the defendants to the plaintiffs under an award dated Jan. 24, 1935, made in a certain arbitration held by virtue of a clause in that behalf in a charterparty dated July 13, 1933, between the defendants, of the one part, and the agents of the plaintiffs, for and on behalf of the plaintiffs, of the other part. The owners of the *Beldis* failed to appear within the four clear days specified in the summons and, accordingly, on April 10, 1935, judgment was entered against them by default. On April 24, 1935, Lambert Brothers, Ltd., the appellants in this appeal, filed an affidavit showing that by virtue of a mortgage bond dated April 23, 1929, they were mortgagees of the steamship *Beldis* and that the award upon which the plaintiffs were suing related to a claim arising under a charterparty which did not relate to the steamship *Beldis* at all, but to another ship of the same owners named the *Belfri*. It will be observed that the particulars of the plaintiffs' claim, to which I have already referred, did not specify the ship in respect of which the charterparty of July 13, 1933, was made, but it is common ground that in fact this charterparty related to the steamship *Belfri* and not to the *Beldis*, and it was upon that basis that the appellants were permitted to intervene in the suit.

By agreement an issue was submitted to the court in the following terms:

> "We, the plaintiffs, and the interveners in the above-named action, herewith submit the following sole issue to be tried by this honourable court, pleadings being waived:
>
> "Whether the plaintiffs' action in rem against the steamship *Beldis* is maintainable in view of the fact that the plaintiffs' claim in this action arose out of a charterparty of the steamship *Belfri*, being a ship belonging to the same owners. The said parties agree that in the event of the question raised in this issue being answered in the affirmative, there shall be judgment for the plaintiffs with costs, and in the event of the question raised in this issue being answered in the negative, there shall be judgment for the interveners with costs."

The issue, therefore, raised the important question whether an action in rem in a county court having Admiralty jurisdiction could be based upon the arrest of property of the defendant owners other than that in respect of which the cause of action arose. This was the sole point argued before the county court judge, who decided that an action in rem against the steamship *Beldis* was maintainable.

The argument in this court proceeded on the same lines. In the course of the argument, however, we directed attention to the question whether the issue was not based on a misconception, inasmuch as it asserted as a fact that the plaintiffs' claim in the action arose out of a charterparty, whereas the plaintiffs' cause of action appeared to be, not upon the charterparty at all, but upon an award, although the submission to arbitration was to be found in the arbitration clause of a charterparty. Having regard to the fact that the parties had agreed upon the framing of the issue, neither counsel betrayed any marked enthusiasm for this point, though they both recognised that no agreement of the parties could give this court jurisdiction to deal with a point, however interesting and important, which did not arise upon the actual facts of the case. Counsel for the plaintiffs, however, argued that, if this court had no jurisdiction to deal with the appeal, the plaintiffs were entitled to hold the judgment in their favour by virtue of the express agreement in the issue. This argument appears to me to be quite untenable. If the truth of the matter is that the plaintiffs' cause of action is nothing but a common law claim upon an award, it would be impossible, nor has counsel attempted to contend that the Admiralty process in rem would be available whether the property against which the action was directed was or was not the very thing in respect of which the cause of action arose. But the county court judge purported to be dealing, as a judge, with an Admiralty action in rem, and it seems to me to be quite impossible to hold, if the foundation of that jurisdiction was lacking, that he unconsciously assumed the burden of a private arbitration between the plaintiffs and the interveners. I am of opinion, for reasons which I will proceed to give, that this point is fatal to the jurisdiction of the county court judge, and consequently of this court, notwithstanding the agreed wording of the issue. But in case I am mistaken in this view, and as the validity of the arrest is at the root of the proceedings and raises a point of great importance which has been very well argued by counsel on each side, I propose also to state my reasons for thinking that the judgment of the county court judge cannot in any event be supported. Our decision on this point will also have an important bearing on the question of costs.

The importance of ascertaining whether the plaintiffs' claim in the action did or did not, in the words of the issue,

> "arise out of a charterparty of the steamship *Belfri*, being a ship belonging to the same owners as the steamship *Beldis*,"

will be seen upon a consideration of one of the statutes on which the jurisdiction of the county court in Admiralty is founded. By s. 2 of the County Courts (Admiralty Jurisdiction) Amendment Act, 1869, it is enacted as follows:—

> "Any county court appointed or to be appointed to have Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and

> determine the following causes: (1) As to any claim arising out of any agreement made in relation to the use or hire of any ship . . . provided the amount claimed does not exceed £300." A

And by s. 3:

> "The jurisdiction conferred by this Act and by the County Courts (Admiralty Jurisdiction) Act, 1868, may be exercised either by proceedings in rem or by proceedings in personam." B

Counsel for the plaintiffs insisted, and the argument is valid whether it tells for or against him, that the jurisdiction of a county court is defined for the present purpose by this statute. It is not suggested that the claim is covered by any other words in the section. Unless, therefore, it can be shown that the plaintiffs' claim arose out of an agreement made in relation to the use or hire of a ship, it cannot be the subject of an Admiralty action in rem in the county court. C

There was, in fact, no evidence before the county court judge as to the nature of the dispute arising under the charterparty of the *Belfri*, but the arbitrator's award has been put in before us and I am prepared to assume that both the claim on which he gave his award in favour of the plaintiffs, and the counterclaim which he dismissed, arose in respect of matters relating to the use or hire of the *Belfri* under the charterparty. In other words, I am prepared to assume that, if those same matters had been the actual subject of the litigation before the county court judge, *The Alina* (10) would have been decisive to show that he had jurisdiction in Admiralty. D

But, in my opinion, the claim in this action was not based upon that foundation at all. It was an action upon the award. The award does not in fact show upon its face what was the nature of the claim made by the plaintiffs; nor is there any reason why it should do so, though incidentally it happens to show the nature of the counterclaim, which was dismissed. The particulars of the claim contain no reference to the nature of the dispute or disputes arising under the charterparty. This is perfectly correct, because it is no part of the cause of action upon an award to show what was the nature of the dispute. All that the plaintiff has to prove is that certain matters in dispute have been submitted to an arbitrator and that he has made his award in the plaintiff's favour. As a matter of pleading it is unnecessary and, as I think, irregular to specify the nature of the dispute: see BULLEN AND LEAKE, PRECEDENTS OF PLEADINGS (3rd Edn.), pp. 71–74. The modern edition of that classic follows the same precedent: see 9th Edn., pp. 86–89. Quite plainly the cause of action is founded, in the summons in this case, upon the award itself and has no relation to the original dispute which gave rise to the arbitration. E F G

That being so, I should not be prepared to hold, even if the matter were free from authority, that a claim upon an award made in an arbitration held under the arbitration clause in a charterparty is a claim arising out of any agreement made in relation to the use or hire of a ship. I think that it is a common law claim upon an award and nothing else. It may be that, as the defendants are out of the jurisdiction, this means that the award is difficult of enforcement, whether by action or by proceedings under s. 12 of the Arbitration Act; but that circumstance affords no ground for bringing an Admiralty action in rem in respect of a common law claim. H

This view of the matter is supported, even if it is not concluded, by the decision of the Court of Appeal in *R.* v. *Judge of the City of London Court* (12). This case, which is also of great importance upon the other point, decided that no greater jurisdiction, except with regard to charterparties, was conferred upon county courts by the County Courts (Admiralty Jurisdiction) Acts, 1868 and 1869, than that which was possessed by the Admiralty Court itself. The point at issue in that case was whether an Admiralty action lay in respect of the negligence of a pilot. There could be no question but that a common law action would lie (see per LORD ESHER, M.R. [1892] 1 Q.B. at p. 286) but the claim in such an action would then have been limited to £50, whereas if the Admiralty jurisdiction was available, the limit was £300. There would, of course, as was pointed out in the judgments, be other distinctions between the two jurisdictions resulting from the difference between the Admiralty and common law doctrines as to the distribution I

A of blame. The plaintiff relied on the words "and also as to any claim in tort in respect of goods carried in any ship," which are also contained in sub-s. (1) of s. 2 of the Act of 1869, part of which I have already quoted. In his judgment LORD ESHER, M.R. ([1892] 1 Q.B. at p. 291), makes it quite clear that he was prepared to hold that the Admiralty jurisdiction of a county court extended to a claim upon a charterparty only because he was bound by *The Alina* (10), so to hold; he said that he would follow that B case so far as it actually went, but not one inch farther. With this exception the court decided that the Admiralty jurisdiction of a county court was co-extensive with that of the Admiralty Court itself. That being the inch to which plaintiffs in a county court are entitled, it is not difficult to imagine what LORD ESHER would have said about the present attempt to take an ell. However that may be, I am not prepared to hold that a claim upon an award made under the arbitration clause of a charterparty is within the C words "any claim arising out of any agreement made in relation to the use or hire of any ship."

Assuming, however, that I am wrong, and that the claim upon this award comes within the Admiralty jurisdiction of the county court, there remains the question, raised by the issue, whether the action in rem can be directed against property of the defendant owner other than that in respect of which the cause of action arose. I have D some difficulty in understanding what, in relation to a claim upon an award, the res would actually be. But that may be said to be immaterial, because it is certain that the ship actually arrested, the steamship *Beldis*, could not possibly be the res connected with the cause of action.

The learned county court judge was invited to decide this issue upon a passage in the judgment of the Court of Appeal in *The Heinrich Bjorn* (1) (10 P.D. at pp. 53 and 54). E It is evident from his judgment that, having regard to his own considerable experience in Admiralty, he would probably have decided the issue the other way if he had not felt himself bound by the particular passage in the judgment in *The Heinrich Bjorn* (1). The passage is as follows:

> "But how and in what manner was the new jurisdiction thus given to the Admiralty Court by the statute of 1840 [the Admiralty Court Act] to be exercised? F The answer is, that it must be exercised in the manner familiar to the Court of Admiralty and to all courts regulated by the civil law, either by an arrest of the person of the defendant if within the realm, or by the arrest of any personal property of the defendant within the realm, whether the ship in question or any other chattel, or by proceedings against the real property of the defendant within the realm G (*The Charkieh* (13) (L.R. 4 A. & E. at p. 91); see also per DR. LUSHINGTON, *The Alexander Larsen* (14) (1 Wm. Rob. at p. 294).
>
> "But if the material man may thus arrest the property to enforce his claim, how does his claim differ from a maritime lien? The answer is, that a maritime lien arises the moment the event occurs which creates it; the proceeding in rem which perfects the inchoate right relates back to the period when it first attached: 'the H maritime lien travels with the thing into whosesoever possession it may come' (*The Bold Buccleugh* (6) 7 Moo. P.C.C. at pp. 284 and 285); and the arrest can extend only to the ship subject to the lien. But, on the contrary, the arrest of a vessel under the statute is only one of several possible alternative proceedings ad fundandum jurisdictionem; no right in the ship or against the ship is created at any time before the arrest; it has no relation back to any earlier period; it is available I only against the property of the person who owes the debt for necessaries; and the arrest need not be of the ship in question, but may be of any property of the defendant within the realm."

Counsel for the interveners admitted that this passage was decisive against him, but argued that it was obiter, and that in any case it was wrong. Seeing that the decision is already fifty years old, it would be a strong thing to ask this court to differ from the statement of the law contained in the passage I have quoted, if it was, as counsel for the plaintiffs contended, an integral part of the decision itself.

It is, therefore, necessary to consider whether this passage was or was not obiter, and to examine the facts in that case in order to see what the point was. The claim was for necessaries, and the cardinal fact was that at the time when she was arrested the *Heinrich Bjorn* had been sold to parties who were complete strangers to the cause of action. Her former owner had entered into an agreement in writing in respect of the supply of the necessaries. It was attempted, unsuccessfully, to assert that this agreement was a bottomry bond; alternatively, it was argued that there was a maritime lien on the ship in respect of necessaries. If there were a maritime lien the ship would, of course, be subject to the lien even in the hands of the new owners; but it was held that there was no maritime lien for necessaries, though it was recognised that a claim for necessaries would give a right to seize the ship for which the necessaries had been supplied in an action in rem against owners on whose behalf the debt had been incurred. This right, however, did not relate back so as to be available against strangers to the claim for necessaries to whom the property in the ship had passed before action brought. In other words, when once the question whether the particular agreement amounted to a bottomry bond, which, for present purposes, is irrelevant, was out of the way, the only question remaining for decision was whether the supply of necessaries gave rise to a maritime lien. If not, the arrest of the *Heinrich Bjorn* could not be justified, since at the material date, namely, the commencement of the action, although she was the res in relation to which the cause of action arose, she was not a res belonging to the defendant owner. It follows that it was quite unnecessary to consider whether property of the owner, other than the ship itself, was liable to arrest in an action in rem. The passage relied upon cannot, therefore, be regarded as a binding statement of existing law on this point, though, naturally, a statement of the law by a court, composed as that Court of Appeal was, must carry weight.

It is, however, material to notice that Fry, L.J., in the passage quoted, couples with the arrest of the ship in question, or any other chattel, the arrest of the person of the defendant, if within the realm, and proceedings against the real property of the defendant within the realm. Now, the last-known instance of the foundation of Admiralty jurisdiction by the arrest of the person was in 1780: see the passage in Dr. Lushington's judgment in *The Clara* (3) quoted below. As regards the statement that the Admiralty jurisdiction was founded by proceedings against the real property of the defendant, this appears to be open to considerable doubt, as appears from the introduction to the Third Edition of the late Mr. Roscoe's book on Admiralty Practice, p. 43, note (*y*). With this qualification as regards proceedings against the real property of the defendant, I have no doubt that the passage relied upon is an accurate statement of the practice of the old Admiralty Court in former days. As regards arrest of the person, I propose to leave the matter where Dr. Lushington left it in *The Clara* (3), with this further observation, that *The Clara* was tried in 1855, fifteen years after the Acts of 1840 establishing the High Court of Admiralty; that no one would know better than Dr. Lushington what was the practice prevailing in Admiralty at the time when those Acts were passed; and that it is common ground that since that decision in 1855 there is no trace of any attempt to found an Admiralty action by the arrest of the person of the defendant.

As regards the arrest of property, there can, I think, be no doubt that the old Admiralty Court asserted the right to found jurisdiction by the arrest of any property of the defendant within the jurisdiction of the Admiral. This appears quite clearly from the introduction by Mr. Marsden to the Select Pleas in the Court of Admiralty, published by the Selden Society, p. lxxi, which was relied on by counsel for the plaintiffs. The passage, of which the marginal note is "Points of law and practice; arrest," reads as follows:

> "The following points may be noted as to the practice of the court and the law which it administered: The ordinary mode of commencing the suit was by arrest either of the person of the defendant or of his goods. Arrest of goods was quite as frequent as arrest of the ship; and it seems to have been immaterial what the goods were, so long as they were the goods of the defendant and were within the Admiral's jurisdiction at the time of arrest. As pointed out below, the Admiral at this period asserted and exercised a jurisdiction over all public streams, rivers, and waters,

> whether the same were within the body of a county or not. Scarcely a trace appears of the modern doctrine of arrest being founded upon a maritime lien; the fact that goods and ships that had no connection with the cause of action, except as belonging to the defendant, were subject to arrest, points to the conclusion that arrest was mere procedure, and that its only object was to obtain security that judgment should be satisfied. The form of the article upon first decree shows that the defendant was always cited 'at'—'apud'—the goods or ship arrested, and that if he did not give bail to satisfy judgment the suit proceeded against him in his absence as well as against the res."

At p. 40 of the introduction to the Third Edition of ROSCOE'S ADMIRALTY PRACTICE, the learned author cites CLERKE'S PRAXIS to the effect that:

> "If the defendant could not be personally arrested in a civil cause by reason of being out of the kingdom, or because he had absconded, and he had any goods, wares, ship, or part of a ship, or vessel upon the sea, or within the flux and reflux of the sea, a warrant could be taken out to arrest such goods or such a ship belonging to the defendant debtor, in whose hands soever they were; and upon the attachment of such goods the debtor was cited specially in respect of the goods, and generally all others who had or pretended to have any right to, or interest in, the said goods, to appear on such a day to answer the plaintiff in a certain maritime and civil cause."

He proceeds (p. 44) to show that this process was a proceeding in rem in the sense that, if the defendant did not appear, the suit could go on without in any way touching the person, and that by the operation of the judgment the defendant was deprived of his property in the chattel, unless he appeared, in which case the proceedings went on in the ordinary course as an action in personam. He attributes the development of this form of action to the prohibitions to which the old Admiralty Court was subjected by the courts of common law if it attempted to act in personam.

But, in my opinion, it would be most unsafe to arrive at any conclusion as to the scope of Admiralty jurisdiction at and after the passing of the Admiralty Court Act, 1840, without bearing in mind that the old Admiralty Court was consistently asserting claims to exercise jurisdiction which the courts of common law as consistently prohibited. Even with regard to the claim which was the subject-matter of *R.* v. *Judge of the City of London Court* (12), if the SELECT PLEAS IN THE COURT OF ADMIRALTY had been published at the time when LORD ESHER gave his judgment I doubt whether he would have asserted as emphatically as he does ([1892] 1 Q.B. at p. 298) that

> "from the beginning of time until now not one case is to be found in the Admiralty Court of any such action being entertained against a pilot."

There are, in fact, the records of two such cases in that volume. Again, on p. 293, contrasting the English and American Courts of Admiralty, the learned MASTER OF THE ROLLS asserted that it was undoubted that no jurisdiction over a policy of insurance in respect of ships or goods has ever been attempted in England. But the patent of the Admiralty judge is set out in an article by the late LORD PHILLIMORE under the title of "THE HIGH COURT OF ADMIRALTY" in the ENCYCLOPÆDIA BRITANNICA (14th Edn.) vol 1, pp. 171–2. The patent had been, in form, substantially unchanged from Tudor times, though the significant words "the statutes to the contrary notwithstanding" do not appear in the more modern patents. Jurisdiction in respect of policies of insurance is expressly mentioned, as is also the widest possible jurisdiction to arrest goods (see *Warner* v. *Wheler* (15)). But it is generally recognised that the patent was extravagant in its claims. A history of the struggle over jurisdiction is set out by MR. ROSCOE in the introduction to which I have already referred. It may be assumed that the Admiralty Court did not submit to the limitations imposed by the courts of common law without a protest. For example, a forcible expression of the point of view of the civilian is to be found in the remonstrance by DR. DAVID LEWIS, the Admiralty judge of Queen Elizabeth's time, which can be seen in the article on Doctors' Commons in STOW'S "SURVEY OF LONDON." Again, the BLACK BOOK OF THE ADMIRALTY, vol 1, contains an ordinance directing an inquiry to be made concerning

> "all those whoe doe sue any merchant, mariner or other person whatsoever at common law of the land for any thing of auntient right belonging to the maritime law"

and directing that on conviction the plaintiff shall be

> "fined to the King for his unlawfull and vexatious suite and besides shall withdraw his suite from the common law and shall bring it in the Admiralty Court, if hee will prosecute any further" (see the reprint in the Rolls Series, p. 83).

It is, however, unnecessary to elaborate this aspect of the matter. The point of Lord Esher's judgment in *R.* v. *Judge of the City of London Court* (12) is that, even if a particular jurisdiction was asserted by the Admiralty Court, the assertion must be considered in light of the prohibitions from time to time imposed by the courts of common law, to which it was in those days always subject. It must always be remembered that it was not until the Act of 1840 that the High Court of Admiralty was established as a court with a jurisdiction defined by statute and a judge whose salary was chargeable upon the consolidated fund, and who was given in express terms all the privileges and protection appertaining to the judges of the courts of common law. In my opinion, the only safe rule is to assume that Parliament intended that the jurisdiction and practice then existing, but as extended and improved by the specific enactments of the statute, should thenceforward be the jurisdiction and practice of the Admiralty Court.

It is admitted that the industry of counsel has not resulted in finding a single instance in which, either between the passing of the Act of 1840 and the decision in *The Heinrich Bjorn* (1) in 1885, or from then until the present time, property, other than that directly connected with the cause of action, has been arrested as the res in an Admiralty action. On the contrary, as Scott, L.J., pointed out in the course of the argument, one aspect of the subject under discussion in *The Heinrich Bjorn* (1) is eloquent to show that no such right was believed to exist. In the passage quoted above from the Introduction to the Select Pleas in Admiralty, Mr. Marsden speaks of the modern doctrine of arrest being founded on a maritime lien. This doctrine is clearly expressed in the opinion of the Privy Council, given by Sir John Jervis in *The Bold Buccleugh* (6) (7 Moo. P.C.C. at p. 284), where it is laid down that a maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches; and while it must be admitted that where such a lien exists, a proceeding in rem may be had, it will be found to be equally true, that in all cases where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process.

This view as to the coincidence of the maritime lien and the action in rem was expressly disapproved in the House of Lords in *The Heinrich Bjorn* (1) (see in particular the speech of Lord FitzGerald, 11 App. Cas. at pp. 285, 286). But the very fact that in 1851 it should be possible for the Privy Council to lay down that the action in rem was exactly co-extensive with the maritime lien, which was said to be its foundation, shows that no one then contemplated that an action in rem could be founded on the arrest of property of the defendant owner unconnected with the circumstances giving rise to the lien.

This brings me to a consideration of the decision of the House of Lords in *The Heinrich Bjorn* (1) affirming the Court of Appeal. In the opening paragraph of his speech Lord Watson used the following words:

> "The action is in rem—that being, as I understand the term, a proceeding directed against a ship or other chattel in which the plaintiff seeks either to have the res adjudged to him in property or possession, or to have it sold, under the authority of the court, and the proceeds, or part thereof, adjudged to him in satisfaction of his pecuniary claims. The remedy is obviously an appropriate one in the case of a plaintiff who has a right of property or other real interest in the ship, or a claim of debt secured by a lien which the law recognises. We have been informed that under the recent practice of the Admiralty Court the remedy is also given to creditors of the shipowner for maritime debts which are not secured by lien; and in that case the attachment of the ship, by process of the court, has the effect of

giving the creditor a legal nexus over the proprietary interest of his debtor, as from the date of the attachment.

> "The position of a creditor who has a proper maritime lien differs from that of a creditor in an unsecured claim in this respect—that the former, unless he has forfeited the right by his own laches, can proceed against the ship notwithstanding any change in her ownership, whereas the latter cannot have an action in rem unless at the time of its institution the res is the property of his debtor."

In this passage Lord Watson, while stating that a maritime lien does give rise to an action in rem, and recognising that an action in rem is also available in respect of maritime debts which are not secured by lien, is engaged in showing that in the one case the action survives, and in the other case does not survive, change of ownership of the ship. This statement is not, of course, quite exhaustive, because under neither heading need the res necessarily be a ship: it may be the cargo, or the proceeds of the ship or cargo, and arrest of the cargo may include arrest of the freight. But it is quite plain that in stating the modern practice of the Admiralty Court Lord Watson is regarding the res as being the very thing in respect of which the maritime debt, or the maritime lien, as the case may be, has arisen. There is not a hint in the passage quoted of the bringing of a maritime action against anything other than that which gives rise to the cause of action. It is quite true that in the House of Lords, as in the Court of Appeal, it was unnecessary, once it was decided that there was no maritime lien for necessaries, to discuss all possible aspects of the action in rem. But of the two statements of the law, both of which are obiter, this is the higher tribunal. Even if it does not purport to be exhaustive, I am convinced that it is correct as a statement of Admiralty jurisdiction and practice in recent times and I propose to follow it.

This view, in my opinion, is supported by *The Dictator* (4). The point for decision in that case was whether, in an action in rem in which bail had been given to avoid an actual arrest, the res was or was not subject to execution by writ of fieri facias in respect of a sum recovered in excess of the amount of the bail. Sir Francis Jeune held that the ship was not exempt from execution. After reviewing the early history of the action in rem the learned President says ([1892] P. at p. 313):

> "Actions beginning with arrest of the person became obsolete in practice; as Dr. Lushington says in *The Clara* (3) (Swab. at p. 3) in the last century, the last recorded instance being in 1780; and arrest of property merely to enforce appearance became rare or obsolete, though in theory such arrest of the person or property would seem still to be permissible: per Fry, L.J., in *The Heinrich Bjorn* (1) (10 P.D. at pp. 53, 54). On the other hand, arrest of property over which a lien could be enforced became more common as the idea of a pre-existing maritime lien developed, and arrest of property, in order to assert, for the creditor, that legal nexus over the proprietary interest of his debtor, as from the date of the attachment, of which Lord Watson speaks in *The Heinrich Bjorn* (1) (11 App. Cas. at p. 277), grew up."

It will be observed that, though Sir Francis Jeune used the words "rare or obsolete" in connection with arrest of property, he evidently regarded arrest whether of the person or property merely for the purpose of compelling appearance as being in the same category, and only mentioned either as being theoretically permissible because of the dictum in the Court of Appeal in *The Heinrich Bjorn* (1). It is unlikely that if there had been any other subsisting foundation for the arrest of property unconnected with the cause of action Sir Francis Jeune would not have said so. It is worthy of note that Lord Watson founds his statement as to the nature of that kind of action in rem which is unconnected with a maritime lien upon recent Admiralty practice. In the third edition of Williams and Bruce on Admiralty Practice, at p. 249, the following passage occurs:

> "Admiralty proceedings may be in rem or in personam. By proceedings in rem the *property in relation to which the claim has arisen*, or the proceeds of such property when in court, can be proceeded against, and made available to answer the claim. This method of proceeding is peculiar to courts exercising Admiralty jurisdiction,

> and generally it is in order to avail themselves of the advantages thus afforded that suitors resort to their jurisdiction. But in cases where the plaintiff does not desire to proceed against the property, the method of proceeding in personam may be resorted to." A

In the late LORD PHILLIMORE'S article on Admiralty jurisdiction in volume 1 of the ENCYCLOPÆDIA BRITANNICA (14th Edn.), pp. 173–174, it is plainly assumed, though not expressly stated, that the res must be that in relation to which the claim has arisen. B Finally, in paras. 94 and 95 of the title "Admiralty" in the second edition of HALSBURY'S LAWS OF ENGLAND, for which LORD MERRIVALE and LANGTON, J., are responsible, it is stated definitely that both arrest of the person and arrest of any property belonging to him in tidal waters have become obsolete. Even if these statements of the law are not, strictly speaking, authorities, they make a formidable collection of views about the modern law and practice held by those best qualified to know what the law and practice are. C

But counsel for the plaintiffs argued that once it was shown that the old law and practice were in his favour, it was immaterial that text-writers, however eminent, declared that the law and practice had become obsolete. It must be shown how and why they had become obsolete. I am inclined to think that the solution is to be found in the passage from the introduction to the SELECT PLEAS IN ADMIRALTY quoted above. D It will be recalled that MR. MARSDEN draws the conclusion that arrest was mere procedure, and that its only object was to obtain security that the judgment should be satisfied. It may be that this was not the only, nor indeed the primary, object, and that the original object of arrest, as MR. ROSCOE suggested in the introduction to which I have already referred, was to found jurisdiction at a time when any attempt to assume jurisdiction in personam was prohibited by the common law courts. It would appear, E however, that even before actions in personam were recognised by the statutes to which I am about to refer, this method of procedure was adopted in the old Admiralty Court. In *The Milan* (16) (Lush. at p. 397) DR. LUSHINGTON says:

> "By the ancient law of the Admiralty with respect to damage by collision, whether the damage was occasioned to ship or to cargo, the mode of proceeding was twofold, either by an action in rem or by an action in personam." F

There are indications of this in the textbooks (see WILLIAMS AND BRUCE (3rd Edn.), p. 321, and ROSCOE (3rd Edn.), p. 45, note (*c*)); but it is difficult to define when this practice grew up or whether, or to what extent, it was recognised by the common law courts. Probably the action in personam developed out of the original practice of founding jurisdiction by arrest of the person (see per JEUNE, P., in *The Port Victor* (17), G [1901] P. at p. 249), and grew as the latter fell into desuetude.

With regard to the statute law, there is no mention in the Act of 1840 of either form of action. The first statutory reference to an Admiralty action in personam appears to be contained in s. 13 of the Admiralty Court Act, 1854. Seeing that the Act deals almost entirely with procedure, and that the subject-matter of the section is not referred to in the preamble, which merely recites the expediency of resolving doubts about the H administering of oaths and for providing for the collection of fees, it is unlikely that s. 13 was regarded as effecting any very revolutionary change in the law or practice. The section reads as follows:

> "In all cases in which a party had a cause or right of action in the High Court of Admiralty of England against any ship or freight, goods, or other effects whatever, it shall not be necessary to the institution of the suit for such person to sue out I a warrant for the arrest thereof, but it shall be competent to him to proceed by way of monition, citing the owner or owners of such ship, freight, goods, or other effects to appear and defend the suit, and upon satisfactory proof being given that the said monition has been personally served upon such owner or owners, the said court may proceed to hear and determine the suit, and may make such order in the premises as to it shall seem right."

The right to issue a monition in personam against the owner or owners is given, but the right to proceed in rem is not taken away. It is clear, however, that in the case of arrest, the ship, freight, goods or other effects to be arrested are those in relation to which the cause of action arises. The words "cause or right of action against any ship or freight, goods, or other effects whatever" are perfectly apt to describe the arrest of the ship, freight, cargo, tackle, and other apparel connected with the ship in respect of which the cause of action arose, but would be inapt in connection with a supposed right to arrest any other property of the defendant owner. Moreover, the rules, orders and regulations made by Order in Council, in pursuance of the Acts of 1840 and 1854, on Nov. 29, 1859, and the forms the use of which is thereby enjoined (see COOTE'S ADMIRALTY PRACTICE (2nd Edn.) p. 190 et seq.) lead to the same conclusion. When, therefore, by s. 35 of the Admiralty Court Act, 1861, Parliament enacted that the jurisdiction conferred by that Act upon the High Court of Admiralty might be exercised either by proceedings in rem or by proceedings in personam, it was merely enlarging the jurisdiction, but not changing the forms of action by which that jurisdiction might be exercised.

Arrest, either of person or property, has long ceased, therefore, to be necessary in order to found jurisdiction. Nor is arrest of property, other than the thing in relation to which the claim arises, necessary in order to obtain security that the judgment shall be satisfied. It is true that, unless the defendant appears to an action in rem, satisfaction of the judgment is limited to the value of the res, but if the defendant appears, the action proceeds in personam as well as in rem. In such a case, as where the action is brought in personam in the first instance, execution can issue against any property of the defendant, including any surplus value of the res over and above the amount for which bail has been given: see *The Dictator* (4), *The Gemma* (7), and *The Joannis Vatis* (8). In my opinion, arrest of property unconnected with the claim was merely procedural, and the maxim "cessante ratione leges cessat ipsa lex," applies. I for one am not prepared, to quote LORD ESHER'S words in *R.* v. *Judge of the City of London Court* (12) ([1892] 1 Q.B. at p. 299), to "re-open the floodgates of Admiralty jurisdiction" upon the public, especially when that public is an international public, and I can see that the innovation would be disastrous to the prestige of the court.

Counsel for the plaintiffs, however, submitted that, even if it was established that in the Probate, Divorce, and Admiralty Division the right to proceed in rem is limited to the res which gives rise to the cause of action, that cannot apply to the statutory jurisdiction given to a county court. He relied in particular on the fact that the Act of 1869, as construed in *The Alina* (10), gave to county courts an Admiralty jurisdiction in respect of charterparties, which plainly is not possessed by the Probate, Divorce, and Admiralty Divisions. By s. 3 of the Act this extended jurisdiction may be exercised by proceedings in rem as well as in personam. Therefore, he argued, the meaning of the words "proceedings in rem" in the Act of 1869 cannot be restricted to the process in rem as understood in the High Court.

I am not convinced by this argument. Section 3 of the Act of 1869 merely repeats, with reference to the county court, the corresponding enactment with reference to the High Court of Admiralty contained in s. 35 of the Admiralty Court Act, 1861, which, as has already been shown, was merely declaratory of the effect of s. 13 of the Act of 1854. I see no ground for supposing that the legislature meant to enact that the nature of the process should differ in the two cases, even if the causes of action in relation to which it could be employed were more extensive in the one case than in the other: see *per* JAMES, L.J., in *The Alina* (10).

In support of his construction of the statute, counsel also relied upon DR. LUSHINGTON'S judgment in *The Alexander Larsen* (14). I do not think, however, that that judgment really assists his argument. The question there was whether the Act of 1840, which gave the High Court of Admiralty jurisdiction to decide all claims for, among other things, necessaries supplied to any foreign ship, enabled the court to try a claim for such necessaries which had arisen before the passing of the Act. DR. LUSHINGTON said in effect that the action could not have been entertained before the statute because it would probably have been prohibited, though it was plainly within the original scope of the maritime law, but that as the legislature had recognised the cause of action, and there were no words prohibiting the court from entertaining after the passing of the statute a claim which had arisen before the statute, there was jurisdiction to try the action. Whether the actual decision was or was not in accordance with the general principles governing the construction of statutes it is unnecessary to inquire, as it does not seem to me to touch the present point. What is important is that in the above decision given in the year after the setting up of the High Court of Admiralty, DR. LUSHINGTON uses these words (1 Wm. Rob. at p. 294):

> "The statute therefore simply confers upon the court a jurisdiction to be employed in every lawful mode which the court has the power to exercise for enforcing the payment; it might be by arresting the person of the owner if he were resident here, or by arresting the property in case a necessity occurred."

As this passage is one of the foundations of the dictum in *The Heinrich Bjorn* (1), in the Court of Appeal, it is worth noting that it is a little surprising, having regard to what he said fourteen years later in *The Clara* (3), that DR. LUSHINGTON should be speaking in 1841 of arrest of the person as a lawful mode of exercising jurisdiction; but it is significant that even in connection with arrest of the person he speaks of the arrest not of "his" property but of "the" property, by which the context seems to show that he means the property in relation to which the claim has arisen. This appears even more clearly from the relevant passage in his judgment in *The Clara* (3) where he says (Swab. at p. 3):

> "In the Admiralty Court there were two modes of proceeding—by arrest of the person, or arrest of the ship. The proceeding by arrest of the person has now for many years been obsolete; I cannot exactly say how long, but I think there was a precedent in 1780; the amount of damage done was the only limit to the amount that might be recovered. The proceedings by arrest of the ship—or in rem, as it is called—was the most sure, for to the extent of the value of the ship the plaintiff would be sure of any amount of damage decreed."

Counsel for the plaintiffs also relied on Mr. Carver's argument in *The Zeta* (11) ([1893] A.C. at p. 475) as being a statement by an eminent Admiralty practitioner of the existing law. I think, however, that we are bound by the decision both in that case and in *R.* v. *Judge of the City of London Court* (12), followed, as they were, by a Divisional Court in *The Champion* (18), to hold that, except with regard to the special case of charterparties, the Admiralty jurisdiction given to county courts is that which was then exercised by the High Court of Admiralty.

In this connection the proviso to s. 8 of the Maritime Conventions Act, 1911, is significant. This section, which applies expressly to all courts exercising Admiralty jurisdiction in this country, imposes a limitation of two years upon any action to enforce any claim against a vessel or her owners (that is to say, upon an action whether in rem or in personam) in respect, among other things, of any damage or loss to another vessel, her cargo or freight, or any property on board her caused by the fault of the former vessel, or in respect of any salvage services, but provides that

> "any court having jurisdiction to deal with an action to which this section relates . . . shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court . . . extend any such period to an extent sufficient to give such reasonable opportunity."

It is true that this section does not cover all cases in which proceedings in rem are available; but, between them, the two classes of case mentioned form the majority of Admiralty causes. It is improbable that Parliament would have enacted this proviso with regard to the arrest of the defendant vessel if in an Admiralty action in a county court there was also jurisdiction to arrest any other property of the defendant owner within the realm.

For these reasons, like LORD ESHER, I find it impossible to suppose that in 1869 Parliament meant to give to county courts any jurisdiction wider, with the exception mentioned, than it had conferred on the High Court of Admiralty in 1840. The appeal also succeeds, therefore, on the point actually argued before the learned county court judge. As regards costs, the plaintiffs bear the responsibility for starting this misconceived litigation with the original arrest of the ship. It is true that by concurring in the issue, which is also misconceived, the interveners have enhanced the costs, but I think that costs should follow the event. The appeal will be allowed with costs here and below.

SCOTT, L.J. (read by Swift, J.)—This appeal is from a judgment of the county court judge for Monmouthshire sitting at Newport on an issue agreed between the interveners in the action and the plaintiffs on the record, in which the interveners challenged the right of the plaintiffs to proceed in rem against the steamship *Beldis* belonging to the defendants. The action was brought in that court in its Admiralty jurisdiction by a plaint in rem dated April 5, 1935, against the steamship *Beldis*. The particulars of claim were expressed to be for money due and payable by the defendants, the owners of the steamship *Beldis*, to the plaintiffs under an award dated Jan. 24, 1935, in an arbitration held by virtue of a clause in a charterparty dated July 13, 1933, and made between the defendants and the plaintiffs, whereby the arbitrator awarded to the plaintiffs the sum of £27 4s. 6d. composed of an item of £19 7s. 6d. for money due in account and an item of £7 17s. for costs. Judgment was in default of appearance signed for the amount claimed.

After judgment Lambert Brothers, Ltd., sought to intervene. By their affidavit they stated that they were mortgagees of the steamship *Beldis* under a mortgage for £20,000 sterling registered at Oslo on May 25, 1929; they challenged the plaintiff's right to proceed in rem against that ship, asked leave to enter an appearance on the grounds (inter alia) that the arrest of the steamship *Beldis* was illegal and that the proceedings were wrongly taken in rem, and prayed that the judgment signed in the action in their absence might be set aside. An issue was agreed between them and the plaintiffs in the following terms:

> "We, the plaintiffs and the interveners in the above-named action, herewith submit the following sole issue to be tried by this Honourable Court, pleadings being waived: Whether the plaintiff's action in rem against the steamship *Beldis* is maintainable in view of the fact that the plaintiffs' claim in this action arose out of a charterparty of the steamship *Belfri*, being a ship belonging to the same owners. The said parties agree that in the event of the question raised in this issue being answered in the affirmative, there shall be judgment for the plaintiffs, with costs, and in the event of the question raised in this issue being answered in the negative, there shall be judgment for the interveners with costs."

The county court judge tried this cause and held on the authority of certain dicta of the Court of Appeal in *The Heinrich Bjorn* (1) that the contention of the interveners was wrong and gave judgment against them. The interveners then appealed to this court, the plaintiffs being respondents.

On the hearing of the appeal the said award was produced to us and it appeared on its face that the charterparty in question was made, not in respect of the steamship *Beldis*, the ship against which the action in rem was instituted, but in respect of a different ship altogether, also belonging to the defendants, namely, the steamship *Belfri*. It further appeared from the award that the said sum of £19 7s. 6d. was a balance due to the plaintiffs in account, being in fact, as we were informed by counsel, an overpayment of charter hire of the steamship *Belfri*.

The phraseology of the issue indicates that in the view of both parties the plaintiffs' action, although based on the award, was nevertheless a claim which arose "out of an agreement made in relation to the use or hire of a ship," because the arbitration had been held pursuant to an arbitration clause in the charterparty of the steamship *Belfri* and because the dispute before the arbitrator "had arisen out of" that agreement.

In the above circumstances two questions call for decision. Question (i): Assuming that "the cause" was one which could have been prosecuted in rem against the steamship *Belfri* under s. 3 of the County Courts (Admiralty Jurisdiction) Amendment Act, 1869, as a claim which arose "out of any agreement made in relation to the use or hire of any ship" within the meaning of s. 2 (1) of that Act, could it be prosecuted in rem against another ship belonging to the same owners, the steamship *Beldis*, with which the said charterparty had no concern? Question (ii): Is the above assumption legally sound, when the plaintiffs were suing not on the charterparty but on an award of an arbitrator, merely because the arbitration had been held pursuant to an arbitration clause in such an agreement? Do the words "claim arising out of any agreement, &c.," cover such a cause of action?

In the court below the parties to the issue were in conflict over Question No. (i), but Question No. (ii) was not discussed, both sides apparently being in agreement in thinking that the court could entertain such an action on an award as an Admiralty cause in rem. No argument was addressed to us on this point until we directed the attention of counsel to the doubt as to whether county court had any Admiralty jurisdiction over such an action.

It is convenient to dispose of Question No. (ii) first. The answer depends upon the true interpretation of the Act of 1869, construed in the light of the state of the law at the time when the Act was passed. Are the words of s. 2 (1) wide enough and clear enough to cover this action? Voluntary arbitrations at that date were governed by the provisions of the Acts of 9 & 10 Will. 3, c. 15, and 1 & 2 Vict. c. 110, s. 18, and the Common Law Procedure Act, 1854. Then, as now, an action lay at common law to enforce an award (see Bullen & Leake (3rd Edn.); Russell on Arbitration (3rd Edn.) (1864), p. 505); but the only other means of enforcing an award was either (a) by making the submission a rule of Court of Queen's Bench—with the consequence that a party acting in disobedience to the award could be attached for contempt (Common Law Procedure Act, 1854, s. 17, and 9 & 10 Will. 3, c. 15, s. 1; see also Russell on Arbitration (3rd Edn.), Part III, Ch. V, p. 565 et seq.); or (b) by obtaining from the common law court a rule absolute for payment of the sum awarded (see 1 & 2 Vict. c. 110, s. 18; Russell on Arbitration (3rd Edn.), p. 612, and *Jones* v. *Williams* (19) there cited).

This being the state of the law about the enforcement of "voluntary" awards, it was unlikely that an action on an award would in 1869 be assigned by Parliament to the High Court of Admiralty; and in the absence of clear words it would be wrong so to interpret the Act even assuming the words to be wide enough to include it. But the words of the statute "any claim arising out of any agreement made in relation to the use or hire of any ship" not only are not clear in the sense supposed, but, in my view, for the following reasons cannot include it.

By the early part of the nineteenth century, as a result of the long war with the common law courts (to which I shall return in connection with question No. (i)), the categories of "Admiralty causes" had become limited to damage, salvage, wages, bottomry, and certain other causes arising out of maritime events and affairs, of which there was then in truth a fairly well-defined list. Indeed, it was just because the jurisdiction in Admiralty had become thus restricted that the aid of the legislature had to be invoked in order to effect the extensions of it contained in the Admiralty Court Acts, 1840 and 1861.

It is true that the Court of Admiralty was thereby given jurisdiction over several causes of action cognisable in either common law or Chancery courts, but each one was defined in precise, plain, and carefully guarded terms; and in the case of those founded on contract, the cause of action was one directly based upon the maritime contract described in the section, e.g., towage and necessaries supplied to foreign ships (1840 Act, s. 6); necessaries to any ship anywhere (1861 Act, s. 5) and certain claims on bills of lading for damage but each of the last two cases only if the shipowner was not domiciled in England and Wales. In my view, it would be entirely wrong to hold that an action on an award arising indirectly out of such a maritime contract was included by the words in the above sections.

Precisely the same reasoning applies to the language of the County Courts (Admiralty Jurisdiction) Act, 1868, with even greater force, since the assignment of Admiralty jurisdiction to county courts was a new departure and in that Act made rather experimentally. By it certain county courts were given Admiralty jurisdiction to try a limited list of what the Act called "Admiralty" causes; and they were not given the full right of Admiralty procedure in rem, being authorised to arrest (otherwise than in execution) only if it was probable that "the vessel or property to which the cause relates" would be removed out of the jurisdiction (s. 22). It is true that by s. 3 of the Act of 1869 the right of Admiralty procedure in rem was conferred for the purposes of both Acts, but there was no change in the method of describing the permitted field of Admiralty jurisdiction: there was merely an extension of the list of particular Admiralty causes over which the court was to have jurisdiction.

With the above history of Admiralty jurisdiction both before and since 1840, it would in my judgment be plainly wrong to say that under s. 2 (1) of the Act of 1869 a county court has Admiralty jurisdiction to entertain an action on an award upon a voluntary submission, merely because the arbitration was held pursuant to an arbitration clause in a charterparty for the reference of disputes arising out of that charterparty.

This conclusion is sufficient to dispose of the appeal and to show that the judgment of the learned judge cannot stand, but in case the above interpretation of the words "arising out of any agreement, &c.," be held by the House of Lords to be wrong, I give my conclusion and reasons on question No. (i) also. It is one of great commercial importance, for it applies to all proceedings in rem whether in county courts or the Admiralty Division.

In many continental systems of law and procedure (e.g., in Germany, Sweden, Belgium, and to a certain extent in France) there is a right of arrest for founding jurisdiction and obtaining bail in respect of any ship or other property of a defendant, although wholly unconnected with the cause of action sued on. But in England I have never heard of such an arrest, and I do not believe any attempt has ever been made here to exercise such a right in practice within the memory of any living practitioner in the Admiralty Court, until the plaintiffs in the present action made it. In my view, there is no such right in English law to-day.

Counsel for the plaintiffs naturally relied strongly upon the expression of opinion in the Court of Appeal in *The Heinrich Bjorn* (1), which appears in the judgment of the court (composed of BRETT, M.R., BOWEN and FRY, L.JJ.), and delivered by FRY, L.J. (10 P.D. at p. 54). The learned lord justice there says in regard to the procedure in rem:

> "The arrest need not be of the ship in question, but may be of any property of the defendant within the realm."

That observation was, however, purely obiter. Apart from an unfounded contention of a bottomry bond, which the court rejected, the only question of law relevant to the decision of the case was whether a maritime lien attaches in English law to a valid claim for necessaries. That was necessarily the sole issue in that case, since the ship for which the necessaries had been supplied had passed by sale from the ownership of the shipowner for whom the necessaries had been supplied to that of new owners who had nothing to do with the voyage when the necessaries were supplied. If there was a maritime lien the new owners took subject to the lien; if there was no maritime lien their ship was free and the plaintiff had no right to arrest it in their hands. The opinion of the court in *The Heinrich Bjorn* (1) is entitled to great respect; but it is not binding on us, and in my view the dictum is erroneous.

My reasons are as follow. There is little doubt that historically the jurisdiction of the Admiralty Court was originally exercised by employing either of two methods of procedure for bringing the defendant before the court: (i) The arrest of his person; (ii) the seizure of his goods. There is more than one case in MARSDEN'S SELECT PLEAS OF THE COURT OF ADMIRALTY which illustrates the arrest of goods other than the goods or ship concerned in the particular cause of action for the purpose of founding jurisdiction. But it seems to be equally clear that both methods had fallen into disuse before the beginning of the nineteenth century, probably as a result of the incessant war of jurisdiction waged by the common law courts on the Admiralty Court in the sixteenth and seventeenth centuries. A full account of this long quarrel is contained in the third edition of ROSCOE'S ADMIRALTY PRACTICE, and that account may, I believe, be accepted as substantially accurate.

During the first half of the nineteenth century there emerges a fact of dominant significance. A belief had grown up in the minds of Admiralty practitioners that the ambit of Admiralty procedure in rem was coterminous with the ambit of the maritime lien; that where there was a maritime lien the right to proceed in rem existed, and where there was no maritime lien the right to proceed in rem did not exist. This belief, strongly held and widely prevalent until judicially corrected, actually found expression in 1851 in the judgment of the Privy Council in *The Bold Buccleugh* (6), reported under the name of *Harmer* v. *Bell*. There the Privy Council themselves said in the judgment (7 Moo. P.C.C. at p. 284):

> "Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story (1 Sumner 78) explains that process to be a proceeding in rem, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding in rem, and indeed is the only court competent to enforce it. A maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding in rem may be had, it will be found to be equally true, that in all cases where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon a thing, to be carried into effect by legal process. This claim or privilege travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached."

The view thus expressed, that the right to proceed in rem was limited to those cases where a valid maritime lien was recognised in Admiralty law, was considered in the very case of *The Heinrich Bjorn* (1), upon which the plaintiffs in the present appeal mainly rely, both in the Court of Appeal and in the House of Lords, and there finally negatived as wholly erroneous; but the fact that it was so long and so widely entertained throws much light on the contention raised in the issue before us. If everybody practising in Admiralty had a firm belief that in order to arrest you must have a lien, they must equally have been satisfied that where there was no lien you could not arrest. If they believed that the right of proceeding in rem was thus limited, it follows that they must have recognised the impossibility of arresting any ship other than the particular ship to which the cause of action related—since ex hypothesi there could be no lien over a ship wholly unconnected with the cause of action. They could never have supposed that *another* ship of the same owner could be arrested in a cause for, e.g., damage or salvage, because ex hypothesi no maritime lien for damage or salvage could possibly attach to any but the delinquent ship or the salved ship. This historical misconception is, to my mind, conclusive proof that during the period of its prevalence the universal practice was to treat the right of procedure in rem as applicable only to the ship or property to which the cause of action related, and that the archaic right of arresting *other* property of a defendant, i.e., other than that with which the cause of action was concerned, had before that period fallen wholly out of use and become obsolete. The complete absence of any reported case in the last 100 years, in which the present attempt to arrest a ship or property unconnected with the cause of action has ever been made before, is, indeed, of itself almost conclusive that the procedure in rem was not regarded in the Admiralty Court as extending to such other ships or property, and from this fact, too, I draw the inference that it had ceased to be permissible.

This view seems to me to be implicit in the language of Parliament in the County Courts (Admiralty Jurisdiction) Act, 1868. The Act of 1869 is to be read as one with the Act of 1868 (s. 1). By s. 3 of the Act of 1869 the Court is empowered to exercise its Admiralty jurisdiction (under either Act) either in personam or by the ordinary Admiralty procedure in rem in respect of any causes within the combined Act. By s. 21 (1) of the Act of 1868 the Admiralty jurisdiction thus conferred is locally limited to the district within which the vessel or property "*to which the cause relates*" is at the time when proceedings are commenced. These provisions justify two comments. In the first place, they seem to presuppose the impossibility of applying the procedure in rem to any ship or property *unless the cause relates to it*; in other words, it is almost a statutory recognition of the existing practice which had then for long prevailed. In the second place, as the county court has no Admiralty jurisdiction beyond what is expressly conferred by the statute, its concomitant power to proceed in rem is equally confined, and it seems to me more consistent with sound interpretation to regard the procedural power as conferred in respect of the same res as that upon which the substantive jurisdiction is founded, viz., the res "to which the cause of action relates."

The language of the Maritime Conventions Act, 1911, to which the learned President has referred, is consistent with and supports the above conclusion. But the argument must not be pressed too far. The proviso to s. 8 which enacts a statutory limitation of two years for the bringing of collision and salvage actions, subject to a power in the court to extend the time if there has been no reasonable opportunity of arresting the defendant ship within the jurisdiction, merely repeats art. 7 of the convention, and that article was accepted with the above proviso by many continental nations who had in their codes of procedure the right of arresting property wholly unconnected with the cause of action and had no intention of altering their procedure; and the proviso has, since then, been put into force by several of them in their national legislation without any change being made in their method of procedure. The truth is that those conventions were not intended by the high contracting parties to touch national laws of procedure. The late LORD STERNDALE and I were delegates of the British Government at Brussels and conducted the negotiations and signed those conventions; and we were alive to this wide difference between the procedural laws prevailing in many continental countries on the one hand and the British Empire on the other. The correct view of the proviso to s. 8 of the Maritime Conventions Act, 1911, is, in my opinion, therefore, simply recognised and leaves unaltered the English Admiralty procedure in rem as it had existed for at least a century.

For the above reasons the conclusion seems to me plain that the plaintiffs had no right to arrest the steamship *Beldis* even if the cause did "arise out of the charterparty of the steamship *Belfri*." My answer to Question No. (i) is, therefore, also in favour of the appellants, the interveners. The appeal ought to be allowed and judgment entered for them, with costs here and below.

SWIFT, J.—By a claim dated April 5, 1935, filed in the County Court of Monmouthshire holden at Newport, the plaintiffs claimed against the owners of the steamship *Beldis* the sum of £27 4s. 6d. payable by the defendants to them under an award made by an arbitrator dated Jan. 24, 1935, and on the following day a summons directed to the defendants was issued out of the said court. The award was based upon a submission to arbitration contained in a charterparty of the steamship *Belfri* which belonged to the same owners as the steamship *Beldis*. The claim was made under the Admiralty jurisdiction of the court and the action purported to be an action in rem.

On April 5, the steamship *Beldis* was arrested under Admiralty procedure. Lambert Brothers, Ltd., claimed to intervene in the said action as being the mortgagees of the steamship *Beldis* and on April 25 they were permitted so to intervene. Thereafter, the plaintiffs and the interveners submitted a "sole issue" to be tried by the court

> "whether the plaintiffs' action in rem against the steamship *Beldis* is maintainable in view of the fact that the plaintiffs' claim in this action arose out of a charterparty of the steamship *Belfri*, being a ship belonging to the same owners."

On June 27, the question raised by that issue was decided by the court and the learned judge held that the plaintiffs were entitled to succeed on that question and judgment in their favour was entered with costs. From that judgment the interveners appeal.

The cause of action alleged is an ordinary common law claim for payment of money due under an award. Such a cause of action is not one of those upon which jurisdiction in Admiralty is conferred upon the county court by s. 2 of the County Courts (Admiralty Jurisdiction) Amendment Act, 1869, nor is it a cause of action for which an action in rem could be brought apart from the County Courts Act. In my view, the proceedings were quite misconceived. The action could not be brought in the Admiralty jurisdiction of the county court at all and it could not be brought as an action in rem.

I think, therefore, that the whole action fails, that the parties had no right to propound any issue in such action for the decision of the court, that the decision of the court upon such issue was invalid and that the action should have been dismissed for want of jurisdiction and judgment should have been entered for the defendants and the interveners. That is sufficient, in my opinion, to dispose of this appeal, which should be allowed and the judgment set aside.

The parties, however, on the hearing of the appeal, argued at length the question which was raised before the county court judge, namely, whether an action in rem would lie against a ship or other property belonging to a person who was a party to the cause of action, but in respect of which cause of action the ship or other property sought to be made liable was in no way involved. I have read and agree with the judgments of the President and SCOTT, L.J., on this point and it is not necessary for me to say anything further than that in my view at the present time an action in rem will not lie save as against the ship or other property which is the very res in respect of or out of which the cause of action arises.

I agree that this appeal should be allowed, with costs here and below.

Appeal Allowed.

Solicitors: *Ince, Roscoe, Wilson, & Glover*, for *Allen Pratt & Geldard*, Cardiff; *Pettite, Kennedy, Morgan, & Broad.*

[*Reported by* J. A. PETRIE, ESQ., *Barrister-at-Law.*]

LONDON PASSENGER TRANSPORT BOARD *v.* SUMNER

[KING'S BENCH DIVISION (Lord Hewart, C.J., Humphreys and Singleton, JJ.), October 11, 1935]

[Reported 154 L.T. 108; 99 J.P. 387; 52 T.L.R. 13; 79 Sol. Jo. 840; 33 L.G.R. 459]

Tramway—Byelaw—Validity—Failure to pay fare—Offence irrespective of mens rea—Tramways Act, 1870 (33 *&* 34 *Vict., c.* 78), *s.* 46.

A byelaw relating to the working of a tramway system was in the following terms: "Each passenger shall, immediately upon demand, or in case no demand shall have been made before leaving the carriage, pay to the conductor the fare legally demandable for his journey and accept a ticket therefor." Another byelaw provided that any breach of the tramway system's byelaws and regulations should be punishable by a fine of 40s.

Held: the first-mentioned byelaw was ultra vires as being repugnant to the general law of the land in that it made failure to pay a fare legally demandable an offence irrespective of whether there was an intention to avoid payment, and also as being unreasonable, and that a person could not be convicted of a breach of it.

Notes. Referred to: *Haynes* v. *Davey* (1937), 25 Ry. & Can. Tr. Cas. 294.

As to tramways byelaws, see 32 HALSBURY'S LAWS (2nd Edn.) 724, 725, and as to byelaws generally, see 9 HALSBURY'S LAWS (3rd Edn.) 40 et seq., and for cases, see 43 DIGEST 349, 350, and 13 DIGEST 325 et seq. For Tramways Act, 1870, see 25 HALSBURY'S STATUTES (2nd Edn.) 1289.

Cases referred to:

(1) *Lowe* v. *Volp*, [1896] 1 Q.B. 256; 65 L.J.M.C. 43; 74 L.T. 143; 60 J.P. 232; 44 W.R. 442; 12 T.L.R. 206; 18 Cox, C.C. 253; 43 Digest 350, *91*.

(2) *Nimmo* v. *Lanarkshire Tramways Co.* 1912 S.C. (J.) 23; 49 Sc.L.R. 549; 1912, 1 S.L.T. 305; 6 Adam, 571; 43 Digest 351, *p*.

Case Stated by the chief magistrate of the metropolis.

At a court of summary jurisdiction sitting at Bow-street three informations were preferred by the London Passenger Transport Board (the appellants) under byelaw 12 of the London County Council's Tramways byelaws and regulations, made by the Minister of Transport on July 27, 1920, under s. 7 of the London County Tramways Act, 1896, s. 2 of the Ministry of Transport Act, 1919, and ss. 46 and 47 of the Tramways Act, 1870, against Miss Mary Sumner (the respondent), for that she on Oct. 5, 6, and 27, 1934, contrary to the byelaw, being a passenger on a carriage using a tramway, did fail to pay to the conductor the fare legally demandable for her journey before leaving such carriage.

Byelaw 12 provided as follows:

> "Each passenger shall, immediately upon demand, or in case no demand shall have been made before leaving the carriage, pay to the conductor the fare legally demandable for his journey and accept a ticket therefor."

On the hearing of the information the following evidence was given on behalf of the prosecution:—On Friday, Oct. 5, 1934, the respondent entered a tramcar of the appellants at Kennington Cross and paid for and received a 2d. return workman's ticket entitling her to travel as far as Savoy-street and back. She continued travelling as far as Aldwych, which was about 500 yds. beyond Savoy-street. Between Savoy-street and Aldwych the conductor called out: "Any more fares, please?" but the respondent tendered nothing and left the tramcar without paying the excess fare of 1d. which was demandable of her. On Saturday, Oct. 6, 1934, exactly the same thing occurred again. On Wednesday, Oct. 10, 1934, the respondent made a similar journey, but paid for and received at the same time as she took the 2d. return workman's ticket a further 1d. ticket entitling her to travel to Aldwych. On Tuesday, Oct. 16, 1934, the respondent made a similar journey, but before leaving the tramcar paid the excess fare of 1d. demandable of her without any specific demand therefor being made. On Saturday, Oct. 20, 1934, the respondent made a similar journey, but before leaving the tramcar paid, on the demand of the conductor, the excess fare of 1d. On Saturday, Oct. 27, 1934, the respondent made a similar journey. Between Savoy-street and Aldwych the conductor called out: "Any more fares, please?" but the respondent tendered nothing and left the tramcar without paying the excess fare of 1d. Mr. Cooper, a plain-clothes inspector of the appellants, followed the respondent and questioned her. She said to him: "I forgot. There's the penny," and showed in her hand a penny and the 2d. return ticket. Mr. Cooper had seen the respondent pay her fare without any demand being made. He had never seen her refuse to pay her fare when demanded personally, but when conductors said: "Fares, please," she sometimes paid and sometimes did not.

At the end of the appellant's case, and before any explanation of the respondent's conduct was offered, it was contended on her behalf that the byelaw was invalid (a) because it was repugnant to the law of England in that it made failure to pay a fare legally demandable an offence, irrespective of whether there was or was not an intention to avoid such payment; and (b) because it was unreasonable.

On behalf of the appellants it was contended that the byelaw was valid (a) because by s. 51 of the Tramways Act, 1870, it was an offence for anyone travelling in a tramcar to avoid payment of his fare, and there was no qualification in the Act as to what intention was necessary to constitute the offence, and because there was nothing in the general law which said, whether expressly or by implication, that it was lawful to avoid payment of a fare on a tramcar, or that a guilty intention was necessary to constitute the offence of avoiding such payment; (b) because the byelaw did not exclude the defence of a lawful excuse any more than s. 51 of the Tramways Act, 1870; and (c) because, having regard to the circumstances in which passengers were carried in tramcars, it was reasonable to require them to pay the fares demandable of them even if such fares be not demanded.

The chief magistrate, in his judgment, said:

> "Apart from authority, I should be disposed to hold that the words relied upon in the byelaw under consideration are repugnant to the laws of England, for no act or omission can be a crime unless mens rea is present, or there is express statutory provision that the act or omission is a crime without any criminal intent, or it can be inferred from the terms of the statute that the mere act or omission is in itself an offence. In the same way the byelaw, or at least the part of it with which I am particularly concerned, also appears to me to be bad as being unreasonable. It purports to make punishable acts or omissions of the most innocent nature, or rendered inevitable by the conduct of the tramway officials themselves. For instance, it would make punishable the omission of a passenger to pay his fare as the result of the most innocent inadvertence. . . ."

He said that he came to the same conclusion on a review of the authorities, especially *Lowe* v. *Volp* (1). He held that the byelaw was ultra vires as repugnant to the general law of the land, and also as unreasonable.

The appellants appealed to the Divisional Court.

Monckton, K.C. (*E. F. M. Maxwell* with him) for the appellants.—The chief magistrate appears to have based his decision, at any rate to some extent, on principles laid down in a series of cases involving the construction of railway bye-laws, but s. 5 (3) of the Regulation of Railways Act, 1889, which imposes penalties for travelling on railways without paying the fare, contains the express words, "with intent to avoid payment [of the fare]." No such words are to be found in s. 51 of the Tramways Act, 1870, and the construction of tramway byelaws should, therefore, be approached from a different angle. Further, the position of a tramway company is entirely different from that of a railway company. Passengers leaving a train are obliged on all occasions to pass a barrier, and it may, therefore, be quite reasonable to impose on a railway company the burden of a demand for the fare in every case, but unreasonable to impose a similar burden on a tramway company. There are dicta in *Lowe* v. *Volp* (1), which appear to be contrary to the present argument, and the Scottish decision of *Nimmo* v. *Lanarkshire Tramways Co.* (2) is directly against it, but, viewing the matter as a whole, the byelaw in question should not be regarded as repugnant to s. 51 of the Tramways Act, 1870, or as unreasonable.

Comyns Carr, K.C., and *Martin O'Connor*, for the respondent, were not called on to argue.

LORD HEWART, C.J.—This is a Case Stated by the learned chief magistrate of the metropolis. It arises out of a prosecution of the respondent for failing to pay to the conductor of a tramcar the fare legally demandable before she left the carriage. The magistrate, having heard argument, dismissed the informations. The question for this court is whether he came to a correct determination in point of law.

It was argued on behalf of the respondent at the close of the appellants' case that the bye-law under which the informations were laid was invalid for two reasons—first, because it was repugnant to the law of England in that it made failure to pay a fare legally demandable an offence, irrespective of whether there was or was not an intention to avoid payment, and, secondly, because it was unreasonable. The chief magistrate upheld each of those contentions and decided, therefore, that the byelaw was invalid. He set out his reasons in a very careful and extremely able judgment.

I have paid the greatest attention to the able and attractive argument of counsel for the appellants, but I am satisfied that the judgment of the chief magistrate was right for the reasons which it expressed. It may be added that, side by side with *Lowe* v. *Volp* (1), there is the further case to which counsel very properly directed our attention, *Nimmo* v. *Lanarkshire Tramways Co.*

I think, therefore, that this appeal ought to be dismissed.

HUMPHREYS, J.—I agree.

SINGLETON, J.—I agree.

Appeal dismissed.

Solicitors: *J. S. Anderson*; *Edmond O'Connor.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

SQUARE *v.* SQUARE (OTHERWISE BEWICKE) (COWAN INTERVENING)

COWAN (OTHERWISE YOUELL) *v.* COWAN

[PROBATE, DIVORCE, AND ADMIRALTY DIVISION (Langton, J.), April 17, 1935]

[Reported [1935] P. 120; 104 L.J.P. 46; 153 L.T. 79; 79 Sol. Jo. 403]

Estoppel—Previous legal proceedings—Representations in minute of settlement of action and in answer to petition for divorce.

Marriage—Validity—Mental reservations by one party.

If two people with the same sources of information assert the same truth, or agree to assert the same falsehood, at the same time, neither can be estopped as against the other from asserting differently at another time.

In 1912 a man, C., and a woman entered into a valid Scottish irregular marriage. In 1915 the woman went through a form of marriage in England with another man, S. In 1920 C. filed a petition for divorce in England averring that he was lawfully married to the woman, and citing S. as co-respondent. By his answer S. pleaded that the Scottish marriage was invalid. The woman then brought an action in Scotland against C. for a declaration of perpetual silence anent the Scottish marriage. That action was settled, one of the terms of settlement being that C. undertook never to maintain that he had been lawfully married to the woman. In that action S. was the woman's curator and administrator, and as such was cognisant of that settlement and signed the minute of settlement. In 1934 S. filed the present petition for nullity of his marriage with the woman on the ground that in 1912 she had contracted a valid marriage with C.

Held: the representations in the minute of the settlement of the Scottish action in 1920 and in S.'s answer to C.'s divorce petition to the effect that the Scottish marriage in 1912 was not a valid marriage did not estop S. from pleading in the present proceedings that it was valid, since (i) he did not make those representations to the woman, (ii) he did not make them with the intention that she should act upon the faith of them, and (iii) it was not suggested that she had acted on the faith of them.

Observations by LANGTON, J., on the effect of mental reservations as to the validity of the ceremony on the part of a person going through a form of marriage.

Notes. As to estoppel by representation, see 15 HALSBURY'S LAWS (3rd Edn.) 223 et seq., and for cases see 21 DIGEST 290 et seq.

Cases referred to:

(1) *Dalrymple* v. *Dalrymple* (1811), 2 Hag. Con. 54; 161 E.R. 675; 22 Digest (Repl.) 618, *7112*.

(2) *Dysart Peerage Case* (1881), 6 App. Cas. 489, H.L.; 22 Digest (Repl.) 116, *996*.

(3) *Pickard* v. *Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest 290, *1032*.

(4) *Freeman* v. *Cooke* (1848), 2 Exch. 654; 6 Dow. & L. 187; 18 L.J.Ex. 114; 12 L.T.O.S. 66; 12 Jur. 777; 154 E.R. 652; 21 Digest 287, *1019*.

(5) *Compania Naviera Vasconzada* v. *Churchill and Sim*, [1906] 1 K.B. 237; 75 L.J.K.B. 94; 94 L.T. 59; 54 W.R. 406; 22 T.L.R. 85; 50 Sol. Jo. 76; 10 Asp. M.L.C. 177; 11 Com. Cas. 49; 21 Digest 304, *1108*.

(6) *Nippon Menkwa Kabushiki Kaisha* v. *Dawson's Bank, Ltd.* (1934), 51 Lloyd's List Rep. 147; L.R. 62 Ind. App. 100.

Petitions for nullity of marriage.

In the first petition Geoffrey Michael Elliot Square sought a declaration of nullity of marriage on the ground that when he went through a form of marriage with Valerie Jean Square (née Grant-Davey) at the register office in the district of Thanet, Kent, on May 15, 1915, she was already married, having entered into an irregular, but valid, Scottish marriage at Sliddery, Isle of Arran, on July 25, 1912, with Aubrey Mendelssohn Cowan (then Cohen), who was still surviving. Mrs. Square, who, in July, 1912, was the widow of an Englishman named Bewicke, denied that she was married to Mr. Cowan, and said that Mr. Square was estopped from setting up the Scottish marriage because in an English divorce suit which Mr. Cowan filed in 1920 citing Mr. Square as co-respondent, the latter averred that he was lawfully married to her, and also because as her curator and administrator in a Scottish action which she brought against Mr. Cowan for "perpetual silence anent" the Scottish marriage Mr. Square was a party to the settlement of that action whereby Mr. Cowan undertook never to maintain that he was married to her. Mr. Cowan, intervening in Mr. Square's suit, adopted the same defence.

In the second petition Ada Mildred Cowan, formerly a widow named Youell, prayed for a declaration of nullity of her marriage on Jan. 7, 1921, to Mr. Cowan on the ground that on that date there was a subsisting marriage between Mr. Cowan and Mrs. Square. Mr. Cowan, by his answer, denied that there had been a valid marriage between Mrs. Square and himself.

The petitions were tried together. It was established that there was a promise of marriage by Mr. Cowan to Mrs. Bewicke (later Mrs. Square), whose domicil of origin was Scottish, and that each of them signed in Scotland a declaration in the following terms, mutatis mutandis:

> "I hereby swear solemnly to take [the other] to be my lawfully wedded wife [or husband] until death do us part."

There had been at least twenty-one days' residence in Scotland at the time of the declaration, and there was subsequent cohabitation by the parties. Mrs. Cowan (as she then was) having made the acquaintance of Mr. Square went through a form of marriage with him in May, 1915. Mr. Cowan had been serving abroad during the war. When he was informed of the latter ceremony and Mrs. Cowan's relations with Mr. Square he petitioned, on Jan. 21, 1920, for the dissolution of his marriage on the ground of Mrs. Cowan's adultery and bigamous marriage with Mr. Square. By her defence to that suit she denied that she had married Mr. Cowan or committed bigamy. On Feb. 16, 1920, Mrs. Square (as she was then known) as the wife of Mr. Square, and with his consent and concurrence in his capacity as her curator and administrator, began proceedings in Scotland against Mr. Cowan claiming a declaration that she was the wife of Mr. Square and that Mr. Cowan be

> "put to silence in respect of false and calumnious allegations by him that he was married to the respondent."

Those proceedings settled on the terms contained in a joint minute that Mr. Cowan admitted that there was no marriage subsisting between him and Mrs. Square, and that he undertook to withdraw his petition for divorce. In January, 1921, Mr. Cowan married Mrs. Youell.

Evidence was given, and the fact of the validity of the Scottish marriage having been found, the only issue remaining was whether Mr. Square was estopped from setting it up.

F. L. C. Hodson for Mrs. Square and Mr. Cowan.
Doughty, K.C., and *Bush James* for Mr. Square.
Bayford, K.C., and *Walter Frampton* for Mrs. Cowan.

Cur. adv. vult.

April 17. **LANGTON, J.**, read the following judgment. In the matters raised by this litigation there are two distinct actions. They raise questions so much interwoven that I made an order to try both actions together. The case of *Square* v. *Square* raises the important point, and the decision of this point governs the *Cowan Case.* I have taken time to consider the matter because the case is unusual and the facts are complicated. It is a history not lacking even in adventure or an element of romance, but it is probably a good thing for the peace and quiet of our work-a-day world that it represents a considerable departure from the normal.

This lady, who is to-day known as Mrs. Square, and whom it will be convenient to refer to hereafter as the respondent, apparently began life as Jean Sinclair Grant-Davey, A and her domicil of origin was Scottish. She made her first attempt at earning her living upon the stage, and, as I understand, dropped her surname and appropriated a new Christian name, Valerie, for this purpose. In the year 1909 she married a man named Bewicke. After a brief, but, from the respondent's point of view, most unhappy, married life, Mr. Bewicke died in the year 1911. I gathered from the respondent that the unhappiness of this comparatively short experience of marriage was such that she B felt very determined in 1911 not to repeat the experiment. I see no reason to doubt her sincerity in this respect; indeed, it is almost necessary to accept it in order to explain the next phase of her career.

In the year 1912 the respondent, having resumed her Scottish domicil on the death of Mr. Bewicke, went to Boulogne and there met Mr. Aubrey Mendelssohn Cohen (who has since changed his name by deed poll to Cowan). They met in the Casino, were C mutually attracted, and Mr. Cowan proposed marriage. The respondent rejected this proposal, but agreed to go with Mr. Cowan to Paris and to live with him there as his mistress. After a short sojourn in that city they went to Scotland—first to Glasgow, where the respondent's home was, and then to the Isle of Arran, where they eventually took a house from the local blacksmith at Sliddery, and stayed during the month of July. On July 25, when both parties had been resident in Scotland for over three weeks, D Mr. Cowan persuaded the respondent, after a very animated and most disagreeable dispute, to sign and countersign holograph documents to the effect that each took the other to be his (or her) lawfully wedded spouse "until death do us part." These two documents have been produced before me in evidence, and their complete authenticity is admitted. At the same time as they were written a third document in the same sense, and in the same terms, was written out and signed by Mr. Cowan and countersigned by E the respondent and taken by Mr. Cowan to Mr. Quick, the postmaster of Sliddery. The postmaster witnessed this third document, and Mr. Cowan kept it for some time in his pocket-book, but lost both wallet and document at Tarbet in the same year—1912. The documents which have been produced before me were put in Mr. Cowan's suit-case, and eventually locked in his desk in a house at Kenley, in Surrey.

After her season in Scotland the respondent turned southwards with Mr. Cowan, and F the years 1913 and 1914 saw her settled in Kenley, Surrey, and there installed, so far as the outside world could judge, as the lawful wedded wife of Mr. Cowan. In 1914, however, there came into the respondent's life a young man—younger and considerably less experienced than herself, named Geoffrey Square. The respondent and Mr. Square became deeply enamoured of one another, and the respondent announced to Mr. Square that she was not the wife, but only the mistress, of Mr. Cowan. On May 15, 1915, Mr. G Square married the respondent at the register office of Thanet, and it is this marriage which Mr. Square is now seeking to be declared void upon the ground of the previous marriage of the respondent to Mr. Cowan.

This marriage in 1915 was kept secret by the parties from Mr. Cowan until 1920, and during the intervening five years the respondent appears to have played the part of wife to both Mr. Cowan and Mr. Square intermittently. This difficult and exacting existence H was rendered possible by the fact that Mr. Cowan was seldom in England, and then only for short periods of military leave. Matters came to a head early in 1920 when Mr. Cowan met the respondent in Edinburgh with the intention of inducing her to join him in his military service upon the Rhine. At an extraordinary and somewhat dramatic interview in St. George's-square, Edinburgh, Mr. Square and the respondent informed Mr. Cowan that they were married, and so much did they fear the reaction of this intelli- I gence upon Mr. Cowan that they took the precaution of removing his revolver from him before imparting the news. This piquant detail is not without importance in considering the degree of seriousness with which Mr. Cowan regarded, and the respondent knew that he regarded, his Scottish marriage. Instead, however, of the apprehended violence, Mr. Cowan took a much more sensible step, and on Jan. 21, 1920, filed a petition in this court for divorce from his marriage in the Isle of Arran, citing Mr. Square as co-respondent on the ground of the bigamous marriage of the respondent with Mr. Square in Thanet and their consequent adultery.

The respondent, faced by this serious charge, sought legal aid in Scotland, and proceeded at once to commence an action in the Scottish courts for a "declaration of putting to silence" Mr. Cowan on the subject of the Scottish marriage. This is broadly the equivalent of the jactitation suit known to English law. The respondent then sought and obtained from the English Divorce Court a stay of the proceedings which Mr. Cowan had commenced against her, on the ground of lis alibi pendens. As the year 1920 advanced Mr. Cowan found himself in a very unenviable position. He was faced with Scottish proceedings in which he was unable to produce any documentary evidence of his irregular Scottish marriage. The document witnessed by the postmaster had been lost for ever at Tarbet, and the other two documents, which have been produced before me, had been deposited in a bank on June 30, 1917. It is quite certain that this very valuable evidence of his Scottish marriage was not in the possession of Mr. Cowan at the crucial moment in 1920. By the adroit manœuvre of the other side he was placed in a most difficult position. At the best he could only hope to establish at considerable cost, and in the face of determined opposition, some of the facts of his residence in the Isle of Arran and subsequently at Kenley. His English petition was stayed, and he was faced with the possibility of being saddled with two sets of costs out of the resources of a serving officer in the army. It is not surprising to learn that he took steps to withdraw as best he might from a most unpleasant position.

A joint minute, bearing no date, so far as I can ascertain, but clearly of a date prior to June 29, 1920, was drawn up between the parties in the Scottish proceedings, whereby Mr. Cowan withdrew his defence and admitted that no marriage either by consent de presenti or by habit and repute or otherwise took place between the parties. Clause 5 of the minute was in these terms:

> "That both parties agree to undertake in the future not to maintain that a marriage has at any time subsisted between them."

The minute was signed not only by the respondent and Mr. Cowan and their respective counsel, but also by Mr. Square. The latter had been made a party to the proceedings both as curator and administrator of his wife, and also, as expressed in the title of the action, "for his own interest in the premises." It is at least doubtful, however, in view of the wording of cl. 5 whether Mr. Square could be said to have done more than approve this clause, since the wording can hardly be said to bind him as to non-assertion of a marriage to which he was certainly not a party. In accordance with the agreement in the minute the court, on June 29, 1920, dismissed the action, and it is important to observe, on the unchallenged evidence of a member of the Scots Bar, that this formality conferred no judicial force upon the agreement such as could have founded an estoppel by judgment. The dismissal by the court amounted to nothing more than a discontinuance by leave without the determination of any issue. Mr. Cowan also discontinued, in accordance with the agreement between the parties, his petition for divorce in England, and since he was left by the agreement to pay his own expenses in the English courts and £21 towards the respondent's legal expenses as well, the respondent had no reason to complain of the result of her first encounter with the law. At a comparatively small cost to herself she had defeated Mr. Cowan's petition for divorce, had thrust behind her an ugly threat of a possible prosecution for bigamy, and was free to pursue her future with the man of her choice.

Mr. Cowan, for his part, being then satisfied that he was not married to the respondent, contracted a marriage on Jan. 7, 1921, with a widow named Mrs. Ada Youell. It is this marriage of parties now known as Mr. and Mrs. Cowan which forms the subject of the second petition for nullity with which the present litigation is concerned.

The respondent continued for some years to live happily with Mr. Geoffrey Square. But by the year 1929 he seems to have become tired of her companionship and was carrying on a correspondence of an amatory nature with another woman. It is clear from this correspondence that he had at least contemplated divorce from the respondent about this time, and this circumstance again points strongly against knowledge on the part of Mr. Square of the existence of the documents still reposing in the bank, which would have enabled him to obtain the desired release by an easier road than divorce.

In November, 1933, at a time when I gather that the respondent and Mr. Square had become still further estranged, Mr. Square closed his account at the bank and asked for a return of all the effects which the bank were holding on his behalf, with the result that the documents from the Isle of Arran were sent to him on Nov. 13, 1933, and on June 4, 1934, he filed a petition for nullity on the ground of the respondent's Scottish marriage to Mr. Cowan.

On behalf of the respondent it was argued, first, that there was no Scottish marriage, and, secondly, that, if there was a marriage, Mr. Square could not be heard to assert it, because he was estopped by his conduct towards the respondent from asserting a fact which he has already formally denied by pleas both in this court and in the court in Scotland, as also by living with her as her husband for five years in secret, and openly for another fourteen years.

On the question of the Scottish marriage, I can entertain no doubt whatever. I had interesting evidence from two natives of the Isle of Arran which I need not detail further than to say that they established beyond question the residence of the respondent and Mr. Cowan in that island for all periods material to the marriage. I may, perhaps, be forgiven for saying that their appearance and personalities caused me a mild disappointment. For many weeks prior to this case I had been apprised of their coming by applications which foreshadowed a considerable movement of wild clansmen from the far west. I do not say that I had actually been led to expect or would have welcomed the appearance in this court of a shaggy horde of tribesmen such as the wild Macdonalds whom Montrose so often led to victory; but, after so much heralding, two staid Scotsmen came to me as something in the nature of an anti-climax. Their costumes were almost painfully prosaic, their speech was not noticeably Doric, and I judged that they would be more interested in the fluctuations of the tourist market than in any operations which could be performed with claymore and targe.

Upon the material point as regards the respondent's state of mind when she signed the marriage document in Arran, I find on her evidence and that of Cowan, that she intended to sign it knowing that it would constitute a Scottish marriage, and making no mental reservation other than this, that she was a little sorry that she had been induced to do it by Mr. Cowan, and retained a faint hope that, if it were ever expedient or necessary, she might be able to disavow it on the ground that it had not received subsequent publication or approval at the hand of the sheriff. Although she realised that she was locking the door, she had a rather nebulous idea that she was not throwing away the key.

It is a feature of this class of marriage that one is bound to have regard to all the surrounding circumstances, including the conduct of the parties before and after the alleged marriage de præsenti in verbis, to interpret and weigh the validity of the marriage. One of these parties, the respondent, had a Scottish domicil. At the time of the marriage they had resided together in Scotland for upwards of twenty-one days, and were living together as Mr. and Mrs. Cowan, a reputed husband and wife. In the Isle of Arran they passed for and were accepted as husband and wife. During the remainder of their stay in Scotland and for more than two years following in Kenley, they continued to live and were received by their social equals as man and wife. Indeed, it is not until Mr. Square came into their lives that there was any suggestion on the part of the respondent that she did not accept to the full the position which she, a woman of full age and considerable experience, had openly contracted to take in the Isle of Arran.

On the question of mental reservation, even in a sense far wider than any which I could possibly attribute to the respondent, there is a clear and impressive passage from the judgment of LORD STOWELL in *Dalrymple* v. *Dalrymple* (1) (2 Hag. Con. at p. 107), adopted and emphasised by LORD WATSON in the *Dysart Peerage Case* (2) (6 App. Cas. at p. 543):

> "Surely it cannot be represented as the law of any civilised country that in such a transaction a man shall use serious words, expressive of serious intentions, and shall yet be afterwards at liberty to aver a private intention, reserved in his own breast, to avoid a contract which was differently understood by the party with whom he contracted."

This, as laid down by LORD WATSON, is the law of Scotland, which I must accept as a fact.

The remaining point concerns the estoppel. When the facts are viewed as a whole A they are far from supporting an estoppel. The estoppel suggested is in pais, and the first step can be stated with some force against Mr. Square. In the English proceedings, commenced by Mr. Cowan in 1920, Mr. Square put in a plea to the effect that the respondent was not married in Scotland, and in the Scottish proceedings, to which he was technically at least a party, he also denied the marriage. He is to-day asserting the reverse, and grounding a suit for nullity upon the very fact which he denied in 1920. B On this aspect of the matter it is urged on his behalf that from 1915 until 1933 he did not know of the documents signed in Arran, but one can have little doubt that, had he known of them, even in 1920, he would equally have denied the Scottish marriage. But I do not think that this knowledge or ignorance of the existence of these documents, or the question whether his conduct towards the respondent is blameworthy or not is in any way decisive of the point of estoppel. C

Counsel for the respondent relied on the well-known classical statement of LORD DENMAN, C.J., as to estoppel in *Pickard* v. *Sears* (3) (6 A. & E. at p. 474):

> "But the rule of law is clear that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." D

This passage was cited and approved by BARON PARKE in *Freeman* v. *Cooke* (4) (18 L.J.Ex. at p. 119). I have also refreshed my memory of the admirable exposition of the law on the subject contained in the judgment of CHANNELL, J., in *Compania Naviera Vasconzada* v. *Churchill and Sim* (5). To my thinking there is no clearer and more compendious statement of the law concerning this rather difficult rule of evidence than E that which recently fell from LORD RUSSELL OF KILLOWEN in the case in the Privy Council of *Nippon Menkwa Kabushiki Kaisha* v. *Dawson's Bank, Ltd.* LORD RUSSELL says (51 Lloyd's List Rep. at p. 150):

> "Estoppel is not a cause of action. It may . . . assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action on . . . by preventing a defendant from F asserting the existence of some fact the existence of which would destroy the cause of action. It is a rule of evidence which comes into operation if (*a*) a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or someone on his behalf; (*b*) with the intention that the plaintiff should act upon the faith of the statement; and (*c*) the plaintiff does act upon the faith of the statement." G

There are thus three conditions necessary to bring the rule into play.

Applying this test to the present case it is difficult to see how any one of the conditions can be said to be here fulfilled. It is true that Mr. Square himself made the statement quite categorically that the Scottish marriage had not taken place—but he never made it to the respondent. Whatever his knowledge or belief may have been at any moment, he was certainly never in a position to inform, still less to mislead, the respondent, upon H this subject. Her knowledge of the facts must at all times have been greater than his. The fallacy lies in supposing that because he may have led her to believe that he would always act in a certain way he cannot now be allowed to act differently. A volte face of this character may open a man to grave reproach, possibly even to some kind of action for breach of promise or contract, though I do not pretend to see how such an action could be laid, but there is no attempted change of any statement of fact which I Mr. Square made to the respondent.

If one looks at the second and third conditions laid down by LORD RUSSELL, the matter becomes clearer still. Mr. Square did not make the statement which he made in his plea to the English proceedings or elsewhere with the intention that the respondent should act on the faith of the statement. The respondent was at the same time making the same statement upon her own initiative for a common purpose. If two people with the same sources of information assert the same truth, or agree to assert the same falsehood, at the same time, I cannot see how either can be estopped as against the other from asserting differently at a later time. When, as in this case, the party claiming the estoppel had in fact better information than the other party, the case would seem to be a fortiori.

It has not been suggested that the respondent relied in the least upon what Mr. Square was saying in 1920 about the Scottish marriage. She was relying upon her own knowledge and her own statements about the happenings in Arran, in which she took part and Mr. Square did not, and though she might have acted differently if she had not thought that Mr. Square intended to stand by her, there was and could be no fact asserted by Mr. Square upon the faith of which she acted to her detriment. Although, therefore, it may be right to extend some measure of sympathy to the respondent, and it may be difficult to admire the conduct of Mr. Square, there is no case here of an estoppel. Counsel for the petition was prepared to argue that there could never be an estoppel to condition or decide matrimonial relations. Parties cannot, he averred, be married by estoppel. They are either married or they are not, and a rule of evidence cannot be allowed to interfere with a question of status which concerns not only the parties themselves but also the State. It may be that the question is as important and as difficult as he suggests, but for the reasons which I have given I do not think that it arises here.

Decrees nisi of nullity.

Solicitors: *Withers & Co.*; *Durrant Cooper & Hambling*; *Tippetts.*

[*Reported by* WILLIAM LATEY, ESQ., *Barrister-at-Law.*]

Re WILKS. KEEFER *v.* WILKS

[CHANCERY DIVISION (Farwell, J.), April 11, 1935]

[Reported [1935] Ch. 645; 104 L.J.Ch. 297; 153 L.T. 255; 51 T.L.R. 489]

Intestacy—Sale by personal representatives—Postponement—Intestate domiciled abroad—Postponement impossible under law of domicil—Administration of Estates Act, 1925 (15 & 16 *Geo.* 5, *c.* 23), *s.* 33 (1).

The deceased, who was domiciled in Ontario, Canada, and died in July, 1934, owned property in Canada, United States of America, France and England. He by his will dealt with the property in all those countries except England. Part of the property in England consisted of a block of shares in a private company. Letters of administration were taken out in England in respect of the English property, and the administrators desired to postpone the sale of the shares. According to the law of Ontario the sale of that portion of the shares to which the deceased's infant children were entitled could not be postponed.

Held: the English administrators were entitled to exercise the power to postpone given to them by s. 33 (1) of the Administration of Estates Act, 1925, over the assets in England until they got a good discharge for the money in their hands from the persons who were beneficially entitled to it.

Notes. As to administration of the residuary estate on intestacy, see 16 HALSBURY'S LAWS (3rd Edn.) 390 et seq., and for cases, see 24 DIGEST 564 et seq. For Administration of Estates Act, 1925, see 9 HALSBURY'S STATUTES (2nd Edn.) 718.

Adjourned Summons.

The facts appear in the headnote and the judgment of FARWELL, J.

Greenland for the plaintiff, one of the English administrators.

R. S. B. Best for the deceased's widow.

Geoffrey Cross for the deceased's infant children.

FARWELL, J.—This summons raises a curious question which seems at present to A
be free from authority as to the powers of administrators in this country over property in England of persons who died domiciled abroad.

The deceased was possessed of property in various parts of the world, and was admittedly domiciled in Ontario, Canada. He left wills dealing with his property abroad, but he omitted to make a will dealing with his English estate, and, accordingly, letters of administration have been granted to the plaintiff and the first defendant in B
this country. Their duty is to administer the estate according to the law of this country; but in distributing the estate among the beneficiaries the rights of the parties must be governed by the law of the domicil. In the present case the testator's property in this country consisted, among other things, of a considerable holding of shares in a private company. The shares are by no means readily saleable and the legal personal representatives are anxious, if they can properly do so, to postpone the sale of the shares for C
the present. The persons entitled to the testator's property in this country, according to the law of Ontario, are the widow, who is entitled to one-third, and the children, all of whom are infants. According to the law of the domicil it would not be possible for the administrators in Ontario to retain these shares on behalf of the infants. They would be bound, according to that law, to sell them at once. If, therefore, having once paid all the debts and other administration expenses the administrators in this country D
have ceased to have any administrative duties beyond distributing the property among the persons entitled according to the law of Ontario, it must follow that the rights of those parties must be regulated by the law of the domicil, in which case these shares must be sold.

The question, therefore, is at what point the administrators cease to administer the estate in this country and become trustees for the purpose of distributing the estate E
among the persons interested. So long as they are performing the duties of administrators their powers and rights are to be found in the Administration of Estates Act, 1925. If, on the other hand, their only duty is to distribute the estate among the persons entitled, according to the law of the domicil, then the powers which are given to them as administrators under the Act can no longer avail. Part III of the Administration of Estates Act, 1925, consisting of ss. 32 to 44, is headed: "Administration of assets," and F
Part IV of the Act is headed "Distribution of residuary estate." So that it would look as though the intention of the legislature was to include in Part III, all those duties which fall to an administrator, and in Part IV to deal with the rights of the parties as to distribution of the assets after the administration has been completed. In Part III, which is the part which deals with the administration of assets, s. 33 (1) provides:

G

> "On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives—(*a*) as to the real estate upon trust to sell the same; and (*b*) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money, with power to postpone such sale and conversion for such a period as the personal representatives, without being liable to account, may think proper, and so that any reversionary interest be not sold until it falls into possession. . . ." H

Subsection (2) provides:

> "Out of the net money to arise from the sale and conversion of such real and personal estate (after payment of costs), and out of the ready money of the deceased (so far as not disposed of by his will, if any), the personal representative shall pay all such funeral, testamentary and administration expenses, debts and other liabilities I
> as are properly payable thereout. . . ."

By sub-s. (3):

> "During the minority of any beneficiary or the subsistence of any life interest and pending the distribution of the whole or any part of the estate of the deceased, the personal representatives may invest the residue of the said money, or so much thereof as may not have been distributed, in any investments for the time being authorised by statute for the investment of trust money, with power, at the dis-

> cretion of the personal representatives, to change such investments for others of a like nature."

By sub-s. (4):

> "The residue of the said money and any investments for the time being representing the same, including (but without prejudice to the trust for sale) any part of the estate of the deceased which may be retained unsold and is not required for the administration purposes aforesaid, is in this Act referred to as 'the residuary estate of the intestate.'"

The other sections in that part of the Act deal with other matters in connection with the administration of the estate. Section 42 (1) provides:

> "Where an infant is absolutely entitled under the will or on the intestacy of a person dying before or after the commencement of this Act (in this subsection called 'the deceased') to a devise or legacy or to the residue of the estate of the deceased, or any share therein, and such devise, legacy, residue or share is not under the will, if any, of the deceased, devised or bequeathed to trustees for the infant, the personal representatives of the deceased may appoint a trust corporation or two or more individuals not exceeding four (whether or not including the personal representatives or one or more of the personal representatives), to be the trustee or trustees of such devise, legacy, residue or share for the infant, and to be trustees of any land devised. . . ."

It is noticeable that that section appears to deal with a case of an infant becoming absolutely entitled on an intestacy of a person dying after the Act of 1925. If that section deals only with persons domiciled in this country, it seems to be a curious provision, because under the Act it is no longer possible for an infant to become absolutely entitled on the intestacy of a person domiciled in this country, since the Act itself makes an infant's interest contingent upon his attaining twenty-one or marrying. Therefore, it looks as though this section is contemplating an intestacy in the case of a person dying domiciled abroad. Whether that be so or not, and I do not propose to found my judgment on that proposition, it appears to me that this is a matter of administration and that the administrators are entitled to exercise the power of postponement which is given them by the Act. They have in their hands money which, no doubt, is the property of the infants, but in respect of which they can get no receipt from the infants because they are still infants. I think that it would be possible for them under s. 42 to appoint a trustee for the infants, and that they could do so as administrators. Equally, in my judgment, it is open to them as administrators to exercise the powers to postpone the sale which they are given by s. 33 (1), and until they can distribute the estate by handing over the proceeds or the property to persons who can give them a good receipt for it they are trustees, but trustees holding the property in their character as administrators and having, therefore, the powers which are given to administrators under s. 33 of the Administration of Estates Act, 1925. The power to postpone given by the Act is a power given to administrators and, in my judgment, it is exercisable over the assets which are in this country until the administrators can get a good discharge for the money in their hands from the persons who are beneficially entitled to it. I propose to make a declaration to that effect.

Declaration accordingly.

Solicitors for all parties: *Freshfields, Leese, & Munns.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

Re WALKER'S SETTLEMENT TRUST. ROYAL EXCHANGE ASSURANCE CORPORATION *v.* WALKER AND OTHERS

[COURT OF APPEAL (Lord Hanworth, M.R., Romer and Maugham, L.JJ.), April 15, 16, 1935]

[Reported [1935] Ch. 567; 104 L.J.Ch. 274; 153 L.T. 66; 51 T.L.R. 389; 79 Sol. Jo. 362]

Company—Amalgamation—Scheme to transfer shares of six companies to holding company—Six companies to continue in business as before subject to control of holding company—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 10 (3) (c).

Trust and Trustee—Powers of trustee—Securities of company subject to trust—Concurrence in scheme for amalgamation of companies—Scheme to transfer shares of six companies to holding company—Six companies to continue in business as before subject to control of holding company—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 10 (3) (c).

A holding company was formed to acquire ninety per cent. of the capital of six existing electricity supply companies, including the W. Co., and of any other similar company. The scheme of acquisition provided inter alia that "the present companies will continue in existence to carry on business as before subject to the control of the board of the new company which would consist wholly or chiefly of the directors drawn from the boards of the existing companies."

£1,125 of the stock of the W. Co. was comprised in a settlement, the trustees of which took out a summons to determine whether the proposed scheme was a "scheme or arrangement . . . for the amalgamation of the W. Co. with another company" in which the trustees were empowered to concur by s. 10 (3) (*c*) of the Trustee Act, 1925.

Held: the proposed scheme was not such an amalgamation because it connoted the continued identity of each separate company and not the blending together of the six companies into one, and, therefore, the trustees had no power to concur therein under s. 10 (3) (*c*).

Dictum of BUCKLEY, J., in *Re South African Supply and Cold Storage Co.* (1), [1904] 2 Ch., at p. 287, explained, approved and applied.

Observations on ways in which an amalgamation within the meaning of s. 10 (3) (*c*) may be carried out.

Notes. The Companies Act, 1929, s. 154 has now been repealed. The corresponding section of the Companies Act, 1948, is s. 208. The passage from BUCKLEY ON COMPANIES referred to in the judgments now appears at p. 589 of the 12th Edition.

Considered: *Re Hayer's Will Trusts, Dobie* v. *National Hospital* (*Board of Governors*), [1953] 2 All E.R. 1242.

As to the power of trustees to concur in an amalgamation, see 33 HALSBURY'S LAWS (2nd Edn.) 241, para. 424, text and note (*e*). As to the meaning of "amalgamation," see 6 HALSBURY'S LAWS (3rd Edn.) 764, para. 1547, and for cases on the subject, see 10 DIGEST (Repl.) 1086, *7511–7512*.

For the Trustee Act, 1925, s. 10 (3) (*c*), see 26 HALSBURY'S STATUTES (2nd Edn.) 68; for the Finance Act, 1927, s. 55 (1), see 21 HALSBURY'S STATUTES (2nd Edn.) 935, and for the Companies Act, 1948, s. 208, see 3 HALSBURY'S STATUTES (2nd Edn.) 627.

Cases referred to:

(1) *Re South African Supply and Cold Storage Co., Wild* v. *The Company*, [1904] 2 Ch. 268; 73 L.J.Ch. 657; 91 L.T. 447; 52 W.R. 649; 12 Mans. 76; 10 Digest (Repl.) 1085, *7508*.

(2) *Wall* v. *London and Northern Assets Corporation*, [1898] 2 Ch. 469; 67 L.J.Ch. 596; 79 L.T. 249; 47 W.R. 219; 14 T.L.R. 547, C.A.; 9 Digest (Repl.) 605, *4012*.

(3) *Murex, Ltd.* v. *Inland Revenue Commissioners*, [1933] 1 K.B. 173; 102 L.J.K.B. 219; 148 L.T. 164; 10 Digest (Repl.) 1102, *7613*.

A (4) *Oswald* v. *Tillotson, Ltd.* v. *Inland Revenue Commissioners*, [1933] 1 K.B. 134; 101 L.J.K.B. 737; 147 L.T. 481; 48 T.L.R. 628, C.A.; Digest Supp.

(5) *Brotex Cellulose Fibres, Ltd.* v. *Inland Revenue Commissioners*, [1933] 1 K.B. 158; 102 L.J.K.B. 211; 148 L.T. 116; Digest Supp.

Summons taken out by the Royal Exchange Assurance, as trustees of a settlement B made by the late Mr. Henry Claude Walker, dated March 8, 1920, to which summons a number of beneficiaries were made respondents.

It raised the question whether a proposed scheme for the transfer to a holding company, the London Associated Electricity Undertakings, Ltd., of the issued capital of, among other electricity companies, the Westminster Electric Supply Corporation, Ltd., was or was not an amalgamation within the meaning of s. 10 (3) (*c*) of the Trustee C Act, 1925, and whether the plaintiffs, as trustees, had power to concur in the scheme and exchange stock of the Westminster company for shares in the holding company. The trustees had considered the scheme and approved it generally in the interests of the beneficiaries.

Section 10 (3) of the Trustee Act, 1925, provides as follows:

> "Where any securities of a company are subject to a trust, the trustees may D concur in any scheme or arrangement—(*a*) for the reconstruction of the company; (*b*) for the sale of all or any part of the property and undertaking of the company to another company; (*c*) for the amalgamation of the company with another company; (*d*) for the release, modification, or variation of any rights, privileges, or liabilities attached to the securities or any of them; in like manner as if they were entitled to such securities beneficially, with power to accept any securities of any E denomination or description of the reconstructed or purchasing or new company in lieu of or in exchange for all or any of the first-mentioned securities. . . ."

Vaisey, K.C., and *W. T. Elverston* for the trustees.

Evershed, K.C., and *N. K. Hutton* for beneficiaries sui juris, contended that the scheme was an "amalgamation" into which the trustees could enter.

F *Harman, K.C.*, and *Gerald Upjohn* for beneficiaries who were infants, or married women restrained from anticipation, argued the contrary.

Cur. adv. vult.

March 5.—**EVE, J.** The plaintiffs are the trustees of a settlement executed by the late Henry Claude Walker on March 8, 1920. The defendants are all the beneficiaries except two who are of full age and resident in Australia. Included in the trust premises G is a sum of £1,125 ordinary stock of the Westminster Electric Supply Corporation, Ltd. A scheme is on foot for the acquisition by a holding company known as London Associated Electricity Undertakings, Ltd., of the preference and ordinary stock and share capital of the Westminster and five other similar companies. On Feb. 8, 1935, the holding company sent to the respective boards of the six companies a detailed statement of the scheme and of the terms on which they were prepared to acquire on or before H April 6, 1935, the £550,000 4½ per cent. cumulative preference stock and the £1,450,000 ordinary stock of the Westminster company. They offered to each ordinary stockholder of the Westminster company one ordinary share of £1 fully paid in exchange for each £1 of ordinary stock held by him in the Westminster company.

In substance, the inducement held out to the shareholders of the Westminster and other five companies for accepting the offer was that the immediate result of acceptance I would be to emancipate them from their position as contributories in a statutory company restricted and confined to and within its statutory powers, and would make them shareholders in a public company formed with objects and endowed by its memorandum of association with powers to embark in enterprises altogether outside the powers of the existing company, but calculated to produce a more satisfactory return in the way of profits on the capital invested.

I shall have to refer by and by to some of the terms of the scheme, but before examining them further it would be more convenient to explain the nature of these proceedings. By sub-s. (3) of s. 10 of the Trustee Act, 1925, it is provided that

> "where any securities of a company are subject to a trust the trustees may concur in any scheme or arrangement: (*a*) for the reconstruction of the company; (*b*) for the sale of all or any part of the property and undertaking of the company to another company; (*c*) for the amalgamation of the company with another company." A

The trustees, finding that the adult beneficiaries were not unanimous on the question whether the offer ought to be accepted or not, and being in doubt themselves whether B the scheme is really one for the amalgamation of the Westminster company with the other five companies within the section referred to, this summons has been issued for the purpose of having it determined by the court whether the scheme is one for amalgamation within the section, and whether the trustees have power under such section to concur in the scheme; and to accept, in exchange for the ordinary shares or stock in the Westminster company, and retain as an authorised investment under the settlement, C such ordinary shares of the holding company as is provided by the scheme.

The question, therefore, in issue is whether the scheme is or is not an amalgamation within the Trustee Act, 1925.

Before embarking on an examination of the scheme itself, reference to the memorandum of association of the holding company shows that it was incorporated on Feb. 2 last, with a nominal capital of £300 and with the object of acquiring not less than D ninety per cent. of the issued share capital of each of the six companies and of any other company, being an authorised undertaker for the supply of electricity within the county of London or of any adjoining or neighbouring county, for such consideration and on such terms and conditions, whether in fully-paid shares or otherwise, as the holding company shall think fit; and of carrying on in all its branches the trade or business of producing, storing, distributing, and supplying electrical energy for all purposes, and E of promoting, supporting, or opposing any Bill or Bills in Parliament for or with a view to improving or dealing with the distribution or supplying of electrical energy in the county of London and elsewhere, and of erecting and maintaining buildings of all descriptions and of promoting companies, lending money for undertaking, carrying on and executing all kinds of financial, commercial, trading, and other operations, together with many other objects not to be found as a general rule in the memoranda of com- F panies whose ordinary shares are regarded as suitable for the investment of trust funds.

The scheme is dated Jan. 30, 1935, and is endorsed as "Holding Company's scheme of merger." So far as I have hitherto referred to it I cannot help thinking that there is little in its conception which accords with the primary meaning attached to the word "amalgamation." The acquisition by the London company of a sufficient number of shares in each of the six companies to give the purchasing company the control of each G company does not involve the conclusion of any bargain by the six companies to bring into a combination their several undertakings and assets or to sink the individuality of each company in a joint adventure.

Nor does the scheme itself disclose anything carrying the matter much further. It provides in para. 2 for the formation of the holding company with the object of acquiring the preference and ordinary capitals of the six companies, subject to its being able to H obtain relief from stamp duty under s. 55 of the Finance Act, 1927, by purchasing ninety per cent. of the ordinary capital of each of the six companies, the whole consideration consisting of fully-paid shares or stock of the holding company. The scheme then sets out particulars of the preference capital of each of the companies and of the terms on which this was to be dealt with. I can pass this over because the applicants are only concerned with the scheme so far as it affects the ordinary stock of the Westminster I company. Para. 6 deals with the price offered for the ordinary capital of each company, and concludes with a statement that the price will be one unit of the holding company's ordinary stock fully paid for each existing ordinary share or stock unit of £1, and that for the purposes of the scheme regard has been had to the true values of the ordinary shares of the companies without regard to the relative market quotations. I do not think I need read any of the paragraphs in full until I come to No. 11. That paragraph is in these terms:

> "The present companies will continue in existence and carry on business as before

> subject to the control of the board of the new company, which will, in the first place, consist wholly or chiefly of directors drawn from the boards of the existing companies. Under this unified control efficiency should be improved and economies effected in various directions, e.g., by bulk buying of materials, by centralising office administration, and selling or letting surplus premises."

Paragraph 12 provides for the compensation of directors for whose services there is no further use, and then follows:

> "(13) The new company will not be subject to control by the Electricity Commissioners and will be able to raise capital in any form it may think fit. No doubt, however, the commissioners will require to be satisfied regarding the rate of interest charged by the new company to the constituent companies in respect of any loans made to them out of capital raised by the new company. If desired, the new company can undertake activities other than the business of selling current and apply any profits it makes without restriction. For example, it can take over the business of selling apparatus to consumers. (14) The income of the new company will consist of dividends received on the shares held in the existing companies and any profit it may make from selling apparatus and from other activities. The expenses to be met out of such income will consist of office rent, secretarial and other salaries, directors' fees, and other administrative expenses in so far as they are not recovered by charges made against the constituent companies for managerial and other services. (15) After the scheme has been put into operation the businesses of the constituent companies will be conducted on lines likely to produce the best results for the undertakings as a whole. The effect may be that revenue will be diverted from one company to another, and the position may arise at some future date that one company has a separate profit over the amount required to meet its dividend, while another company has insufficient profits. If, in course of time, it appears that this is likely to happen, the question of an arrangement for the pooling of profits can be considered. There seems to be nothing in the London Electricity (No. 2) Act, 1925, which definitely prohibits such an arrangement, but it would be advisable to obtain the approval of the Electricity Commissioners before bringing it into operation."

This paragraph appears to me to be the only one in which anything like an amalgamation is adumbrated, but it is only a suggestion of something that may be done in the future and has no present application.

That is, I think, all I need read; the concluding paragraph deals with a statutory authority to amalgamate any two or more of the undertakings of any of the companies, subject to the approval of the Electricity Commissioners, but it is not suggested that this holding company's scheme of merger constitutes such an amalgamation, and I come back to the question whether this scheme is an amalgamation within the meaning of the Trustee Act. Speaking for myself, I can see nothing in it which connotes such a blending together in whole or in part of two or more separate undertakings as to amalgamate or fuse them into one. However, it has been held in these Courts (in *Re South African Supply and Cold Storage Co.* (1)) that there is no very precise meaning to be given to the words "amalgamate" or "amalgamation," that neither word has any definite legal meaning, that they are commercial and not legal terms, and that even as commercial terms they have no exact definite meaning. So be it, but in the very case in which these conclusions were authoritatively laid down the learned judge went on to express an opinion that an amalgamation must involve certain characteristics. There is no authority to which I have been referred wherein any doubt has been cast on the judgment pronounced by BUCKLEY, J., in *Re South African Supply and Cold Storage Co.* (1), and I think I am entitled to assume that the legislature, when conferring this important power on trustees to concur in a scheme for the amalgamation of one company with another, must have contemplated an amalgamation embodying the characteristics enumerated by BUCKLEY, J. The present scheme does not, in my opinion, involve those elements which he regarded as essential for an amalgamation. BUCKLEY, J., said (91 L.T. at p. 452):

> "Now what is an amalgamation? An amalgamation involves, I think, a different idea. There you must have the rolling, somehow or other, of two concerns into one. You must weld two things together and arrive at an amalgam—a blending of two undertakings. It does not necessarily follow that the whole of the two undertakings should pass—substantially they would pass—nor need all the corporators be parties, although substantially all must be parties. The difference between reconstruction and amalgamation is that in the latter is involved the blending of two concerns one with the other, and not merely the continuance of one concern."

In my opinion, I ought to answer the question raised in this summons in the negative, and I so do. Costs will be paid out of the capital of the estate.

The beneficiaries sui juris appealed.

LORD HANWORTH, M.R.—This case raises an interesting point, and one in which we must take a little trouble to explain the reasons why this court is in agreement with EVE, J.

I am taking some of the facts from his judgment, where he states them very accurately: [His lordship then read the first two paragraphs of the judgment of EVE, J., supra.]

I now turn from that statement to take some excerpts from the scheme, which is called "Holding company scheme of merger." The scheme has been prepared, it said,

> "in accordance with instructions received from the Central London Electricity Distribution Committee, 1934, Ltd. Only the above-named six companies are concerned in the first instance, but the scheme has been drafted in such a way as to facilitate the inclusion of other companies later on. Particulars of the debenture and share capitals of the six companies are given in a statement attached hereto. (2) A new company will be formed to acquire the preference and ordinary capitals of the companies, the object of acquiring the preference capitals being to obtain the relief from stamp duty granted, subject to certain conditions, by s. 55 of the Finance Act, 1927, in a case where not less than ninety per cent. of the total issued share capital of an existing company is purchased. The issued ordinary capital of the Chelsea company represents more than ninety per cent. of its total issued share capital, so that in the case of that company it is not absolutely necessary for the new company to acquire the preference capital, but for the sake of uniformity it is suggested that it shall do so. From inquiries made by Messrs. Slaughter and May at Somerset House it has been ascertained that in order to obtain relief from stamp duty it will be necessary for the new company to acquire the ordinary capital of the city undertaking of the Charing Cross company as well as that of the west end undertakings, notwithstanding the fact that the latter own the city undertaking's ordinary capital through the medium of the Suppliers' Construction Co., Ltd. [now come important statements:] It will be unnecessary for the new company to acquire any of the debenture capitals. (3) The whole of the consideration payable by the new company will consist of its own stocks, issued as fully paid, thus complying with the condition in s. 55 of the Finance Act, 1927, that in order to obtain relief from stamp duty not less than ninety per cent. of the consideration must consist of shares or stock of the transferee company."

Then it sets out the exact position of the companies and of their stocks, and it says this in para. 11:

> "The present companies will continue in existence and carry on business as before subject to the control of the board of the new company which will in the first place consist wholly or chiefly of directors drawn from the boards of the existing companies. Under this unified control, efficiency should be improved and economies effected in various directions, e.g., by bulk buying of materials, by centralising office administration and selling or letting surplus premises."

I do not think I need read more of the scheme.

That being the offer that is made to the members of these several companies, a summons was taken out, asking that it may be determined

A

> "whether the proposed scheme for the transfer to London Associated Electricity Undertakings, Ltd., of the issued capital of"

inter alia Westminster Electric Supply Corporation, Ltd., in which the trustees are holders of shares

> "is a scheme for the amalgamation of the companies parties thereto within the meaning of s. 10 (3) of the Trustee Act, 1925, and whether, accordingly, the plaintiffs as such trustees as aforesaid have power under such section to concur in the said scheme and to accept in lieu of or in exchange for the ordinary stock of the said Westminster Electric Supply Corporation, Ltd., now held by them as such trustees as aforesaid and retain as an authorised investment under the said indenture of settlement such ordinary shares or ordinary stock of the said London Associated Electricity Undertakings, Ltd., as provided by the said scheme."

B

C

When the matter came before EVE, J., on that summons, he came to the conclusion that the scheme was not an amalgamation within the Trustee Act. He held this:

> "The acquisition by the London company of a sufficient number of shares in each of the six companies to give the purchasing company the control of each company, does not involve the conclusion of any bargain by the six companies to bring into a combination their several undertakings and assets or to sink the individuality of each company in a joint adventure."

D

It will be observed that the purpose, as indicated in the scheme, is the hoped-for unified control which would promote efficiency in various directions, but the identity of each company is maintained, and the debenture capital of each company will remain the loan to each individual company and the responsibility of each individual company. In effect, the new holding company will be a supplying company, but the old companies will have to exercise the powers which are given to them under the statutes, and they will still remain separate entities.

E

That being so, I turn to look at s. 10 (3), which is the section we have to construe:

> "Where any securities of a company are subject to a trust, the trustees may concur in any scheme or arrangement: (*a*) for the reconstruction of the company; (*b*) for the sale of all or any part of the property and undertaking of the company to another company; (*c*) for the amalgamation of the company with another company; (*d*) for the release, modification, or variation of any rights, privileges or liabilities attached to the securities or any of them; in like manner as if they were entitled to such securities beneficially, with power to accept any securities of any denomination or description of the reconstructed or purchasing or new company in lieu of or in exchange for all or any of the first-mentioned securities."

F

G

Examining that section itself, it would seem that there are four possibilities contemplated, the reconstruction of a company, the sale of the property or undertaking of a company to another company, what is called the amalgamation, not of undertakings, but in contrast with the previous sub-cl. (*b*), it is the amalgamation of the company with another company; then (*d*) is for the release, modification, or variation of any rights, privileges and liabilities, which would include voting power and the like. The contemplated cases in which these changes occur, and in respect of which the trustees are empowered to concur and to accept new securities in place of the old, are three: they may accept any securities of any denomination of the "reconstructed" company (that refers to (*a*)), or "purchasing" (that refers to (*b*)), "or new company in lieu of or in exchange for all or any of the first-mentioned securities"; the "new" company must be appropriated to (*c*), and, so far as it does, it would seem that what was contemplated was an amalgamation of the company with another company by means of a new company. I do not want to stress it or to place too much emphasis upon those words, but one certainly must say this, that there is no indication of what is meant by an amalgamation of the company with another company, except by the method of a new company, although I do not want to say that all amalgamations within the section can only be carried out by the means of a new company. One turns, however, to consider what is the meaning of the word "amalgamation." It has been

H

I

explained by BUCKLEY, J., in *Re South African Supply and Cold Storage Co.* (1) ([1904] A 2 Ch. 287), that the word "amalgamation" has not any definite legal meaning, and that statement has been reinforced in a number of other authorities both before and since. I also think that it is right to bear in mind what was said in *Wall* v. *London and Northern Assets Corporation* (2), namely, that when you are using a word like "amalgamation," you must look at the context in which it is used in order to ascertain its meaning. CHITTY, L.J., in that case ([1898] 2 Ch. at p. 481), says : B

> "I agree that the term has no fixed meaning in point of law. You have to see how the term is used in the particular document that has to be construed."

For my own part, I think it would be impossible to give an exact or definitive interpretation to the meaning of the word "amalgamation." I think one will be able to identify an amalgamation when one sees it, but I hesitate to offer any suggestions of finality as C to its interpretation. I think the better course is to examine each case as it comes, and to determine whether upon the facts of that particular case there is or is not what may pass for and be properly called an amalgamation. It is only thus that one will elucidate what is the meaning of and what are the limits of "amalgamation."

I turn, therefore, to consider the present proposal. It is a proposal which, from the passage I have read from the scheme and the facts, connotes the continued identity D of each separate company, with its board of directors more or less identified with the board of the new company, but not necessarily in every particular the same. Each company still carries its deadweight of debt in the form of its debentures. It is not proposed to dissolve any of the companies. The attraction is that the shareholders of the existing companies may find that in the new company they have got wider facilities and a possibility of more profitable adventures or undertakings or business. E Can one call that an amalgamation? The observations that are made by BUCKLEY, J., in *Re South African Supply and Cold Storage Co., Wild* v. *The Company* (1) are, of course, matters to which one would pay great attention, but can you say that either of these companies is merged in the new one, that its identity has been lost, and that there is a unification of the one company with another? The facts seem to absolutely contradict any such statement; and while one may give full weight to the prospect of unified F control and improved efficiency by means of that unified control, still there is nothing like an amalgam made of the one company with the other. Further, I would point out once more, for the purposes of emphasis, that in this sub-cl. (*c*) we are considering the amalgamation of a company with another company, and not considering what is by contradistinction referred to in sub-cl. (*b*), the unification or the sale of the property or undertaking by one company to another. There is a definite indication in those G clauses that the undertaking and property are considered apart from the company; and when one comes to look at it, one is talking of the amalgamation of company with company, and not the amalgamation of undertaking with undertaking, or property with property.

For these reasons it appears to me, as EVE, J., put it, it

> "does not involve the conclusion of any bargain by the six companies to bring into H a combination their several undertakings and assets or to sink the individuality of each company in a joint adventure."

It has been suggested that before you can find amalgamation you must find that provision is made for the winding-up of the transferring company as no longer required to be maintained. I do not wish to accept that test. In some cases I do not think that may be necessary. I do not think it will be a good touchstone to apply, but upon the facts I of the present case it appears to me that there is no amalgamation, for the reasons which I have given, and therefore that EVE, J., determined the question put to him rightly, and the appeal must be dismissed.

ROMER, L.J.—I also think that EVE, J., arrived at a correct conclusion. In my opinion the scheme which we have to consider in this case cannot properly be described as a scheme of amalgamation. It does not result, in my opinion, either in an amalgamation of the six corporations, or result in an amalgamation of the six undertakings. I agree with what was said by Buckley, J., in *Re South African Supply and Cold Storage Co., Wild* v. *The Company.* He said ([1904] 2 Ch. at p. 287):

> "Now what is an amalgamation? An amalgamation involves, I think, a different idea. There you must have the rolling, somehow or other, of two concerns into one. You must weld two things together and arrive at an amalgam—a blending of two undertakings."

It must not be thought from that statement of Buckley, J., that he in any way thought that an amalgamation of two undertakings was the same as an amalgamation of two companies. I think he was only intending to refer to the fact that, as the result of an amalgamation proper of two companies, there must be an amalgamation of the two undertakings. It is quite obvious you can have an amalgamation of two undertakings, that is to say, the undertakings of two companies without there being an amalgamation of the two companies. If one company sells its undertaking to another for cash, and the new purchasing company thenceforward carries on its own undertaking and the purchased undertaking as one, without question there has been an amalgamation of the two undertakings. There has not been in that case an amalgamation of the two companies. I find some definition, if it be a definition, of "amalgamation" in Buckley on Companies (11th Edn.), p. 487. It is a definition which, so far as it is a definition, I should like to adopt as my own; it is there stated as follows:

> "The word 'amalgamation' has no definite legal meaning. It contemplates a state of things under which two companies are so joined as to form a third entity, or one company is absorbed into and blended with another company."

Two companies can amalgamate, as one knows, in either of two ways: Company A can sell its business and undertaking to company B in consideration of shares in company B. Company A then goes into liquidation and distributes the shares in company B amongst its shareholders, and the result of it all is that, whereas there were previously two corporations, A and B, corporation A has now become merged in B. There is only one corporation carrying on one undertaking with one set of shareholders. Another way in which it is frequently done is that a third company, a new company, is formed, company C, and both the companies A and B sell their undertakings to company C in consideration of shares in undertaking C. The shares in A and B are then distributed amongst the shareholders by means of liquidation, and companies A and B cease to exist. As the result of the transaction there is now one corporation C in place of the former corporations A and B. There is one set of shareholders instead of two sets of shareholders, one undertaking instead of two undertakings.

I need not go through the scheme in the present case. It is quite obvious from what Lord Hanworth, M.R., has said that as the result of that scheme there will not in future be one corporation instead of six corporations; there will not be one undertaking instead of six undertakings; there will not be one set of shareholders instead of six sets of shareholders, because each company will continue to carry on its business in its own name, and the shareholders in the six companies will now be different indeed from the shareholders previously existing, but they will be shareholders of six separate companies. There will not be a blending together of all the shareholders in the six companies.

It was said by counsel for the beneficiaries sui juris, and I appreciate the force of his argument, that in the two methods, to which I have referred, of amalgamating two companies, there is a sale, that is to say, one company sells its undertaking, and he says if those be the only two forms of amalgamation I have described, it would be unnecessary for the legislature to refer, in this sub-s. (3) of s. 10, to an amalgamation of the company with another company, in addition to referring to the sale of all or any part of the property and undertaking of the company to another company. There appear to me to be two answers to that. The first is this, that the company may become amalgamated with another company, not by means of a sale, but by means of a purchase. Company A may purchase the assets of company B and the undertaking of company B in consideration of shares in company A, and that would not be covered by the subsection relating to the sale of all or any part of the property and undertaking of the company to another company. It is true that in that case the trustee of shares in company A would not be called upon to take up anything in exchange, any new shares or additional shares, for the shares he already held in company A; but that does not show that such an amalgamation is not within the contemplation of the legislature, because a trustee is given express power in this subsection to concur, amongst other things, in the release, modification, or variation of any rights, privileges or liabilities attached to the securities, or any of them, and his concurrence in that would not result in any new shares or securities being acquired. The truth of the matter is that the power given to the trustees to concur includes a power of concurring by means of an exercise of the trustees' voting power. Therefore, if a scheme be put forward for the amalgamation of a company, in which a trustee holds shares, with another company, to be carried out by means of a purchase of the company in which the trustee holds shares, the trustee may concur under the powers conferred upon him by this section by voting in favour of the scheme put forward.

I think there is this further to be observed, that an amalgamation may be carried out by means of a purchase by one company of all the shares in another company with which it is proposed to amalgamate. The purchase of the shares does not, by itself, result in an amalgamation. It may be a step towards amalgamation, and amalgamation would, in such a case, eventually be brought about by the first company being put into liquidation by the company which has bought all its shares, or the large majority of its shares, and by the acquisition by the purchasing company of the undertaking of the first company. In that event there would be an amalgamation of the two companies; there would be an amalgamation of the two undertakings. There would then be one set of shareholders and not two sets. I think that that consideration is the answer also to the argument which was based upon the Finance Act of 1927. It is to be observed that s. 55 (1) begins as follows, and is governed by these words:

> "If in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any companies it is shown to the satisfaction of the commissioners of inland revenue that there exist the following conditions, that is to say . . . (*b*) that the company (in this section referred to as 'the transferee company') is to be registered or has been incorporated or has increased its capital with a view to the acquisition either of the undertaking of, or of not less than ninety per cent. of the issued share capital of, any particular existing company";

then, if certain other conditions are shown, the relief in the matter of stamp duty is provided. If an acquisition by one company of all the shares in another company was equivalent to an amalgamation in the view of the legislature, the legislature certainly would not have said in this section:

> "If in connection with a scheme for the . . . amalgamation of any companies it is shown";

it would have contented itself, I should have thought, with saying: "If it is shown," but it continues in the way the section does continue.

For these reasons, it seems to me that here one cannot say that there has been an amalgamation. It seems to me that the scheme here lacks the really essential qualities of amalgamation, the essential quality being that which I have mentioned, of there being one corporation in the future instead of the six corporations, one undertaking instead of the six undertakings, one body of shareholders instead of the six bodies of shareholders, and I agree that this appeal fails.

MAUGHAM, L.J.—I am of the same opinion. The question is the apparently simple question, at first sight, as to the true construction of s. 10 (3) (*c*) of the Trustee Act, 1925. The Act is now some ten years old, which one is sometimes tempted to forget, and there have been quite a number of statutes passed which are said to show that the legislature had taken a rather wide view of the meaning of the words in the subsection to which I have referred, namely, the words "for the amalgamation of the company with another company." Strictly speaking, of course, you cannot construe that section by reference to anything in the Finance Act of 1927, or the Companies Act of 1929, but still, I think, one may fairly look to see how the legislature does use the word "amalgamation," even in a later Act than the Trustee Act of 1925.

Primâ facie I think it must be accepted, at any rate, it is, in my opinion, correct to say, that in the year 1925 "amalgamation" had, generally speaking, the meaning which is to be found in Buckley on Companies (11th Edn.), p. 487. I accept, like my brother Romer, the view that the word "amalgamation" has no definite legal meaning; and I also accept the view that it contemplates a state of things under which two companies are so joined as to form a third entity, or one company is absorbed into and blended with another company. If that be right, the question here would be whether there is, in this case, a scheme or arrangement for the amalgamation of the company, in which the trustees have their interests with another company or companies; and you ask yourself whether, accepting the statement which I have read, there is anything to show that two companies are so joined as to form a third entity, or one company is absorbed into and blended with another. The answer is clearly that there is not.

I need not repeat the facts stated by Lord Hanworth, M.R.; it is sufficient to summarise the position by observing that the undertakings of the five companies are to be continued. Their liabilities will still remain the liabilities of the separate undertakings, and the debenture holders' position in the various companies is not to be affected. There will continue to be separate boards of directors and, I think, there is really no possibility of saying, in accurate language, that there is a blending of any undertakings at all. What may be described as amalgamated or blending are the interests of the shareholders in the various concerns; in other words, I think, without gross inaccuracy, this might be described as an amalgamation quoad, the interests of the shareholders. However, the section we are dealing with speaks of a scheme for the amalgamation of the company with another company. On the view I take as to the meaning of the word, there is nothing of that kind; but I agree with the earnest argument that has been addressed to us on behalf of the beneficiaries sui juris, that it might be that there could be found something in the general frame, or the context, of s. 10 (3) of the Trustee Act which might lead the court to give to the word in sub-s. (3) (*c*) a popular and, as I think, a somewhat inaccurate meaning.

The first point and, perhaps, I may say, the main point, upon which counsel urges us to take that course, is founded upon the fact that the trustees are being authorised under the subsection to concur in a scheme or arrangement (*a*) for the reconstruction of the company; (*b*) for the sale of all or any part of the property and undertaking of the company to another company; and (*c*), the material subsection, "for the amalgamation of the company with another company." He says that if you read that as combined with the words that the trustees are to have power

> "to accept any securities of any denomination or description of the reconstructed or purchasing or new company in lieu of or in exchange for all or any of the first-mentioned securities,"

you will find that "amalgamation" must have the more general meaning which he says should be attributed to it. To my mind, there are two answers to that argument. The first is, that I am not sure that (*b*) and (*c*) in the subsection are necessarily exclusive. I think it is quite sufficient to explain (*c*) to say that the draftsman or, to put it in other words, the legislature, may have thought that there were possibly amalgamations such as the section refers to, which would not be properly described as within sub-cl. (*b*), which refers to the sale of all or any part of the property and undertaking of the company to another company. I would observe, though I do not lay much stress upon it, that there might be an amalgamation under s. 154 of the Companies Act, 1929, which would not involve, I think, such a sale as I have mentioned, and yet there would be, by the direction of the court, a dissolution possible without winding up of the transferor company, and provisions for the appropriation by the transferee company of shares and other like interests which are to be allotted or appropriated to or for any person. Apart from that, there are the reasons which my brother Romer has given, and I would add one more: that there might be an amalgamation properly so-called by private Act of Parliament.

Accordingly, I do not myself attribute very much weight to the contention that you will find that the phrase "amalgamation of the company with another company" must necessarily involve the case where shares are to be acquired in the other company by the shareholders in the company which is primarily concerned. I think we have to answer this question: Can an acquisition of shares by a holding company properly be described as an amalgamation of the company whose shares, or a controlling interest therein, are being acquired by the holding company? For my part, I must answer that in the negative. It is material to remember that there is no warrant for limiting sub-cl. (*c*) to a case where there is to be an acquisition of not less than ninety per cent. of the share capital of the company in which the securities are subject to the trust. Apparently, the mere acquiring of a controlling interest would have to be regarded, according to the view of the beneficiaries sui juris, as resulting in an amalgamation. For my part, I do not believe there is any warrant for so wide an extension of the sentence.

In s. 55 of the Finance Act of 1927, a section not too easy to construe and which has been the subject of three decisions—*Murex, Ltd.* v. *Inland Revenue Commissioners* (3); *Oswald Tillotson, Ltd.* v. *Inland Revenue Commissioners* (4); *Brotex Cellulose Fibres, Ltd.* v. *Inland Revenue Commissioners* (5)—language is used which certainly points to the fact that the legislature has used the word "amalgamation" as though it included in that case a scheme for the acquisition of not less than ninety per cent. of the shares to be acquired by the transferee company in the existing company. The section, in other words, upon its true construction, explains quite clearly, or with reasonable clearness, what in the statement of conditions (*a*), (*b*) and (*c*) in sub-s. (1) the legislature is dealing with, and what conditions have to be observed and, I may add, strictly observed, in order that there may be the exemption from stamp duty with which the section is dealing. The argument on behalf of the appellants is, at any rate, double edged, for it would have been quite easy, in s. 10 of the Trustee Act, 1925, to add to the phrase "for the amalgamation of the company with another company" some such words as are to be found in s. 55 (1) (*c*), sub-cl. (2), of the Finance Act, 1927. They are not to be found there.

In the argument for the appellants I do not think it was suggested that the acquisition of shares by a holding company in a single other company can properly be described as an amalgamation of that company with a holding company. What was said was, that if there are a number of subsidiary companies whose shares are being acquired by a holding company, you can then say that each subsidiary is amalgamated with each other subsidiary; but it is to be noted that, although the singular would include the plural, you have to make the subsection we are considering, namely, a scheme "for the amalgamation of the company with another company," apply if there is only a single company which is being amalgamated with the other company. It seems to me impossible to say, if the whole transaction consists of certain shares being acquired by a holding company, the controlling interest, I would assume, being acquired by a holding company in the company where the securities are subject to trust, it can be said that that alone involves an amalgamation.

Accordingly, in my opinion, for the reasons given by my brethren and by EVE, J., it is not possible here to say that the scheme with which we are dealing is one for the amalgamation of the company with another company, and the appeal must fail.

Appeal dismissed.

Solicitors: *Slaughter & May*; *Attenboroughs.*

[*Reported by* A. W. CHASTER, Esq., *and* GEOFFREY P. LANGWORTHY, ESQ., *Barristers-at-Law.*]

CORFIELD *v.* DOLBY

[King's Bench Division (Lord Hewart, C.J., Goddard and Singleton, JJ.), December 18, 1935]

[Reported 154 L.T. 266; 100 J.P. 75; 52 T.L.R. 139; 80 Sol. Jo. 128; 34 L.G.R. 97; 30 Cox, C.C. 341]

Gaming—Lottery—Possession of tickets for sale or distribution—Tickets bought on behalf of syndicate—Tickets held by one member as custodian—No sub-sale among members—Betting and Lotteries Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 58), *s.* 22 (1) (b).

The appellant received from the purchaser a block of forty-eight tickets in a lottery on behalf of a syndicate comprising twenty-one persons, including the appellant. He collected from each member 2s. a week and himself set aside a similar amount weekly, and subsequently paid over the money collected by him to the purchaser of the tickets. The whole of the forty-eight tickets were held by the syndicate on behalf of all the members, each member holding a twenty-first part in the whole of the tickets. No individual member was entitled to any particular ticket or tickets, and any prize won by means of any of the tickets would have been divided equally between the members of the syndicate. The appellant was convicted under s. 22 (1) (b) of the Betting and Lotteries Act, 1934, of having the tickets in his possession for the purpose of sale or distribution.

Held: the members of the syndicate were co-partners in the purchase of the tickets; it was never in their contemplation that there should be a sub-sale of the tickets inter se, but it was contemplated that the appellant should hold all the tickets as custodian or agent on behalf of all the members; and in those circumstances the appellant was not guilty of the offence charged, and the conviction must, accordingly, be quashed.

Notes. As to lotteries, see 18 Halsbury's Laws (3rd Edn.) 238 et seq., and for cases, see 25 Digest 452 et seq. For Betting and Lotteries Act, 1934, see 10 Halsbury's Statutes (2nd Edn.) 785.

Case Stated by Lincolnshire justices.

An information was preferred by the respondent, Police Superintendent Dolby, under s. 22 of the Betting and Lotteries Act, 1934, against the appellant, Charles Corfield, charging the appellant with unlawfully having in his possession, for the purpose of sale or distribution, forty-eight tickets in a lottery, namely, the Irish Free State Hospitals' Sweepstake on the 1935 Derby.

On the hearing of the information the following facts and matters were admitted or proved:—On May 28, 1935, Detective-Sergeant Brewster saw the appellant at Ashby, Scunthorpe, and then and there took possession from him of forty-eight 10s. tickets for the Irish Free State Hospitals' Sweepstake on the 1935 Derby. The tickets were received by the appellant from a Mr. Fred Robertshaw about the end of February or the beginning of March, 1935. The appellant received the tickets for and on behalf of himself and twenty other men, one of whom was Mr. Robertshaw, and they together formed a syndicate known as "One Big Family." The appellant collected from each of the other men in the syndicate 2s. a week and himself set aside a similar weekly amount. Mr. Robertshaw had bought the tickets from a Mr. Britain Petch as agent on behalf of the members of the syndicate, and had received the tickets from Mr. Petch, to whom he paid the price thereof. After receiving the tickets from Mr. Petch, Mr. Robertshaw had handed them over to the appellant in order that the appellant might hold them as custodian and agent for the members of the syndicate, he being the treasurer thereof. The appellant subsequently paid over to Mr. Robertshaw the moneys which had been collected by him from the members of the syndicate in reimbursement of the amount which Mr. Robertshaw had paid to Mr. Petch for the purchase of the tickets. The whole of the forty-eight tickets were held by the syndicate on behalf of all the members thereof. Each of the members had a twenty-first part or share in the whole of the tickets, and no individual member of the syndicate was entitled to any individual ticket or tickets. If any prize had been won by means of any of the tickets, such prize would have been divided equally between the members of the syndicate.

On the part of the appellant it was contended that (i) the tickets were in his possession as custodian on behalf of the members of the syndicate and would have so continued in his possession; (ii) the tickets were not in his possession for the purpose of sale or distribution. On the part of the respondent it was contended that, while it was in order for any individual to have in his possession a ticket or tickets in the sweepstake for himself, one of the objects of the Betting and Lotteries Act, 1934, was to prevent a person having possession of tickets for the purpose of sale or distribution to another person or other persons, as had been done in the present case, and that in any event the appellant had the tickets in his possession for the purpose of distribution.

The justices were of opinion that the weekly collection from the members of the syndicate and the payment of the proceeds over to Mr. Fred Robertshaw was, in effect, a sale of the tickets, notwithstanding the fact that the tickets remained in the possession of one member of the syndicate, and that the appellant was guilty of having the tickets in his possession for the purpose of sale. They also held that the appellant had the tickets in his possession for the purpose of distribution. They, accordingly, convicted the appellant and fined him 10s. and a certain sum for costs.

The appellant appealed to the Divisional Court.

By the Betting and Lotteries Act, 1934, s. 22 (1):

> "Subject to the provisions of this section, every person who in connection with any lottery promoted or proposed to be promoted either in Great Britain or elsewhere . . . (*b*) sells or distributes, or offers or advertises for sale or distribution, or has in his possession for the purpose of sale or distribution, any tickets or chances in the lottery . . . shall be guilty of an offence."

Sandlands, K.C., and *John Neal* for the appellant.

Walker Carter for the respondent.

LORD HEWART, C.J.—In my opinion, this appeal ought to be allowed. [His Lordship stated the facts as set out above, and continued:] The justices came to a wrong conclusion in point of law. There was no evidence that any of the tickets were in the possession of the appellant for the purpose of distribution. On the contrary, what was desired was that there should not be a distribution, but that the tickets should be held as a whole on behalf of all the members of the syndicate. Nor was there, in my opinion, any evidence of a sale by the appellant. There was, undoubtedly, a sale by Petch to Robertshaw, and a purchase by Robertshaw, but purchase is not hit in s. 22 of the Betting and Lotteries Act, 1934, eo nomine. It is impossible to say that what was contemplated was that the appellant should sell any of the tickets or any interest in any ticket to the other members of the syndicate.

The legal view of the position of those members is that they were co-partners in the purchase of the tickets. To use a common expression, they had clubbed together to buy the tickets, and nothing was further from their minds than that the appellant should sell tickets or fractions of tickets to the other members. The intention was that he should hold all the tickets as custodian and agent on behalf of all the members. Although there had been a purchase on behalf of those persons who had clubbed together to buy, it was never in contemplation that there should be a sub-sale inter se. If all had gone together with their money to buy a block of forty-eight tickets, it would not have been suggested that they were selling the tickets to each other. In the present case there was a domestic arrangement by which the same result was produced, and it cannot reasonably be suggested that what was contemplated was a sale by the members inter se.

Counsel for the police has suggested that, if the conviction be quashed, grave consequences may follow. One consequence may be that in the future those who are responsible for the initiation of prosecutions will exercise a little of the ingenuity which is often displayed by those who have to answer prosecutions. For these reasons I am of

A opinion that the conclusion of the justices cannot be supported, and that the appeal must be allowed.

GODDARD, J.—I agree. I cannot see that what was done in the present case amounted to an ingenious evasion of the Act or to taking advantage of a loophole in it. By the Betting and Lotteries Act, 1934, Parliament has made the sale of lottery tickets B unlawful, but has expressly refrained from making the purchase of a ticket in a lottery an offence. If the buying of a ticket by an individual is lawful, the buying of a ticket by two persons jointly is equally lawful, and, if two persons can lawfully buy a ticket jointly, it seems to follow that there can be no reason why any number of persons should not buy jointly with an agreement between themselves that, if a fund comes into existence as a result of the purchase, they should all be entitled to share in it.

C **SINGLETON, J.**—I also think that this appeal should be allowed, but I wish to add that in my opinion that does not mean that the appellant did not commit any offence against the statute. If the information had been framed differently, I think that it is quite possible he would have had no answer on the facts as found.

Appeal allowed.

D Solicitors: *Joynson-Hicks & Co.*, for *R. A. C. Symes & Co.*, Scunthorpe; *Bird & Bird*, for *Sergeant & Collins*, Scunthorpe.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

E

Re YAGERPHONE, LTD.

F [CHANCERY DIVISION (Bennett, J.), January 25, 28, 29, 1935]

[Reported [1935] Ch. 392; 104 L.J.Ch. 156; 152 L.T. 555; 51 T.L.R. 226; 79 Sol. Jo. 162; [1934–5] B. & C.R. 240]

Company—Winding-up—Fraudulent preference—Payment by company of sum of money within three months of liquidation—Repayment by creditor to liquidator— G *Right of debenture holder to money—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 265.

The right to recover a sum of money from a creditor who has been preferred is conferred on the liquidator of a company to benefit the general body of the creditors.

On Jan. 14, 1933, a company issued a debenture to secure a loan of £2,000, it being provided that the moneys secured should become immediately payable if a H distress or execution were levied or issued against any property of the company and were not paid out within seven days. On Jan. 17 the company paid to a creditor £240 11s. 2d. On Jan. 23 another creditor levied execution on the goods of the company. On Jan. 28 the debenture holders demanded payment of the £2,000 secured by the debenture and three days afterwards appointed a receiver. On March 31 the company passed a resolution for voluntary liquidation. The I liquidators claimed from the first-mentioned creditor the £240 11s. 2d. that had been paid to him, alleging that the sum had been paid to him with the intention of preferring him to other creditors. In December, 1933, that creditor paid the £240 11s. 2d. to the liquidators. On a summons taken out by the debenture holders for an order that the £240 11s. 2d. should be paid to the receiver appointed by them,

Held: at the date when the security contained in the debenture crystallised the money was not the property of the company nor property in respect of which it could be said that the company had even a contingent interest, for the company had as yet not gone into liquidation; and, therefore, when it was recovered, it did not become part of the general assets of the company, but was impressed in the hands of the liquidators with a trust for those creditors to whom they had to distribute the assets of the company.

Notes. The Companies Act, 1948, s. 265, has been replaced by s. 320 of the Companies Act, 1948, which alters the period within which certain acts constitute a fraudulent preference from three to six months before the commencement of the winding-up.

As to fraudulent preferences, see 6 HALSBURY'S LAWS (3rd Edn.) 682 et seq., and for cases, see 10 DIGEST (Repl.) 1029 et seq. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

(1) *Ex parte Cooper* (1875), 10 Ch. App. 510; 44 L.J.Bcy. 121; 33 L.T. 3; 23 W.R. 782, L.JJ.; 5 Digest 904, *7416*.

(2) *Willmott* v. *London Celluloid Co.* (1886), 34 Ch.D. 147; 56 L.J.Ch. 89; 55 L.T. 696; 35 W.R. 145; 3 T.L.R. 121, C.A.; 10 Digest (Repl.) 1029, *7115*.

Summons.

The following facts are taken from the judgment of BENNETT, J.

This is a summons in the liquidation of Yagerphone, Ltd., issued by the applicant, H. Yager (London), Ltd., to which the two liquidators of Yagerphone, Ltd., are respondents, asking for an order that the liquidators do forthwith pay the sum of £240 11s. 2d. to the receiver appointed by the applicant of the property and assets of Yagerphone, Ltd., comprised in and charged by a debenture issued by the company to the applicant on Jan. 14, 1933, such sum of £240 11s. 2d., having been received by the liquidators on Dec. 1, 1933, namely, after the appointment of the receiver and being or representing moneys subject to the charge contained in the debenture.

The debenture referred to in the summons was issued by Yagerphone, Ltd., on Jan. 14, 1933, in consideration of a loan of £2,000 made by the applicant. By the debenture Yagerphone, Ltd., acknowledged that it had received the £2,000 and undertook that it would on demand or without any demand on the happening of any of the events thereinafter specified pay to the applicant as debenture holder all such sums as were then or should thereafter become owing to the debenture holder from the company and that the company would pay interest on any such sum by equal quarterly instalments. The debenture provided that the principal moneys thereby secured should become immediately payable without any demand, and on the happening of any of the following events: (*a*) if the company gave three months' notice in writing to the debenture holder of its intention to pay off this debenture; (*b*) if a distress or execution were levied or issued against any of the property of the company and were not paid out within seven days; (*c*) if an order were made or a resolution were passed for winding-up the company; (*d*) if the company should cease or threaten to cease to carry on its business; (*e*) if a receiver should be appointed of the company's assets or any part thereof.

On Jan. 17, 1933, Yagerphone, Ltd., paid to a creditor the sum of £240 11s. 2d. On Jan. 23, 1933, another creditor levied execution on the goods of the company. On Jan. 28, 1933, the applicant demanded payment of the money secured by the debenture. On Jan. 31, 1933, the applicant appointed the person named in the summons to be the receiver of the property comprised in the charge created by the debenture. On March 31, 1933, Yagerphone, Ltd., passed a resolution for voluntary liquidation. The liquidators took proceedings to recover from the creditor who had been paid the £240 11s. 2d. on Jan. 17, 1933, alleging that the payment was a payment made by Yagerphone, Ltd., with a view to preferring him over the other creditors. The proceedings were based on s. 265 of the Companies Act, 1929, which incorporates into the liquidation of a company the provisions of s. 44 of the Bankruptcy Act, 1914. In December, 1933, the creditor paid to the liquidators the sum claimed by them, i.e., £240 11s. 2d., and the contest between the liquidators and the applicant is whether the sum paid in these circumstances is charged by the debenture held by the applicant or whether it is a sum which the liquidators are entitled to retain and distribute among the creditors for whom they hold the assets, namely, the creditors of the company who have proved in the liquidation.

Lionel Cohen, K.C., for *Maurice Berkeley* for the applicant.

Grant, K.C., and *C. Montgomery White* for the liquidators.

BENNETT, J. [after stating the facts as above set out, continued:] So far as my attention has been called to the authorities there is, I think, no case which decides the point which calls for decision on this summons. There have been two cases which establish quite clearly that, whether in bankruptcy or in the liquidation of a company, a secured creditor has no right to enforce for his benefit the remedy which is given to a trustee in bankruptcy or the liquidator of the company of avoiding a payment or setting aside a transaction made or entered into with a view to preferring a creditor of the bankrupt or a company in liquidation. The authorities are *Ex parte Cooper* (1) and *Willmott* v. *London Celluloid Co.* (2).

Neither of these cases, as I have said, decides the point which arises on the summons. I propose to decide it in favour of the liquidators on this ground, namely, that, at the time when the securities contained in the debenture issued to H. Yager (London), Ltd., crystallised, the £240 11s. 2d. was not the property of Yagerphone, Ltd., the company which issued the debenture. The debenture charges with the payments which fall to be made the undertaking of Yagerphone, Ltd., and all its property whatsoever and wheresoever, both present and future. On Jan. 17, 1933, the creditor to whom the money was paid and from whom the money was recovered was a creditor of Yagerphone, Ltd. When Yagerphone, Ltd., paid to the creditor the £240 11s. 2d., that sum, in my judgment, ceased to be the property of Yagerphone, Ltd. The payment to that creditor could not have been attacked or impeached, unless within three months from the date of payment the liquidation of Yagerphone, Ltd., had begun, and, in my judgment, at the date when the security contained in the debenture crystallised, the sum of £240 11s. 2d. was not the property of Yagerphone, Ltd., nor property in respect of which it could, I think, be said that Yagerphone, Ltd., had even a contingent interest.

The right to recover a sum of money from a creditor who has been preferred is conferred for the purpose of benefiting the general body of creditors, and I think counsel for the liquidators was right when he said that the sum of money, when recovered by the liquidators by virtue of s. 265 of the Companies Act, 1929, and s. 44 of the Bankruptcy Act, 1914, did not become part of the general assets of Yagerphone, Ltd., but was a sum of money received by the liquidators impressed in their hands with a trust for those creditors amongst whom they had to distribute the assets of the company. The application fails and must be dismissed.

Application dismissed.

Solicitors: *H. Fishman*; *Heywood & Ram.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

COOK *v.* ALFRED PLUMPTON, LTD., AND ANOTHER

[KING'S BENCH DIVISION (Lord Hewart, C.J., Hawke and Lawrence, JJ.), June 21, 1935]

[Reported 153 L.T. 462; 99 J.P. 308; 51 T.L.R. 513; 79 Sol. Jo. 504; 24 Ry. & Can. Cas. 237; 30 Cox, C.C. 270; 33 L.G.R. 363]

Road Traffic—Limitation of driving time—Continuous period—Aggregate of continuous periods—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 19 (1) (i), (ii), (2).

By the Road Traffic Act, 1930, s. 19 (1): "... It shall not be lawful in the case of ... (*c*) any motor vehicle constructed to carry goods other than the effects of passengers for any person to drive or cause or permit any person employed by him or subject to his orders to drive (i) for any continuous period of more than five hours and one-half; or (ii) for continuous periods amounting in the aggregate to more than eleven hours in any period of twenty-four hours commencing two hours after midnight. ... (2) For the purposes of this section (a) any two or more periods of time shall be deemed to be a continuous period unless separated by an interval of not less than half an hour in which the driver is able to obtain rest and refreshment. ..."

The words of sub-s. (2) are applicable only to one continuous period and not to an aggregate of continuous periods.

Where, therefore, during a period of twenty-four hours a driver of a commercial vehicle had worked for a number of periods which totalled more than eleven hours, but were each separated by an interval of at least half an hour,

Held: offences against s. 19 (1) (ii) had been committed by the driver and his employers.

Notes. As to hours of driving, see 31 HALSBURY'S LAWS (2nd Edn.) 745–747, and for cases see DIGEST SUPPS, tit. STREET TRAFFIC, cases 2321 et seq. For Road Traffic Act, 1930, see 24 HALSBURY'S STATUTES (2nd Edn.) 569.

Case Stated by Sunderland justices.

At a court of summary jurisdiction at Sunderland an information was preferred by the appellant, Police Superintendent Cook, on behalf of the Traffic Commissioners for the Northern Traffic Area, against the respondents, Alfred Plumpton, Ltd., charging them that they, on Jan. 3, 1935, being then the owners of a motor lorry constructed to carry goods other than the effects of passengers, unlawfully permitted James Henderson to drive the vehicle for continuous periods amounting in the aggregate to more than eleven hours, namely, twelve-and-a-half hours, in the period of twenty-four hours beginning at 7.30 a.m. on Jan. 3, 1935, contrary to s. 19 (1) (ii) of the Road Traffic Act, 1930. A second information charged the defendants with a similar offence on the following day. Informations were also preferred charging the driver with driving the vehicle in contravention of the above section of the Road Traffic Act, 1930, on the two days above mentioned.

On the hearing of the information the following facts were proved or admitted. Alfred Plumpton, Ltd., were at all material times the owners of the vehicle in question, and James Henderson was employed by them as a driver. On Jan. 3, 1935, the driver worked for Alfred Plumpton, Ltd., from 7.30 a.m. to 1 p.m. He rested from 1 p.m. to 2 p.m. He worked from 2 p.m. to 6 p.m. rested from 6 p.m. to 6.30 p.m., and then worked from 6.30 p.m. to 9.30 p.m. He had worked, therefore, according to the records, for twelve-and-a-half hours on that day. On Jan. 4, 1935, the driver worked from 7.30 a.m. until 1 p.m. He rested from 1 p.m. to 2 p.m. He worked from 2 p.m. until 6 p.m., rested from 6 p.m. to 6.30 p.m., and worked again from 6.30 p.m. to 9 p.m. He had worked, therefore, according to the records, for twelve hours on that day.

It was contended on behalf of the appellant (i) that s. 19 (1) (ii) of the Road Traffic Act, 1930, prohibited Alfred Plumpton, Ltd., from permitting the driver to drive, and the driver from driving, the vehicle for continuous periods amounting in the aggregate to more than eleven hours in any period of twenty-four hours, beginning two hours after

A midnight; and (ii) that the admitted facts and records showed that the defendants were guilty of the offences charged. It was contended on behalf of the respondents (i) that the periods worked by the driver could not be deemed continuous periods in view of s. 19 (2) of the Act, as the periods of work were on each day separated by intervals of at least half an hour; and (ii) that, accordingly, the admitted facts and records showed that the driver had not worked for continuous periods amounting in the aggregate to B more than eleven hours in a period of twenty-four hours. Similar contentions were made on behalf of the driver.

The justices were of opinion that, in view of s. 19 (2) (*a*) of the Road Traffic Act, 1930, the driver had not driven the vehicle for continuous periods amounting in the aggregate to more than eleven hours in the period of twenty-four hours beginning at 7.30 a.m. on each of the days in question, within the meaning of s. 19 (1) (ii). They accordingly C dismissed all the informations, and the appellant appealed to the Divisional Court.

George Bankes for the appellant.

Neither of the respondents appeared.

LORD HEWART, C.J.—These cases are really too clear for argument, and it is not surprising that neither of the respondents has thought fit to appear. The justices have D evidently, and no doubt inadvertently, confused the expression "continuous period" in s. 19 of the Road Traffic Act, 1930, with the expression "aggregate of continuous periods." What the section provides is that it is unlawful for a person to drive or to cause or permit another person to drive a vehicle of the specified classes for one continuous period of more than five and a half hours. If that time is exceeded, then an offence is committed. Again, it is no less unlawful for a person to drive or to cause or permit E another person to drive such a vehicle for a number of continuous periods amounting in the aggregate to more than eleven hours in twenty-four. We have, therefore, two expressions "continuous period" and "aggregate." When one comes to s. 19 (2), it is provided that

"(*a*) any two or more periods of time shall be deemed to be a continuous period"

F not an aggregate of continuous periods, but a continuous period—unless separated by a certain interval. The justices have evidently come to the conclusion that those words are applicable when one is examining what an aggregate of continuous periods is, which, with all due respect to them, is plainly contradictory of the express terms of the statute. I think that it is clear that in each of these cases the appeal ought to be allowed, and that the cases should go back to the justices with the direction that the offences charged G were proved.

HAWKE, J.—I agree.

LAWRENCE, J.—I agree.

Appeals allowed.

Solicitor: *The Treasury Solicitor.*

H

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

A

R. *v.* INCOME TAX SPECIAL COMMISSIONERS. Ex Parte ELMHIRST

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.), December 2, 3, 1935] B

[Reported [1936] 1 K.B. 487; 105 L.J.K.B. 759; 154 L.T. 198; 52 T.L.R. 143; 79 Sol. Jo. 941; 20 Tax Cas. 381]

Income Tax—Appeal—Right of taxpayer to withdraw—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 136 (1), *s.* 148 (1) (a).

A taxpayer, who had been assessed to an additional assessment to income tax, gave notice of appeal against that assessment. He subsequently gave notice that C he withdrew the appeal, but the Special Commissioners refused to allow the appeal to be withdrawn.

Held: the proceedings on an appeal under Part VII of the Income Tax Act, 1918, were still directed towards ascertaining the correct assessment; that entailed consideration not only of the question whether the assessment appealed against was too high, but also of the question whether it was too low; and, therefore, a notice D of appeal having been given, the appeal could not be withdrawn at the instance of the taxpayer.

Notes. The Income Tax Act, 1918, was repealed by the Income Tax Act, 1952, s. 51 (1) of which reproduces s. 136 (1) of the Act of 1918 and s. 62 (1) of which reproduces s. 148 (1).

As to appeals against assessments to income tax, see 20 HALSBURY'S LAWS (3rd Edn.) E 675 et seq., and for cases, see 28 DIGEST 99 et seq. For Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 1.

Case referred to:

(1) *Inland Revenue Commissioners* v. *Sneath*, [1932] 2 K.B. 362; 101 L.J.K.B. 330; 146 L.T. 434; 48 T.L.R. 241; 17 Tax Cas. 149, C.A.; Digest Supp.

F

Rule nisi for prohibition.

In June, 1932, an additional assessment to income tax under Sched. D of the Income Tax Act, 1918, was made on the applicant Elmhirst by the income tax commissioners for the parish of Dartington, Devon, for the financial year 1925–26, in the total sum of £5,200. On July 5, 1932, notice of appeal against that assessment was given on behalf of the applicant to the Special Commissioners. On Nov. 21, 1933, the appellant gave G notice that he withdrew the appeal, but the commissioners refused to allow the appeal to be withdrawn.

The applicant obtained a rule nisi calling on the Special Commissioners to show cause why a writ of prohibition should not be awarded to prohibit them from proceeding to hear the appeal. The grounds urged in support of the rule were that, the appeal having been withdrawn, there were no appeal proceedings in existence and no jurisdiction in H the commissioners to hear any such alleged appeal.

The Divisional Court discharged the rule, and the applicant appealed.

Millard Tucker, K.C., and *J. S. Scrimgeour* for the applicant.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *Reginald P. Hills* for the respondents.

LORD WRIGHT, M.R.—This is an appeal from a judgment of the Divisional Court I discharging a rule nisi which had been granted to the present appellant addressed to the Commissioners for the Special Purposes of the Income Tax Acts, and requiring them to show cause why a writ of prohibition should not be awarded to prohibit them from proceeding to hear an appeal against an additional assessment to income tax No. 55,371, made by the commissioners of income tax for the parish of Dartington, under Sched. D for the year ended April 5, 1926, in the total sum of £5,200. That rule nisi was discharged by the Divisional Court, and it is from that that this appeal is brought.

The facts of the case are not really material, and need not be referred to except in the baldest outline, because the matter at issue turns on the true construction of certain sections of the Income Tax Act, 1918. The assessment in question was in the terms which already appear in the passage which I have read. The notice of the assessment, which was an additional assessment, was dated June 14, 1932, and the assessment was in respect of the tax year 1925–26. The applicant for the rule, Mr. Elmhirst, had, in 1925, married an American lady of considerable wealth. He had acquired definitely and beyond question a residence in this country in 1926, after the determination of the previous tax year up till April, 1926, and it appeared to the commissioners that in fact he had resided for tax purposes in this country in the years 1925 and 1926, and thereupon this additional assessment was made. He gave notice of appeal from that assessment on July 5, 1932, and matters proceeded on the basis of a pending appeal until Nov. 21, 1933, when he wrote a letter to the inspector withdrawing, or purporting to withdraw, his notice of appeal. In view of that he has contended that the commissioners have no further jurisdiction to proceed in the matter, and his main argument is that a notice of appeal so given may give to the commissioners certain powers, for instance, to order him to deliver a precept under s. 139, but that there is no appeal being prosecuted by him. He distinguishes a notice of appeal from an actual appeal, and his argument is that the actual appeal is only constituted and the powers of the commissioners to hear the appeal and to determine the appeal only come into effect, as contrasted with preliminary powers, when he actually appears at the hearing, the date having been fixed for the hearing, as, in fact, it was in this case, and that, if he does not do that—if he does not appear, and, indeed, gives notice that he does not intend to appear and has withdrawn his notice—then the whole of the jurisdiction of the commissioners ceases entirely and they cannot go on any further and deal with the assessment. The practical point at issue arises from the fact that on an appeal the commissioners have not merely a right of reducing the assessment which has been made in favour of the appellant, but, if the appeal proceeds, they have the power to alter it against the interests of the appellant and to increase the assessment. In this particular case it is said (we have not gone into the facts and we have not considered them) that the assessment ought to be something like ten times as much as the sum so far assessed from the appellant.

In order to determine the issue at law so raised it is necessary to refer to certain sections of the Income Tax Act of 1918, some of them from Part VI, but principally from Part VII, which is the part dealing with appeals. It must be admitted at the outset that these sections do present some difficulties, or, at least, apparent difficulties, because of their phraseology, and, in particular, the arrangement of the sections, but I have come to the conclusion, after considering all these sections, that the decision of the Divisional Court was right and should be affirmed, and that the appeal should be dismissed.

I will refer shortly, in the first place, to s. 121 in Part VI, the part dealing with assessment. Shortly, that deals with the procedure to be followed in order to make an assessment when there is no question of an appeal. Sections 121 and 122 are to be read together, and the end of s. 122 (3) is significant. It says:

> "The assessments under Sched. D, certified and delivered by the additional commissioners to the general commissioners, shall be allowed and confirmed by the general commissioners after the time for hearing appeals against such assessments has expired."

I need not say that though the assessment is made provisionally by the additional commissioners it is not effective until it has been allowed and confirmed by the general commissioners, and the final words that I have just read mean that, if no notice of appeal has been lodged and the time for hearing appeals has expired, the assessment is to be allowed and confirmed. I need not deal in detail with the provisions of s. 121. In the first place, the surveyor has to examine the statements made by the taxpayer which have to be laid before the additional commissioners, and it provides that, when a surveyor has had a reasonable time for the examination, the additional commissioners shall appoint meetings for the consideration of such statements as are then or from time to time delivered to them. If the commissioners are satisfied that a statement is in accordance with the Act and is sufficient, or there is no ground to doubt the sufficiency of the statement, and the surveyor makes no objection, the additional commissioners shall direct the assessment to be made in accordance with the statement. If, however, the surveyor declares himself dissatisfied with the determination of the additional commissioners, he can then require them to state and sign a case for the opinion of the general commissioners and the general commissioners shall with all convenient speed return the case with their opinions subscribed thereon, and the assessment shall be altered or confirmed accordingly. Then there is a provision for what is to happen if the taxpayer makes a default in delivery of a statement, or if the additional commissioners are not satisfied with the statement delivered, or if the surveyor makes an objection in writing to the statement, "setting forth the cause thereof." Then the additional commissioners are to

> "make an assessment on the person concerned in such sum as, according to the best of their judgment, ought to be charged on him."

There are further provisions, and, in particular, there is a provision that if the surveyor, after examining the assessment which the additional commissioners have made before it is delivered to the general commissioners, makes an objection in writing as to the amount of the assessment, the commissioners shall certify his objection, and any information they may have obtained respecting it, to the general commissioners, and the surveyor shall give notice of his objection and particulars thereof to the person assessed in order that he may appear before the general commissioners in support of the assessment.

This, I think, is all I need say on the general question of the procedure when there is no question of an appeal, and I may note at once that in making the assessment and in dealing with the appeals the commissioners are exercising the statutory authority which they are bound to carry out, not as judges deciding the issue between the particular parties, but under a wider obligation. It is to exercise their judgment on such material as comes before them, and, as we shall see later, to obtain any material which they think is necessary and which they think they ought to have, and on that to make the assessment or the estimate which the law requires them to make. They are not deciding the case inter partes; they are assessing or estimating the amount which, in the interests of the country at large, the taxpayer ought to have to deal with as the basis on which he is to be taxed.

I may at this point refer to a very short passage from *Inland Revenue Commissioners* v. *Sneath* (1). I need not refer to the facts; the question was whether the decision of the commissioners in one year constituted an estoppel binding the commissioners in the following year, and it was held that it did not, and I may refer to the reasoning on which that was based, which involved some definition of the province and duty of the income tax commissioners. I read a short passage from the judgment of ROMER, L.J. ([1932] 2 K.B. at p. 390). He says this:

> "The duty of the commissioners, as I read the provisions of the Income Tax Acts, is to form an estimate in each year of assessment of the amount of the income of the taxpayer on which the surtax imposed for that year is to be charged. For this purpose the taxpayer is required to make a return of his income from all sources as defined by s. 5 of the Income Tax Act, 1918. With this to guide them, the Special Commissioners have then to form their own estimate of the total income and to make an assessment accordingly."

This was surtax. The general principles apply to surtax, and the general principles apply to any form of income tax.

> "With this to guide them, the Special Commissioners have then to form their own estimate of the total income and to make an assessment accordingly. If the taxpayer is not content with such assessment he can bring the matter before the Special Commissioners by way of appeal. But the proceedings on the appeal are still merely directed towards ascertaining the income upon which the taxpayer is to be charged with surtax for the particular year of assessment, and the Special

> Commissioners may, if they think fit, increase the assessment made by them in the first instance. The appeal is merely another step taken by the commissioners, at the instance of the taxpayer, in the course of the discharge by them of their administrative duty of collecting the surtax."

With these words in mind I can now turn to Part VII of the Act, which deals with appeals, and s. 133 (1) is in these terms:

> "Save where expressly authorised by this Act, the general commissioners shall not alter any assessment before the time for hearing and determining appeals, and then only in cases of assessments appealed against, and in accordance with their determination."

That makes the precise matter their determination as the result of an appeal. Then sub-s. (3):

> "Where an objection has been made by the surveyor to an assessment upon any person, and that objection has been dealt with and determined on appeal, the surveyor shall not, thereafter, make any further charge for the same year, upon that person, in respect of the same matter, property, or profits included in the assessment to which the objection, so determined, was made."

That relates back to the provisions of ss. 121 and 122. Then s. 134 merely deals with the notices of the assessments, and s. 135 provides:

> "Notice of appeal meetings to be held by the general commissioners shall also be given to the surveyor by the clerk to the commissioners."

Then comes s. 136 (1):

> "A person aggrieved by any assessment upon him, made by the additional commissioners, or by the assessor for any parish, or by a surveyor, in any first or additional first assessment, or by any objection by the surveyor to an assessment made by the additional commissioners, shall be entitled to appeal to the general commissioners, on giving notice in writing to the surveyor, within twenty-one days after the date of the notice of such assessment or objection."

Those provisions, in my opinion, do not have the meaning which counsel for the applicant has sought to attach to them. He relies on the words "shall be entitled to appeal . . . on giving notice," and he says that the right given by s. 136 (1) is not a general right of appeal, but merely a right to give notice of appeal, and that a person is nowise committed to the position of an appellant because he has given a notice of appeal. I do not accept that construction of s. 136 (1). I think it merely gives to the taxpayer, if he is aggrieved by the assessment, a right of appeal in general terms, and "entitled to appeal" means that he has that right conditioned on his giving notice within the appropriate time. But, as it will appear later, in my opinion, if he does give that notice, an appeal is constituted with whatever consequences may follow from that circumstance. Subsection (3) of s. 136 was also referred to as indicating, in the submission of counsel for the applicant, that the presence of the taxpayer at the hearing of the appeal was something which was essential to the continuance of the appeal, but I do not so read it. I think all it means is that the appellant, if I may call him so—the person aggrieved—may have the full opportunity of being present, and that there should be no decision behind his back in the sense that he has not had a proper opportunity of coming, if he wanted to come. Section 137 deals with the duty of the commissioners to give notice of the day for hearing appeals to every appellant, and the word "appellant" there is important: it, to my mind, indicates that when the provisions of s. 136 have been followed, the taxpayer who has given notice of appeal is an appellant, and that there are appeals in existence which have to be heard.

There are three other subsections of that section which I think ought to be noticed. The first is sub-s. (2):

> "The surveyor and the assessor may attend every appeal, and shall be entitled (*a*) to be present during all the time of the hearing, and at the determination of the appeal;

> and (*b*) to produce any lawful evidence in support of the assessment or surcharge; A
> and (*c*) to give reasons in support of the assessment or surcharge."

There is nothing there obviously in the negative. It gives him certain positive rights and in particular gives him the right to be present during all the time of the hearing, and, as will appear in the sequel, I think he, having the right to be present and also the duty to be present, is available to give such information and help to the commissioners B on the hearing of the appeal as may appear to them to be necessary or desirable. Then sub-s. (4) is:

> "If, on an appeal, it appears to the majority of the commissioners present at the hearing, by examination of the appellant on oath or affirmation, or by other lawful evidence, that the appellant is overcharged by any assessment or surcharge, the commissioners shall abate or reduce the assessment or surcharge accordingly, but C otherwise every such assessment or surcharge shall stand good."

Then sub-s. (5), which is complementary, because sub-s. (4) is not, as might appear to be at first sight, comprehensive, says:

> "If, on any appeal, it appears to the commissioners that the person assessed or surcharged ought to be charged in an amount exceeding the amount contained in D the assessment or surcharge they shall charge him with the excess."

These two subsections clearly contemplate, first, that an appeal has been constituted by the giving of notice of appeal, and secondly, that on the hearing of that appeal the appellant may give evidence on oath, other lawful evidence may be called, and furthermore that the commissioners have the duty and the right of coming to a conclusion, not only diminishing, if that appears to them to be the proper course, but increasing E the assessment.

Then s. 139 has been much debated, and I think it has to be read as part of a general code which goes at least to the end of s. 145, and I think these sections must all be read together to give a picture of what is to happen when the process starts which is indicated in s. 139. It will be noted in s. 139 that the start of the whole thing and the foundation of the jurisdiction and the duty of the general commissioners depend on their receiving F notice of appeal. I ought to have said, and I say at once, that we are dealing here with Special Commissioners and not general commissioners, because the choice has been exercised of appealing to the Special Commissioners, and I shall call them in future "commissioners," because I need not distinguish between the general or the Special Commissioners. What I am going to say will apply equally to either class of commissioners. Then s. 139 is: G

> "(1) If the general commissioners have received notice of appeal against an assessment made by the additional commissioners, or see cause to allow the objection of the surveyor to any such assessment"—

that is the other matter provided for, as I have already shown—"they shall issue a precept to the appellant ordering him to deliver to them, within the time limited by the H precept, a schedule containing such particulars, for their information"—that ought to be noted as indicating their functions—"as they may demand under the authority of this Act." Then the schedules are to contain particulars of the profits or gains, and so forth, of the taxpayer and the deductions—"which particulars the said general commissioners are hereby empowered and required to demand at their discretion whenever the same shall appear to them necessary for the purposes mentioned in this Act." The I section continues:

> "(2) The general commissioners may issue further precepts whenever they consider it necessary for the purposes aforesaid, until complete particulars have been furnished to their satisfaction. (3) A person to whom a precept is issued shall deliver the schedule required, within the time limited, and in default thereof, shall forfeit a sum not exceeding twenty pounds and treble the tax at which he ought to be charged. (4) Any surveyor may, at all reasonable times, inspect and take copies of or extracts from any schedule."

Counsel does not contest the proposition that once the notice of appeal has been given by a person, that person is under an obligation to obey the precept and to deliver a schedule containing the necessary particulars and such further schedules as may be required. Section 140 merely deals with penalties for failure to deliver a sufficient schedule, and it also gives the taxpayer the right to rectify or amend the schedule in proper cases. Then the precept, it is assumed, has been duly obeyed and the schedule has been issued, and thereupon the position of the surveyor is taken into account. Section 141 says:

> "(1) The surveyor may, within a reasonable time to be allowed by the commissioners to whom an appeal is made"—

again emphasising the fact that there is a subsisting appeal at that stage—

> "after examination by him of any schedule, object to such schedule or any part thereof, and in that case shall state, in writing, the cause of his objection, according to the best of his knowledge or information. (2) In every such case he shall give notice in writing of his objection, to the person to be charged in order that he may, if he thinks fit, appeal against the same. The notice shall be under cover and sealed, and addressed to the person to be charged. (3) No assessment shall be confirmed or altered until any appeal against such objection has been heard and determined."

Here the surveyor is put in the position of initiating a step on his own account. The schedule has been delivered; the surveyor objects; and thereupon the taxpayer is entitled to appeal, if he thinks fit, against that objection, and that is a matter which seems to be, as it were, a subsidiary or an auxiliary appeal; but in that proceeding, which follows inevitably from the delivery of the precept, if the surveyor so decides that appeal may decide the whole matter of the assessment. However, s. 142 proceeds to deal with the matter in still further detail. It deals with two contingencies. The first is:

> "If (*a*) the commissioners to whom an appeal is made see cause to disallow an objection of the surveyor to a schedule,"

and the second is:

> "If (*b*) on the hearing of an appeal, the commissioners are satisfied with the assessment made by the additional commissioners, or if, after the delivery of a schedule, they are satisfied therewith, and have received no information as to its insufficiency, they shall direct the assessment to be confirmed or to be altered in accordance with any such schedule, as the case may require."

That deals with the circumstances of the commissioners being satisfied with the schedule and with the assessment already made by the additional commissioners, and then the assessment will be confirmed or altered in accordance with the schedule and in accordance with either of these possible contingencies. Then comes a series of provisions which deals with the case of the commissioners being

> "dissatisfied with an assessment delivered to them by the additional commissioners or with a schedule, or if they require further information relating thereto";

then they may (this is s. 143 (1))

> "at any time and from time to time, by precept, put any questions in writing concerning the assessment or schedule, or any matter which is contained or ought to be contained therein, or concerning any deductions made in arriving at the profits or gains, and the particulars thereof, and may require true and particular answers in writing, signed by the person to be charged, to be given within seven days after the service of the precept. Subsection (2) (*a*) The person to be charged shall, within the time limited, either answer any such questions in writing signed by him, or shall tender himself to be examined orally before the commissioners, and may object to, and refuse to answer, any question, but the substance of any answer or answers given by him orally shall be taken down in writing in his presence, and be read over to him, and after he has had liberty to amend any such answer or answers he may be required to verify the same on oath to be administered to him by any one of the commissioners."

The next part of the section is mere machinery enabling the taxpayer, instead of himself being examined, to tender someone else on his behalf to attend and be examined. That obviously provides for an oral proceeding or hearing in the course of this appeal, which has, as we have seen, been proceeding since the time when the notice of appeal was given. Section 144 gives the commissioners further powers of acquiring information to enable them to perform their duties. It enables them to

> "summon any person whom they think able to give evidence respecting an assessment made or to be made on another person, to appear before them to be examined, and may examine such person on oath (except the clerk, agent, servant or other person confidentially employed in the affairs of a person to be charged . . .)"

and so on, and there is a penalty attached to any failure to answer truly by such witness in accordance with the oath. Section 145 deals in the main with the case where there has been a refusal by a person required to deliver a schedule in accordance with a precept to obey that precept or to deliver the schedule, or where a clerk, agent or servant of any such person, having been summoned, has neglected or refused to appear before the commissioners to be examined (these are all provisions ancillary to these powers which I have already referred to in the preceding section) or has declined to answer questions; and then there are two further rather different categories dealt with in the section. The first is where an objection has been made to a schedule, and the objection has not been appealed against; or the commissioners decide to allow any objection made by the surveyor; then in all or any of the circumstances

> "the commissioners shall ascertain and settle, according to the best of their judgment, the sum in which the person chargeable ought to be charged, and shall make an assessment and charge accordingly."

Section 148 provides for an appeal against an assessment under Sched. D being made to the Special Commissioners instead of to general commissioners.

I do not think it necessary to go on to discuss any of the further sections in the Act in this part relating to appeals. I will only say that on an examination of this code (because I think all these sections from 139 to 145 inclusive ought to be read together as embodying an inclusive code; s. 146 merely, I think, deals with penalties), the conclusion I draw from the code is that the commissioners, having set before them the duty of ascertaining and settling according to the best of their judgment the sum on which the taxpayer ought to be assessed, are required to make the assessment in accordance with that judgment, and in view of that I find it quite impossible to accept the argument that the giving of the notice of appeal is merely, as it were, a sort of offer, or is merely an act, from which the taxpayer can at his discretion, at any time resile, subject to his obeying the precepts and so forth, and that he can at any moment prevent the commissioners from ascertaining and settling the sum to be assessed by the simple process of intimating by word or by deed that he withdraws the notice of appeal, and that there is no appeal pending at all. It seems to me that the code contained in these sections is quite inconsistent with any such argument. It would, indeed, be a curious position if, notice of appeal having been given by the taxpayer in the hope of reducing his assessment, he should be able, when the information elicited shows conclusively that the assessment, so far from being an overcharge, was an undercharge, and possibly a very serious undercharge indeed, to prevent the commissioners from estimating or valuing or assessing the taxpayer's liability according to the true facts which have been elicited, or that they should be debarred from proceeding further to develop the facts so that they can feel that they have ascertained the true position. The whole trend of these sections seems to be inconsistent with and contrary to any such view. There is one phrase which I think was relied on. The words are used in more than one case "on an appeal" or "upon the hearing of an appeal," and it was argued that there could not be a hearing of an appeal unless the appellant was present. I find it impossible to accept any such view. If the appellant does not think fit to be present, the machinery of these sections shows that in such a case the commissioners have the power and the duty of examining all the facts, and that power is given to them by the mere giving of the notice of appeal. Having a duty to examine the facts, they are bound to give effect to what appears to them to be the proper assessment or estimate or valuation to be made in view of those facts. For these reasons, as I have already said, I think the appeal should be dismissed and dismissed with costs.

ROMER, L.J.—I agree. The Income Tax Act, 1918, provides the procedure to be adopted for the purpose of assessing the gains and profits of an income tax payer under Sched. D, and that procedure is as follows. After the statement of profits or gains has been made by the income tax payer in accordance with the Act, that statement is laid by the surveyor before the additional commissioners unless an assessment has to be made by the Special Commissioners; in general it is laid before the additional commissioners. If they are satisfied that the statement has been bona fide made so as to enable them to assess the person with the full tax which ought to be charged, and no information is given to them as to the insufficiency of the statement and the surveyor makes no objection thereto, the additional commissioners shall—it is provided by s. 121—direct an assessment to be made in accordance with that statement. If, on the other hand, the income tax payer makes default in delivery of this statement, or the additional commissioners are not satisfied with the statement which has been delivered, or the surveyor makes an objection in writing to that statement, the additional commissioners are required under the section to which I have referred to

> "make an assessment on the person concerned in such sum as, according to the best of their judgment, ought to be charged on him."

The additional commissioners, having so made an assessment, are required by s. 122 to enter that assessment in books provided for the purpose, and to make out in those books certificates of assessments accordingly; and by s. 122 (2) they are required to sign the assessments and deliver the signed assessments to the general commissioners. Then s. 122 (3) provides this:

> "The assessments under Sched. D, certified and delivered by the additional commissioners to the general commissioners, shall be allowed and confirmed by the general commissioners after the time for hearing appeals against such assessments has expired."

It is plain that to those words must be added, as a necessary implication: "If in the meantime no notice of appeal against the assessment has been served." Where, therefore, no notice of appeal has been served against the assessment of the additional commissioners, the general commissioners are under a statutory obligation to allow and confirm the assessment, and after they have so allowed and confirmed the assessment, the procedure for the purpose of ascertaining the amount of income to be taxed under Sched. D has been completed. If, on the other hand, a notice of appeal has been served by the income tax payer, the general commissioners have no power under this section to make or to confirm or to allow the assessment, and the power to do so is, as I read the Act, in that event to be found in the sections which immediately follow s. 132 in Part VII of the Act, which is entitled "Appeals." Where, therefore, as in the present case, the income tax payer serves a notice of appeal, it is under Part VII and Part VII alone, of the Act that the general commissioners have the power to take the final step in the assessment of allowing and confirming the assessment of the additional commissioners.

The question that we have to determine in this case is whether, when a taxpayer has served a notice of appeal, and so brought into effect the machinery designed by s. 133 for the purpose of completing the assessment, he can stop the further working of that machinery either by withdrawing the appeal or by refusing to be present at the hearing of the appeal. If that be right, and he can in that way stop the working of the machinery, then, as it appears to me, he is in a position to prevent any final assessment being made upon him at all under the Act. That would be an extraordinary intention to impute to the legislature. In my opinion, that is not the effect of the Act. In my opinion, the income tax payer has no more power, after he has served the notice of appeal and so brought into operation the machinery of procedure set up for it in Part VII of the Act, to stop the machinery of procedure than he is in the position to stop the machinery of procedure for the ascertainment of his liability to tax in any other part of the Act. It is not now asserted on his behalf that by withdrawing his notice of appeal or failing to make an appearance at the hearing of the appeal, he can stop a part of the procedure laid down in Part VII. If, for instance, the general commissioners are not satisfied with the information before them, it is admitted that under s. 139, not only have the general commissioners power, but they are under a statutory obligation to issue a precept to the taxpayer to compel him to provide them with further information. It is admitted that no withdrawal of the appeal can prevent the commissioners from exercising that power. The precept having been issued to the income tax payer, he is under a statutory liability to make a return in accordance with that precept. If he does not, he is subjected to various penalties. If he does make a return to the precept, then the surveyor has power to object within a reasonable time under s. 141 to the schedule which has resulted from the obedience to the precept. If he does so object, then the income tax payer may appeal against that objection, and it is agreed that until that appeal has been heard no assessment can be confirmed or altered. That is the result of s. 141. If the commissioners decide to allow the surveyor's objection, or if the person to whom the precept has been delivered has neglected or refused to deliver a schedule in accordance with it, or if an objection has been made to the schedule by the surveyor and the objection has not been appealed against, it is admitted that under s. 145, the commissioners are under a statutory obligation to ascertain and settle according to the best of their judgment the sum in which the person chargeable ought to be charged, and that whether the notice of appeal has been withdrawn or not.

But what has been said by the applicant in the present case is that, if the commissioners are satisfied with the assessment made by the additional commissioners, or, if after the delivery of a schedule in accordance with the precept they are satisfied therewith, and have received no information as to its insufficiency, they have no power under s. 142 to direct the assessment to be confirmed or to be altered in accordance with any such schedule as the case may require, because s. 142 says, in sub-s. (*b*): "on the hearing of an appeal"; that is to say, because the section says that this power of the commissioners can be or is to be exercised at the hearing of an appeal, the appellant, by withdrawing his notice of appeal or by refusing to appear at the appeal, can prevent the commissioners from exercising that power. I have too much respect myself for the legislature to impute to them any such absurdity as that. I think that, once the procedure laid down in Part VII of the Act has been brought into being, the income tax payer has no power of preventing it being carried out to its full effect, resulting as it will in the assessment either in the amount originally assessed by the additional commissioners or with some variation by way of increase or diminution.

For these reasons, in addition to those which have been given by the Master of the Rolls, I think this appeal fails, and must be dismissed with costs.

GREENE, L.J.—I agree.

Appeal dismissed.

Solicitors: *McKenna & Co.*; *Solicitor of Inland Revenue.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

R. *v.* KENT JUSTICES. Ex Parte METROPOLITAN POLICE COMMISSIONER

[King's Bench Division (Lord Hewart, C.J., Humphreys and Singleton, JJ.), November 5, 1935]

[Reported [1936] 1 K.B. 547; 105 L.J.K.B. 201; 154 L.T. 133; 100 J.P. 17; 52 T.L.R. 78; 80 Sol. Jo. 54; 33 L.G.R. 517; 30 Cox, C.C. 284]

Quarter Sessions—Appeal to—Appeal against sentence—No appearance by prosecutor—Quarter sessions not entitled to quash conviction—Criminal Justice Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 25.

Magistrates—Court of summary jurisdiction—Right to appear on appeal to quarter sessions—Duty to assist court.

On an appeal to quarter sessions against sentence only, quarter sessions are entitled to deal only with the question of sentence, and the failure of a private prosecutor in the court below to appear on the hearing of the appeal cannot be a ground entitling the court to quash the conviction.

R. v. *Surrey Justices and Bell* (1), [1892] 2 Q.B. 719, distinguished.

On the hearing of an appeal to quarter sessions the justices of the court of summary jurisdiction have always a right to appear, to instruct counsel, and to call evidence in support of their decision, without making themselves a party to the appeal.

Per Humphreys, J.: If the justices are informed that the prosecutor is not going to be represented, it is the duty of their clerk to see that quarter sessions are afforded assistance in the manner above indicated on the hearing of the appeal. If the justices do not wish to instruct counsel, they may arrange that some public authority, such as the local police authority, shall act on their behalf, and it is desirable that they should request the authority in writing so to act.

Quære, whether the Commissioner of the Metropolitan Police has ex virtute officii a special right to appear as respondent on the non-appearance of a private prosecutor.

Notes. As to appeals to quarter sessions, see 21 Halsbury's Laws (2nd Edn.) 705 et seq., and for cases, see 33 Digest 390 et seq. For Criminal Justice Act, 1925, see 14 Halsbury's Statutes (2nd Edn.) 934.

Cases referred to:

(1) *R.* v. *Surrey Justices and Bell*, [1892] 2 Q.B. 719; 61 L.J.M.C. 200; 67 L.T. 266; 56 J.P. 742; 41 W.R. 79; 36 Sol. Jo. 713; 17 Cox, C.C. 547; 33 Digest 401, *1115*.

(2) *R.* v. *Purdey* (1864), 5 B. & S. 909; 5 New Rep. 76; 34 L.J.M.C. 4; 11 L.T. 309; 29 J.P. 132; 11 Jur. N.S. 153; 13 W.R. 75; 122 E.R. 1069; 16 Digest 467, *3446*.

(3) *Harris* v. *Cooke* (1918), 88 L.J.K.B. 253; 119 L.T. 744; 83 J.P. 72; 16 L.G.R. 850, D.C.; 33 Digest 391, *1019*.

(4) *R.* v. *Truelove* (1880), 5 Q.B.D. 336; 49 L.J.M.C. 57; 42 L.T. 250; 44 J.P. 436; 28 W.R. 413; 14 Cox, C.C. 408, D.C.; 33 Digest 333, *453*.

Rules nisi for certiorari and mandamus.

At Bromley Petty Sessions a defendant was charged on a private prosecution by the manager of an inn with stealing an article therefrom. He elected to be dealt with summarily, pleaded Guilty and was fined £2 and ordered to pay a sum of 5s. for damage. He appealed to quarter sessions against that sentence, on the ground that it was too severe. When the appeal was called on for hearing before the appeal committee, counsel for the appellant stated that he appeared for the defendant, and another counsel stated that he appeared to oppose the appeal on behalf of the Commissioner of the Metropolitan Police. Counsel for the appellant objected that his opponent could not be heard, inasmuch as the commissioner was not a party to the appeal, and neither the commissioner nor any police officer had been prosecutor in the court below. The appeal committee held that the commissioner was not entitled to be heard or to take any part in the appeal. They declined to respite the appeal to a later date and, on the authority of *R.* v. *Surrey Justices and Bell* (1), proceeded to quash the conviction. At the instance of the commissioner rules nisi for certiorari and mandamus were obtained, calling on the justices who constituted the appeal committee to show cause why their order quashing the conviction should not be quashed, and directing them to hear and determine the appeal according to law.

Vernon Gattie, and *B. H. Waddy*, showing cause on behalf of the justices.

G. B. McClure and *F. J. Powell*, in support of the rules.

LORD HEWART, C.J.—These are two rules nisi, one for a writ of certiorari and the other for a writ of mandamus, and it will be convenient to deal first with the case of the writ of certiorari. A rule was granted calling upon certain justices of the county of Kent

> "to show cause why a writ of certiorari should not issue to remove into this court a certain order dated May 22, 1935, allowing the appeal of the defendant against a conviction by the court of summary jurisdiction for the Bromley petty sessional division whereby he was convicted"

of stealing an article of the value of 5s. from the New Inn public-house, Hayes. The justices in quarter sessions quashed the conviction, and what is desired is that the order quashing that conviction should be removed into this court and quashed.

The facts of the case are very simple. On March 25, 1935, the defendant appeared before the justices at Bromley upon a charge that he stole an article of the value of 5s. from a public-house, and in the alternative that he did receive that property well knowing it to have been stolen. On that occasion he elected to be dealt with summarily and pleaded Guilty to the offence of stealing. No evidence was called, but a statement of the facts was made, and, after hearing the facts and a plea in mitigation of punishment, the justices imposed a fine of £2 and ordered the defendant to pay a further sum of 5s. for damage. Against that sentence the defendant appealed by notice dated April 5, 1935, and the only ground stated was that his sentence, as he alleged, was too severe.

The facts, therefore, were that there had been a plea of Guilty, that against conviction there was not, and could not be, an appeal, and that there was an appeal only against sentence. When the appeal was called on, counsel on one side informed that court that he appeared on behalf of the appellant, and another counsel informed the court that he appeared on behalf of the Commissioner of Metropolitan Police. Counsel for the appellant then objected that this counsel could not be heard, inasmuch as the commissioner was not a party to the appeal, and neither the commissioner nor any police officer was prosecutor in the proceedings in the police court. After some argument counsel who appeared on behalf of the prosecution said that he abandoned his claim to represent the justices, who were not parties to the proceedings, though they had the right to appear, but he contended that the Commissioner of Metropolitan Police was entitled to be heard and to conduct the appeal as respondent. Argument followed upon that contention, and in the result the West Kent appeal committee came to the conclusion that the Commissioner of Metropolitan Police was not entitled to be heard or to take any part in the appeal. They by no means stopped there. Instead of calling upon the chief witness, who was present in court, to depose to the facts or of respiting the appeal to a later date, as they were invited to do, they decided to deal with the matter in the absence of counsel for the prosecutor, and, having had their attention directed to *R.* v. *Surrey Justices and Bell* (1), they accepted the contention urged on the appellant's behalf that he was entitled not only to have his appeal allowed and the sentence which was being appealed from struck out, but also to have the conviction quashed. They, accordingly, quashed the conviction, having decided that there was nobody whom they could hear on behalf of the prosecutor.

It is quite clear that in taking that course the justices believed that they were acting upon the authority of the decision in *R.* v. *Surrey Justices and Bell* (1), but it is no less clear, when one looks at that case and the date of it, that they could find there no warrant for the course which they took. In *R.* v. *Surrey Justices and Bell* (1), decided in August, 1892, that is to say forty-three years ago, there was an appeal against sentence in the sense that there was an appeal against a summary conviction upon the sole ground that the punishment inflicted was excessive. But in that case there had been no plea of Guilty, and the appellant was appealing against his conviction. The justices, dealing with the sentence, came to the conclusion that the appeal ought to be allowed and quashed the conviction. Much has happened since then. By s. 25 of the Criminal Justice Act, 1925, it is provided:

> "A person who after pleading Guilty or admitting the truth of the information is convicted of any offence by a court of summary jurisdiction shall have a right to appeal in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions against his sentence."

There a right is given to appeal against sentence even though a defendant has pleaded Guilty in the first court. Previously, by s. 37 of the Criminal Justice Administration Act, 1914, it was provided:

> "Any person aggrieved by any conviction of a court of summary jurisdiction in respect of any offence, who did not plead Guilty or admit the truth of the information, may appeal from the conviction in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions."

In my opinion, since the passing of the Criminal Justice Act, 1925, which gave a right to appeal against sentence notwithstanding a plea of Guilty, the decision in *R.* v. *Surrey Justices and Bell* (1) throws no light at all upon the duty of a court of quarter sessions in such a case. Here the court was entitled to deal only with the question of sentence, and they exceeded their jurisdiction when, going beyond the appeal which was before them, they proceeded to quash the conviction.

With regard to the other point whether the contention of counsel for the respondent was right, when he argued that the commissioner of police was entitled to appear and to take part in the conduct of the appeal, I prefer at this moment to express no final opinion; the matter may hereafter call for very careful consideration. It is quite obvious that the justices might have instructed counsel. It is, perhaps, true that in the circumstances which happened the justices, in effect, instructed counsel by inviting the police to take the matter up, and, if all the facts had then been known, counsel who said he was appearing for the commissioner of police might conceivably have been in a position to say he was appearing for the justices. He took no such course; on the contrary, he abandoned the contention that he was appearing for the justices, and said he claimed to appear only for the commissioner of police. I do not think it is at all necessary for the decision of the present case to decide whether the commissioner of police was entitled so to appear, but I have no doubt at all that the justices came to an erroneous conclusion when they decided that in the circumstances no course was open to them except to proceed to deal with the appeal in the absence of evidence. They might have obtained evidence themselves, or they might have adjourned the appeal, as they were asked to do. But even if they had been right in proceeding to hear the appeal against sentence in the absence of evidence, they had no jurisdiction to quash the conviction.

I think, therefore, that this rule nisi for certiorari for the purpose of quashing that order of quarter sessions must be made absolute, and, as it appears clearly that the justices never directed their minds to the real and only point which was before them, namely, the quantum of the sentence which had been imposed by the court below, I think that the rule nisi for a writ of mandamus directing them to hear and determine the matter according to law must be made absolute.

HUMPHREYS, J.—I am of the same opinion. The rule in this case is directed to justices of the peace for the county of Kent to show cause why a writ of certiorari should not issue to remove into this court, for the purpose of being quashed, an order dated May 22, 1933, allowing the appeal of a defendant against a conviction by the court of summary jurisdiction for the Bromley petty sessional division. The very short ground which is sufficient for the decision of this case is that, in truth, there was no appeal by the defendant against any conviction by a court of summary jurisdiction, and, therefore, the court of quarter sessions which made an order allowing such appeal must be wrong, and I further think that it was clearly in excess of their jurisdiction to make any such order. Therefore a writ of certiorari ought to issue to them to quash that order made without jurisdiction.

The appeal in this case was brought by virtue of s. 25 of the Criminal Justice Act, 1925, and until the passing of that Act no such appeal could possibly have been brought to any court of quarter sessions. The section provides:

> "A person who after pleading Guilty or admitting the truth of the information is convicted of any offence by a court of summary jurisdiction shall have a right to appeal in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions against his sentence."

Those words are so plain and clear that it would have been extremely difficult for anyone to argue that upon such an appeal the question of an appeal against conviction was a matter which quarter sessions had power to consider. Counsel for the justices has based his argument upon *R.* v. *Surrey Justices and Bell* (1) on which the court of quarter sessions relied. I think it is only necessary to realise what the law was at the date of that case, 1892, and to have in one's mind the alteration of the law made in 1925, to see that that case is no authority whatever for the proposition that the justices in this case had any power to deal with the matter as they did. In 1892 the only general right of appeal against a conviction by a court of summary jurisdiction—I use the word "general" because certain Acts of Parliament gave a specific right of appeal against conviction for certain offences—was under s. 19 of the Summary Jurisdiction Act, 1879, which provided that where any person was adjudged by a court of summary jurisdiction to be imprisoned without the option of a fine and did not plead Guilty or admit the truth of the information or complaint, he might appeal to a court of general or quarter sessions. It was, therefore, necessary for any person who came to quarter sessions and purported to have a right of appeal to show that he had been convicted by a court of summary jurisdiction, that he had not admitted the truth of the accusation, in other words, had not pleaded Guilty, and that he had been sentenced to imprisonment. Those circumstances were present in the case of Bell, who was the appellant in *R.* v. *Surrey Justices and Bell* (1). He had not pleaded Guilty, he had been convicted of an offence, and he had been sentenced to fourteen days' imprisonment. He appealed against that conviction, which was the only thing he could appeal against, but his object in doing so, as he made clear in his grounds of appeal, was that he desired to protest against the propriety of the fourteen days' imprisonment. When the matter came before the Divisional Court it was held, following the ratio decidendi of the earlier case of *R.* v. *Purdey* (2), that upon such an appeal, since it was an appeal against the conviction, although the only matter of controversy was the matter of the sentence, it was for the respondent to begin and to prove de novo the commission of the offence. Some reliance has been placed by counsel upon some of the words in the judgment of CAVE, J. The learned judge is reported to have said, speaking of the case under consideration ([1892] 2 Q.B. at p. 722): "Here the appellant appealed against the judgment, not against the verdict." If that is to be taken to mean that he did not appeal against his conviction, but did appeal against his sentence, of course, it is wrong, and obviously wrong. I prefer to assume that the learned judge was not saying anything of the sort, but was merely indicating that the object of the appellant was to get not the conviction but the sentence altered.

The next change in the law, as my Lord has mentioned, was in 1914, when by s. 37 of the Criminal Justice Administration Act, 1914, an amendment, but only a very slight amendment, in the law was made. It was provided by that Act that a person should have the right of appeal to quarter sessions against a conviction although he had not been sentenced to imprisonment, and that was the only alteration which was made. The section provides:

A
> "Any person aggrieved by any conviction of a court of summary jurisdiction in respect of any offence, who did not plead Guilty or admit the truth of the information, may appeal from the conviction."

It left out the proviso that he must have been sentenced to imprisonment. In 1918 that section was under consideration by this court in *Harris* v. *Cooke* (3). The ratio decidendi of that case is of no materiality in the consideration of the present case; it B turned upon the right of appeal expressly given by the regulations made under the Defence of the Realm Act, 1914, but in the course of his judgment, with reference to a matter which had been argued by counsel who appeared for the appellant, AVORY, J., made this observation (83 J.P. at p. 73):

> "I will only say that I do not at present think that any person who has really, with- C out any ambiguity, pleaded Guilty to an offence covered by [s. 37 of the Criminal Justice Administration Act, 1914] has any right to appeal either against the finding that he is Guilty or against the sentence. I think that the purpose of that section, as of s. 19 of the Summary Jurisdiction Act, 1879, was to take away from a person who has in fact pleaded Guilty any right of appeal."

D Therefore, it is, to my mind, clear beyond question that when the defendant decided to appeal against the sentence he could only appeal under the terms of s. 25 of the Act of 1925, and that the matter of the conviction which was not appealed against, and could not be appealed against by him, was not before the court. For these reasons I agree with the judgment of my Lord that certiorari must go in this case.

An interesting matter has been argued by counsel upon both sides as to the position of a member of the Bar who appeared, as he said, for the prosecutor upon the appeal. I E agree that this case does not call for, and, therefore, ought not to receive, a decision upon the question whether the Commissioner of Metropolitan Police has the right to appear as the respondent in a case where the party to the appeal other than the appellant is not represented. I will only say this, that, having looked at the case which was relied upon by counsel supporting the rules—*R.* v. *Truelove* (4)—I do not regard that as any authority at all in support of the proposition that the commissioner has the right to F appear; it does not seem to me to touch the matter at all. It is, to my mind, of the greatest importance that, where a private prosecutor has initiated criminal proceedings, and a conviction by a court of summary jurisdiction has been obtained, and there is an appeal, some person other than the appellant should be present to assist quarter sessions in the matter, and I entertain no doubt whatever that, while the party who initiated the proceedings is a proper respondent, and normally the only respondent, to the appeal, G the justices themselves have an absolute right to appear, to instruct counsel, and to call evidence in support of the decision at which they have arrived and which is then under consideration by the court hearing the appeal. In so doing they do not make themselves a party to the appeal, and, therefore, no order can be made against them in respect of costs, but they appear, in my view, in precisely the same way as licensing justices who have refused the renewal of a licence appear where there is an appeal to quarter H sessions from such refusal—to inform the court of quarter sessions of the reasons upon which they acted, and to give their assistance to the court. One can well understand that normally a bench of magistrates, or a stipendiary magistrate, would not desire to be represented on such an appeal where the respondent is going to be represented. I should like to express my view that, upon information that the respondent to the appeal is not going to be represented, it is the duty of the clerk to the justices to see that I quarter sessions are afforded that assistance to which I have referred. That may be done in several ways; one way in which it clearly may be done is by requesting the Director of Public Prosecutions to take up the matter, and he has statutory power to do so. If it is desired to insist upon his doing so, recourse may be had to the Attorney-General, who has power to direct the Director of Public Prosecutions to take up any case. But apart from that, and if the justices have some reluctance to instruct counsel through their clerk, assuming him to be a solicitor, I can see myself no objection in law, and it seems to me to be an extremely convenient thing in practice, for the justices to arrange for some person, probably a public authority, and it might conveniently be the local police authority, to act on their behalf in the way in which I have indicated. I would only add that, in my own opinion, it would be very desirable in future, if justices think it right to take such a course, to put the matter beyond doubt by directing their clerk to apply to the local police authority in writing requesting that authority to act on their behalf, and to represent them upon the hearing before quarter sessions. Whether, in those circumstances, the commissioner of police has any more right than any other individual to take up the matter and make himself respondent is a matter upon which I express no opinion.

SINGLETON, J.—I agree. When the defendant was before the justices on March 25, 1935, he elected to be dealt with summarily, and pleaded Guilty to the offence with which he was charged. The justices inflicted a fine of £2, and ordered him to pay 5s. damages. On April 5, 1935, he gave notice of appeal, and it is clear that his appeal was an appeal against sentence only, as, indeed, it could only be, because he had pleaded Guilty to the offence with which he was charged. That appeal was filed under s. 25 of the Criminal Justice Act, 1925. When the case came before the court of quarter sessions objection was taken by the appellant, who appeared by counsel, and after a discussion it was decided by the justices that they could not hear counsel on behalf of the Commissioner of the Metropolitan Police. Thereupon, as is shown by the affidavit of the chairman of the West Kent Appeal Committee:

> "Proof having been given to the satisfaction of the committee that the statutory notices had been duly served upon the said Frank Clarke [the prosecutor in the court below] and the clerk of the said court of summary jurisdiction [counsel for the appellant], upon the non-appearance of the said Frank Clarke and the Bromley justices, cited to the committee the case of *R.* v. *Surrey Justices and Bell* (1), and contended that in the absence of any evidence the appellant was entitled to have his appeal allowed and the sentence appealed against struck out, and that the conviction must consequently be quashed. The committee, having considered the said case cited to them, accepted the contention, and thereupon quashed the said conviction."

I think that was wholly wrong for this reason. There was no appeal against conviction; there could be none. *R.* v. *Surrey Justices and Bell* (1) was cited to us in this court in support of the proposition for which it was used in the court of quarter sessions. In my view, however, it has no bearing whatever upon a case in which there is no appeal against conviction, but an appeal against sentence only under s. 25 of the Criminal Justice Act, 1925; and it is no part of the duty of the appeal committee of quarter sessions to quash a conviction where there is no appeal against it. The circumstances of that case and the present case are quite different, and I feel that a consideration of the change in law made by the Criminal Justice Act, 1925, would have obviated any such argument. The justices should consider such evidence as is put before them. If they had not sufficient evidence to deal with the matter of sentence, which was all that was before them, they could have adopted the suggestion of adjourning the case until there was representation on the other side satisfactory to them, and then all the facts could have been put before them.

Rules absolute.

Solicitors: *Sharpe, Pritchard & Co.*, for *W. L. Platts*, Maidstone; *Solicitor for the Metropolitan Police.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

Re A DEBTOR (No. 591 of 1934). Ex Parte THE DEBTOR v. PETITIONING CREDITORS AND OFFICIAL RECEIVER

[Court of Appeal (Lord Hanworth, M.R., Romer and Maugham, L.JJ.), January 18, 1935]

[Reported [1935] Ch. 353; 104 L.J.Ch. 228; 152 L.T. 368; 51 T.L.R. 277; [1934–5] B. & C.R. 234]

Bankruptcy—Petition—Hearing—Duty of court—Proof of debt, service and of act of bankruptcy—Unconscionable moneylending transactions—Moneylenders Act, 1927 (17 & 18 *Geo.* 5, *c.* 21), *s.* 10—*Bankruptcy Act,* 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 5 (2)—*Bankruptcy Rules,* 1915, *r.* 171.

In bankruptcy proceedings it is of primary importance that the registrar should comply strictly with the provisions of the Bankruptcy Act, 1914, s. 5 (2), and the Bankruptcy Rules, 1915, r. 171, regarding proof of the matters stated in the petition. Furthermore, it is the duty of the court under the Moneylenders Acts, 1900 and 1927, to consider, with a view to re-opening it, any moneylending transaction to which the debtor is a party and which is harsh and unconscionable, and no agreement between the parties can relieve the court of that duty. A full note of these matters should be made in case of an appeal.

Notes. For material rule, see now Bankruptcy Rules, 1952, r. 167 (1).

Distinguished: *Re A Debtor* (*No.* 27 *of* 1943), [1943] 2 All E.R. 15.

As to procedure on a bankruptcy petition, see 2 Halsbury's Laws (3rd Edn.) 301 et seq., and for cases, see 4 Digest 134 et seq. For Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321, and for Bankruptcy Rules, 1952, see 3 Halsbury's Statutory Instruments 155 et seq.

Case referred to:

(1) *Mills Conduit Investment, Ltd.* v. *Leslie and Denholm*, [1932] 1 K.B. 233; 100 L.J.K.B. 685; 145 L.T. 585; 47 T.L.R. 514, C.A.; Digest Supp.

Appeal from an order of Mr. Registrar Warmington made on Dec. 4, 1934. The facts so far as any facts are material are stated in the judgment of the Master of the Rolls.

G. F. Kingham for the debtor.

T. F. Davis for the petitioning creditors.

LORD HANWORTH, M.R.—It is by no means clear that certain important principles of the bankruptcy court have been duly observed in this case.

The debtor failed to comply with a bankruptcy notice which had been issued by a creditor who was different from the petitioning creditors, the respondents to this appeal. He had committed an act of bankruptcy and the petitioning creditors took advantage of the fact that he had committed an act of bankruptcy by presenting a petition in bankruptcy on June 21, 1934. The petition states facts, but facts to which very important additions, in our opinion, ought to have been made.

The petition is presented by two creditors—Louis Sherwood and the Dunn Trust, Ltd., in respect of the sum of £1,683 14s. With regard to the Sherwood claim, there was an aggregate sum of £1,156 2s. 10d. that was due for a principal sum of £1,150 advanced and interest at 5 per cent., and there was also some further interest under s. 9 (1) of the Moneylenders Act, 1927, for the sum of £160 2s. 2d. which was recoverable in bankruptcy only if all the other creditors had been paid in full. That was interest at the rate of 60 per cent. With regard to the Dunn Trust, Ltd., the claim was for a sum of £527 11s. 2d. advanced, with 5 per cent. interest, and there was a postponed claim in respect of interest payable at 240 per cent. per annum.

In addition to those facts, it ought to have been made clear to the court that with regard to the portion of the sum of £1,156 judgment had been given by the master for £580 and £5 8s. 4d. There was leave to defend as to the rest, and there had been a stay of execution in respect of the £580 for which judgment had been given. The matter went before DU PARCQ, J., who confirmed the order of the master, and granted a stay of execution until an appeal to the Court of Appeal, and that appeal was not determined until July 26, 1934.

With regard to the Dunn Trust, Ltd., in which there was a judgment, there was a contest, and the sum for which judgment was given was £130 and no more. Therefore, as the facts stood on the day when the petition was presented, namely, on June 21, the position was that, although there were these claims made by these two petitioning creditors, the total amount for which at that time there was an available debt was £130 and no more due to the Dunn Trust, Ltd. More than that, it would appear from a statement made, that in both cases the matters arose out of transactions in which provision was made for the payment of interest at a sum exceeding 48 per cent., and, therefore, requiring the duty of the court to be exercised in accordance with s. 10 of the Moneylenders Act. That duty cannot be evaded by any admission or consent which is given by any one of the parties. That is made clear in *Mills Conduit Investment, Ltd.* v. *Leslie and Denholm* (1), and I desire to re-state the observations which were made in the judgment given by the court ([1932] 1 K.B. at p. 239):

> "The consent of the parties cannot relax the duty or lessen the powers of the court. . . . Although the parties have made their own agreement, it is still the duty of the court to observe, respect, and carry out the direction in s. 10 and to presume that in this case the interest is excessive and the transaction harsh and unconscionable until the contrary is proved."

By the effect of the Moneylenders Acts of 1900 and 1927 the Bankruptcy Court is charged with the duty of respecting and carrying out the terms of the Moneylenders Act, 1927.

When the matter went before the registrar, as it did on July 17, the stay of execution in respect of the whole of the claim of Louis Sherwood was still effective, and the only debt which at that time was available was this sum of £130 due to the Dunn Trust, Ltd. We have got a note which seems imperfect; the note of the registrar is this:

> "The debt and act of bankruptcy admitted, attendance of petitioning creditors dispensed with."

It may be that that note was only made for the registrar's own purpose and without thought of making a record for the Court of Appeal, but it is not a very useful record when produced in the Court of Appeal. In all cases the court would want to be satisfied that the terms of s. 5 (2) of the Bankruptcy Act, 1914, have not been overlooked, that section saying that:

> "At the hearing the court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may make a receiving order in pursuance of the petition."

Rule 171 of the Bankruptcy Rules, 1915, carries out the terms of s. 5 (2), because the terms of it are as follows:

> "On the appearance of the debtor to show cause against the petition, the petitioning creditor's debt, and the act of bankruptcy, or such of those matters as the debtor shall have given notice that he intends to dispute, shall be proved. . . ."

I have specifically called attention to these rules because on July 13 there was filed a notice to dispute, and that notice to dispute has in terms stated that there was a stay of execution in respect of the Louis Sherwood debt, and that with regard to the Dunn Trust, Ltd., only £130 was due. Inasmuch as the note is not perfect, I will say no more, but I do call the attention of the registrar and of all other persons to the importance of observing and complying with s. 5 (2), and r. 171, and of making a note that they have been complied with. I also call attention to the fact that any admission is not sufficient in bankruptcy proceedings; the court is acting not merely inter partes but in the public interest, and, that being so, the court has a public function and duty to perform and is bound to perform it.

A There was an adjournment until July 31. By that time an order had been made in the Court of Appeal dismissing the appeal in the Louis Sherwood case with the consequence that the stay of execution had come to an end. The notice of opposition was withdrawn; what exactly that means I do not know. It may have been sufficient for the registrar to advise himself, but inasmuch as these cases are not to be decided inter partes, we would have liked to have had a more precise record of what was intended. B After that there are adjournments made, I suppose in consequence of some suggestions now made and recorded in an affidavit, that the debtor would be able to pay if certain ventures in which he was engaged ended satisfactorily. We are told now that the additional facts in respect of these two debts were stated to the registrar and that he was thus informed of them. Again, I think it would have been more useful, having regard to these additional facts being drawn to the attention of the court, if the note had C contained a statement that that information had been given. The matter was further adjourned on different dates, and finally until Dec. 24, when the situation, so far as one could see, had not changed, and the receiving order was made. From that receiving order an appeal was brought before this court, and counsel for the debtor was anxious to withdraw the appeal and only asked for a stay of the advertisement.

Having regard to the matters which were revealed in the course of this petition, we D were not satisfied to accede to that application without a further investigation. I hope that in future attention will be drawn to the importance both of proof of the debt and to a more ample and complete statement being made of the exact situation in respect of matters which are before another court, and that attention will be given as to whether or not the duty of the Bankruptcy Court in respect of the Moneylenders Act has or has not been complied with. Now that the matter has been cleared up I think there is no E sufficient ground for interfering with the registrar's decision and the appeal must be dismissed.

ROMER, L.J.—I agree.

MAUGHAM, L.J.—I agree.

Appeal dismissed.

F Solicitors: *P. B. Bullock*; *Woolfe & Woolfe.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re BERREY. LEWIS *v.* BERREY

[Chancery Division (Farwell, J.), October 31, 1935]

[Reported [1936] Ch. 274; 105 L.J.Ch. 38; 154 L.T. 335]

Lunatic—Intestate—Devolution of real property—Person who otherwise would have taken under former law illegitimate on Jan. 1, 1926—*Legitimation on Jan.* 1, 1927—*Administration of Estates Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *s.* 51 (2)—*Legitimacy Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 60), *s.* 3 (1).

The Administration of Estates Act, 1925, by s. 45 (1) abolished all pre-existing rules of descent of real and personal estate of persons dying after the commencement of the Act. By s. 51 (2), where a lunatic dies intestate, his or her real estate shall "devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case."

A person of unsound mind died on Feb. 22, 1933, intestate, a spinster, without brothers or sisters of the whole blood. M. A. claimed to be the sole next of kin of the whole blood, and, therefore, by reason of the general law in force before the commencement of the Act of 1925 applicable to freehold land, to be the sole heir at law of the intestate and solely entitled to her freehold land. M. A. had, however, been born out of lawful wedlock, and by the law in force before the Act of 1925 was not entitled to inherit the property of any intestate. She contended that by reason of s. 1 (1) the Legitimacy Act, 1926, which came into force on Jan. 1, 1927, she had from that date become a legitimate person, her parents having married in 1900, and that, by s. 3 (1) of that Act, she became entitled to take any interest "in the estate of an intestate dying after the date of legitimation . . . in like manner as if" she "had been born legitimate," and, therefore, that under s. 51 (2) of the Act of 1925 she was entitled to the real property of the intestate under the old law as if she had been born legitimate.

Held: in order that M. A. should succeed she would have to show that the Legitimacy Act, 1926, must be construed as having repealed s. 51 (2) of the 1925 Act; it was, however, well settled that the court did not construe a later Act as repealing an earlier Act unless it was impossible to make the two Acts stand together, and there was no such inconsistency between s. 3 (1) of the 1926 Act and s. 51 (2) of the 1925 Act as would compel the court to hold that the 1926 Act impliedly repealed s. 51 (2) of the earlier Act; and, therefore, M. A. was not a person capable of taking under the general law in force before the commencement of the 1925 Act, and so was not entitled to the real property of the deceased.

Notes. As to the devolution of the real estate of an intestate of unsound mind, see 21 Halsbury's Laws (2nd Edn.) 360, 361, and for cases, see 33 Digest 228, 229. For the relevant statutes, see 2 Halsbury's Statutes (2nd Edn.) 492; 9 ibid., 718.

Adjourned Summons

Elizabeth M. Berrey, a person of unsound mind, died on Feb. 22, 1933, intestate, a spinster without parents or brother or sister of the whole blood. Her nearest relatives surviving her were (i) Walter F. Berrey, the first defendant, and (ii) Mabel Allchurch, the second defendant. The first defendant was a brother of the intestate of the half blood, he having been the son of the second wife of the intestate's father, whereas the intestate was a daughter of her father's first wife. The second defendant was the sole surviving child of a deceased brother of the intestate of the whole blood.

The Administration of Estates Act, 1925, by s. 45 abolished all pre-existing rules of descent of real and personal estate of persons dying after the commencement of the Act, but the new rules of descent provided by s. 46 of the Act made no distinction between real and personal property, whereas the pre-existing rules had made that distinction. By the law in force before the commencement of the Act, including the provisions of s. 9 of the Inheritance Act, 1833, the second defendant, if she had been born in lawful wedlock, would, by reason of her descent being traced by the whole blood, have been entitled to the real estate of the intestate to the exclusion of the first defendant, who could only trace his descent by the half blood. By s. 51 (2) of the Administration of Estates Act, 1925, it was provided that where a lunatic died intestate his or her real estate should

> "devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall notwithstanding any repeal apply to the case."

The second defendant was born in 1885 out of lawful wedlock of her parents. Her parents married each other in 1900. By s. 1 (1) of the Legitimacy Act, 1926, which came into force on Jan. 1, 1927,

> "where the parents of an illegitimate person marry one another whether before or after the commencement of this Act, the marriage shall . . . render that person if living legitimate from the date of this Act or from the date of the marriage whichever last happens."

By s. 3 (1) of the same Act

> "a legitimated person and his spouse, children, or more remote issue shall be entitled to take any interest—(*a*) in the estate of an intestate dying after the date of legitimation . . . in like manner as if the legitimated person had been born legitimate."

By operation of the provisions of the above Act the second defendant became a legitimated person on Jan. 1, 1927. She claimed that, as she had become legitimate before the date of the death of the intestate in 1933, she was entitled to the real estate of the intestate by operation of s. 51 (2) of the Administration of Estates Act, 1925. On the other hand, the first defendant claimed that as s. 51 (2) of that Act provided that the intestate's real estate should devolve in accordance with the general law in force before the commencement of the Act applicable to freehold land, and as there was included in such law the rule that no person born out of lawful wedlock was capable of inheriting any property of an intestate, the fact that the second defendant became legitimate by reason of a law passed subsequently to the commencement of the 1925 Act could not alter the fact that she was not entitled by the earlier law to inherit the intestate's estate, and, therefore, he (the first defendant) alone was entitled to the real estate.

This summons was taken by the administratrix of the intestate for the determination of the question whether the second defendant was capable of inheriting the real estate of the intestate.

Greenland for the plaintiff.
D. L. Jenkins for the first defendant.
R. W. Turnbull for the second defendant.

FARWELL, J.—One Elizabeth Berrey died a spinster on Feb. 22, 1933, intestate. She was at the date of her death, and she had been for many years prior thereto, of unsound mind. The question has arisen in the administration of her estate, as to the persons entitled to the freehold property which belonged to her.

There are two claimants before me, the first defendant, who would have been the person entitled to that property apart from and prior to the coming into force of the Legitimacy Act, 1926, which came into force on Jan. 1, 1927, and, secondly, a lady, the second defendant, who claims that by virtue of that Legitimacy Act, 1926, she is entitled to the property. The question depends entirely upon the construction of two or three sections of each of those Acts. The second defendant was not legitimate at the time of her birth, but by reason of the subsequent marrying of her parents she became, as from Jan. 1, 1927, legitimated and having the rights of a legitimate person save and so far as those rights are curtailed by the provisions of the Act. She claims that under that Act she is entitled to the real estate of this intestate who died of unsound mind.

The Legitimacy Act, 1926, provides in s. 1:

> "Subject to the provisions of this section, where the parents of an illegitimate

> person marry . . . whether before or after the commencement of this Act, the marriage shall . . . render that person, if living, legitimate from the commencement of this Act or from the date of the marriage, whichever last happens." A

Then sub-s. (3) recites:

> "The legitimation of a person under this Act does not enable him or his spouse, children or remoter issue to take any interest in real or personal property save as is hereafter in this Act expressly provided." B

Section 3 provides for the interests which such a person may take and one of those is this:

> "Subject to the provisions of this Act, a legitimated person and his spouse, children or more remote issue shall be entitled to take any interest . . . (*c*) by descent under an entailed interest created after the date of legitimation."

It is said on behalf of the second defendant: Here is a person who is entitled under that C section to take an interest in the estate of this intestate because she died after the date of legitimation, and, that being so, she is the person who is now entitled to the real estate. On the other hand, the first defendant relies upon s. 51 of the Administration of Estates Act, 1925. That Act came into operation on Jan. 1, 1926, and, by s. 51 (2), provides:

D

> "The foregoing provisions of this part of this Act do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death, and any such beneficial interest . . . shall . . . devolve in accordance with the E general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case."

It is said on behalf of the first defendant that under the law as it was before the passing of the Act of 1925 a person in the position of the second defendant could not have taken any interest in the property and that the provision that the property shall "devolve in accordance with the general law in force before the commencement of this Act" can F only mean that the first defendant, who, by the law in force prior to the coming into operation of the Administration of Estates Act, was entitled to the real estate, is, therefore, the person entitled now.

One has to look back and see what it is that the Administration of Estates Act is dealing with in sub-s. (2) of s. 51. Looking at s. 45 it appears:

> "With regard to the real estate and personal inheritance of every person dying G after the commencement of this Act, there shall be abolished—(*a*) All existing modes rules and canons of descent, and of devolution by special occupancy or otherwise, of real estate . . ."

The effect of this provision in the Administration of Estates Act, 1925, is to put an end to the descent of real estate which was in force prior to the coming into operation of that H Act. It is said that the words themselves "modes rules and canons of descent" only mean that the way of descent was put an end to and that when one comes to read s. 51 (2), it does not operate in such a way as to be inconsistent with s. 3 of the Legitimacy Act, 1926. If I gave effect to that argument I should, in truth, be disregarding altogether the last words of that subsection, that is the words

> "any . . . beneficial interest . . . shall . . . devolve in accordance with the general I law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case."

In my judgment, the true construction of these sections of the Administration of Estates Act, 1925, is the same, apart from the general alteration that has been made, as to the rights of persons to real and personal estate, of a person who dies intestate and of unsound mind—that is to say, in the case of an intestate who dies of unsound mind the real estate of that intestate is to pass to the persons who would have taken it under the law as it was before the commencement of this Act.

That being the true view, except for the effect of the Legitimacy Act, it is quite plain that the second defendant would have no right at all. The law did not recognise persons born out of wedlock as capable of inheritance, and the property would have devolved upon the footing that the person who was not legitimate was not entitled to come in and claim at all.

Then one comes to the Legitimacy Act of 1926, and it is true that there appears the provision in that Act that:

> "Subject to the provisions of this Act a legitimated person . . . shall be entitled to take any interest in the estate of an intestate after the date of legitimation."

Those two sections would seem at first sight possibly not to be wholly consistent, but there is no such inconsistency as would compel me to hold that there is anything in the Legitimacy Act of 1926 which in any way repeals the provisions of the earlier Act. The rule is clearly settled now—that the court does not construe a later Act as repealing an earlier Act unless it is impossible to make the two Acts stand together and the later section can only be given a sensible meaning if it is treated as impliedly repealing the section of the earlier Act. It is not necessary for me to have resort to any such construction as that. The truth of the matter is that s. 51 is leaving the persons interested in the estate of an intestate who was of unsound mind at the time of her death and prior thereto in exactly the same position as though the Administration of Estates Act had not been passed. In my judgment, it is impossible to say that the subsequent Act has the effect of bringing in and adding to the persons who under that old law would be entitled to take, the person who is not entitled to take and only became entitled, if at all, by reason of the Legitimacy Act, 1926. I come to the conclusion, although the matter is not free from doubt, that the second defendant is not entitled to the real estate, and, accordingly, that the first defendant is the person so entitled.

Order accordingly.

Solicitors: *Field, Roscoe, & Co.*, for *Perry, Parr, & Ford*, Nottingham; *The Official Solicitor*; *Smith & Hudson*, for *Eking, Morris, Morris, & Foster*, Nottingham.

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

Re AN ARBITRATION BETWEEN THE ECCLESIASTICAL COMMISSIONERS FOR ENGLAND AND THE NATIONAL PROVINCIAL BANK, LTD.

[COURT OF APPEAL (Greer, Maugham and Roche, L.JJ.), March 5, 1935]

[Reported [1935] 1 K.B. 566; 104 L.J.K.B. 352; 153 L.T. 23; 51 T.L.R. 377; 79 Sol. Jo. 305]

Agriculture—Agricultural holding—"Tenant"—Short term credit under Agricultural Credits Act, 1928*—Charge by tenant to bank of farming stock and "other agricultural assets"—Whether bank a "tenant"—Agricultural Holdings Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *s.* 16 (1), *s.* 57 (1)*—Agricultural Credits Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 43), *s.* 5 (7).

A tenant of a holding under the Agricultural Holdings Act, 1923, charged to a bank his farming stock and "other agricultural assets," as defined in s. 5 (7) of the Agricultural Credits Act, 1928, under the provisions for agricultural short term credits in the Act of 1928. On a claim by the bank that they were "assigns of" or an "other person deriving title from" the tenant, and so were within the definition of "tenant" in s. 57 (1) of the Agricultural Holdings Act, 1923, and, therefore, entitled to have their claim against the landlords determined by arbitration under s. 16 (1) of the Act,

Held: the bank were not assigns of or successors to the tenancy agreement, and so were not within the definition and not entitled to arbitration under s. 16 (1).

Notes. The Agricultural Holdings Act, 1923, has been repealed: provision for agricultural holdings is now made by the Agricultural Holdings Act, 1948, (11 & 12 Geo. 6, c. 63), s. 94 (1) of which is in the same terms as s. 57 (1) of the 1923 Act. Section 70 (1) of the 1948 Act makes similar, but wider, provisions than s. 16 (1) of the 1923 Act for the determination by arbitration of "any claim of whatever nature by the landlord or tenant of an agricultural holding against his tenant or landlord being a claim which arises (a) under [the 1948] Act, or any custom or agreement, and (b) on or out of the termination of the tenancy of the holding or part thereof."

As to the definition of "tenant" in the Agricultural Holdings Act, 1948, the determination by arbitration of claims on termination of a tenancy of an agricultural holding, and the creation and nature of an agricultural charge, see 1 HALSBURY'S LAWS (3rd Edn.) 253, 324, 373.

For the Agricultural Credits Act, 1928, s. 5 (7), see 1 HALSBURY'S STATUTES (2nd Edn.) 622, and for the Agricultural Holdings Act, 1948, ss. 70 (1), 94 (1), see 28 HALSBURY'S STATUTES (2nd Edn.) 80, 94.

Case referred to:

(1) *Newfoundland Government* v. *Newfoundland Rail. Co.* (1888), 13 App. Cas. 199; 57 L.J.P.C. 35; 58 L.T. 285; 4 T.L.R. 292, P.C.; 7 Digest 420, *345*.

Appeal by the bank from a decision of the county court on a Case Stated by an arbitrator purporting to act under s. 16 (1) of the Agricultural Holdings Act, 1923.

At the hearing of the arbitration in the above matter the following facts were proved and admitted:

(1) The Ecclesiastical Commissioners for England (hereinafter called "the landlords") are and were at all material times the landlords of an agricultural holding known as the Manor Farm in the parishes of Leighton Bromswold and Catworth in the county of Huntingdon. The holding was let by the landlords to one Bryan Nichols (hereinafter called "the tenant") from Oct. 11, 1926, from year to year at a rent of £480 per annum. He was, however, only in occupation of 368 acres, 3 roods, 12 poles, in the parishes of Leighton Bromswold and Catworth at the material time of the arbitration. On Oct. 7, 1932, the tenant served upon the landlords a notice to quit the said holding at Michael-

mas, 1933, and in pursuance of the said notice quitted the same at Michaelmas (Oct. 11), 1933.

(2) By a charge under the Agricultural Credits Act, 1928, dated April 29, 1933, the tenant charged in favour of the National Provincial Bank, Ltd. (hereinafter called "the bank"), his farming stock, and "other agricultural assets" as defined in s. 5 (7) of the Agricultural Credits Act, 1928. This charge was duly registered on May 5, 1933, and became a fixed charge on Oct. 14, 1933. The bank, by virtue of its powers under the said charge, appointed a receiver of the assets comprised in the charge.

(3) On Dec. 5, 1933, a receiving order was made against the tenant, and he was duly adjudicated bankrupt, and a trustee in bankruptcy was appointed. Neither the tenant nor the trustee in bankruptcy made any claim upon the landlords arising out of the termination of the tenant's tenancy.

(4) Within two months from the termination of the tenancy the bank made a claim to the whole of the sums due from the landlords to the tenant at the termination of the tenancy free from deductions. The landlords disputed the right of the bank to make the said claim and, in any event, claimed to deduct from any sums to which the tenant was entitled at his outgoing all sums due from him (*a*) in respect of arrears of rent, and (*b*) in respect of dilapidations for which the tenant was liable under his lease. Formal statutory claims were made and their sufficiency was not disputed.

(5) The arbitrator was appointed by both parties under the provisions of the Agricultural Holdings Act, 1923. At the opening of the hearing the landlords contended that the arbitrator had no valid appointment, and he agreed to state a case for the opinion of the court as to whether his appointment was valid or not, but it was agreed by both parties, in order to save expense, that he should continue with the hearing of the case without prejudice to the landlords' contention that there could be no arbitration under the Agricultural Holdings Act, 1923, between the landlords and the bank.

(6) It was conceded by the landlords that if the bank was the tenant within the definition contained in s. 57 (1) of the Agricultural Holdings Act, 1923, they were liable to account to the bank, subject to a set-off which they claimed, for certain sums which were payable by them in respect of tenant-right. The amount due to the landlords in respect of arrears of rent was admitted to be £321 9s. 6d., and it was further admitted by the bank that the landlords were entitled to have such sum set off against any amount found by the arbitrator to be due from the landlords to the bank. There was also a sum due to the landlords in respect of dilapidations, but the bank denied that there was any right in the landlords to have this sum or any part thereof. No question arose in the case as to figures.

(7) Clause 26 of the tenancy agreement provided for a set-off of claims as between landlord and tenant at the expiration of the tenancy. Further, it was proved before the arbitrator and admitted by the bank that it was a custom of the county of Huntingdon that where at the expiration of the tenancy of an agricultural holding there were claims and counterclaims between the landlord and the tenant the landlord deducted from the amount due to the tenant any sums due from the tenant in respect of arrears of rent or dilapidations and that the balance, if any, was the amount recoverable by the tenant from the landlord upon the tenant's outgoing.

(8) By cl. 11 of the tenancy agreement the tenant covenanted (i) that he would keep the premises in good and substantial repair during the term, and (ii) that he would leave the premises in good and substantial repair at the termination of the tenancy. The landlords took no steps under the provisions of the tenancy agreement to enforce the provisions of the aforesaid maintenance covenant during the period of the term of the lease and no claim in respect of dilapidations was made against the tenant until after the term had expired.

(9) Fields numbered 111, 6, 7, 16, 17, 19, and 21 in the schedule to the tenancy agreement which comprised the whole of the arable land of this holding were laid down by the tenant during his tenancy to temporary pasture. The holding was let as partly arable and partly pasture and the buildings were adapted to the use of the holding as a mixed farm. The land was at all material times during the last year of tenancy out of shift.

On the aforesaid facts the landlords' contentions were:

(*a*) That the bank was not the tenant of the holding within the definition of "tenant" in s. 57 (1) of the Agricultural Holdings Act, 1923.

(*b*) That the bank was not entitled under the provisions of the Agricultural Holdings Act, 1923, to appoint or concur in appointing an arbitrator under that Act.

(*c*) That the arbitrator's appointment was invalid and of no effect.

(*d*) That if there was a valid arbitration under the Agricultural Holdings Act, 1923, and in any event, the landlords were entitled by reason of cl. 26 of the tenancy agreement and (or) by the custom of the county of Huntingdon to have deducted from the amount found due by the arbitrator from them to the bank in respect of the tenant's claim the amount of £321 9s. 6d. arrears of rent and the amount found due by the arbitrator from the tenant to them in respect of dilapidations, and that the amount, if any, recoverable by the bank from the landlords was the balance, if any, after such deductions were made.

(*e*) That the arbitrator had the power and that it was his duty to direct and award a set-off against the amount found due to the bank of the amounts due to the landlords for arrears of rent and for dilapidations or so much thereof as was sufficient to extinguish the amount found due to the bank.

(*f*) That if the bank were entitled to arbitrate under the Agricultural Holdings Act, 1923, and if the amounts found by the arbitrator to be due from the tenant to the landlords exceeded the amount found by the arbitrator to be due from the landlords to the bank in right of the tenant the balance thereof should be awarded by the arbitrator against the bank in favour of the landlords.

(*g*) That in refraining from enforcing the maintenance covenant referred to in para. 8 of the case during the currency of the term they had not waived the breaches thereof, and were entitled to enforce such covenant at the termination of the term.

On the aforesaid facts the contentions of the bank were:

(*a*) That they were assigns of the tenant, or alternatively were persons deriving title from him, and as such were entitled to appoint or concur in appointing an arbitrator under the provisions of the Agricultural Holdings Act, 1923, and that the arbitrator's appointment was valid.

(*b*) That the landlords, having taken no steps before the expiration of the term to enforce the tenant's liability under his maintenance covenant, namely, to keep the premises in repair, must be deemed in making their claim for dilapidations to be relying solely upon the breach of the tenant's yielding-up covenant, namely, to leave the premises in repair; alternatively, to have waived the breaches of the maintenance covenant.

(*c*) That the tenant's liability for breach of his covenant to leave in repair arose after the date of registration of the bank's charge.

(*d*) Further, that if the landlord's claim to dilapidations could be made under the maintenance covenant the landlords could not in fact prove any debt to them in that respect prior to the date of registration of the bank's charge.

(*e*) That, conceding the existence of the custom proved and admitted before the arbitrator, the landlords were not entitled after registration of the charge to deduct as against the bank any sums in respect of breaches of covenant by the tenant for which the tenant's liability arose after the registration of the charge;

(*f*) That the arbitrator had no power and no duty to direct and award a set-off save in respect of the landlord's claim for arrears of rent.

(*g*) That notwithstanding that the tenant was in breach of his covenant under cl. 7 of the tenancy agreement he ought to make an allowance to the bank as assignee of the tenant for the laying down of temporary pasture in fields Nos. 111, 6, 7, 16, 17, 19, and 21.

The questions of law submitted for the opinion of the court were:

(1) Was the appointment of the arbitrator under the Agricultural Holdings Act, 1923, valid?

(2) If his appointment was valid as an arbitrator under the Act, (*a*) were the landlords entitled by reason of cl. 26 of the tenancy agreement and (or) by the custom of the

A county of Huntingdon to have deducted from the amount found due by the arbitrator from them to the bank in respect of the tenant's claim the amount found due by the arbitrator from the tenant to the landlords in respect of dilapidations, and was the amount, if any, recoverable by the bank from the landlords the balance, if any, after such deduction, together with a deduction in respect of arrears of rent, was made?

(*b*) Had the arbitrator the power and was it his duty to direct and award a set-off B against the amount found due to the bank of the amounts due to the landlords for arrears of rent and for dilapidations or so much thereof as was sufficient to extinguish the amount found due to the bank? (*c*) And if the amounts found by the arbitrator to be due from the tenant to the landlords exceeded the amount found due by him from the landlords to the bank in right of the tenant was it his duty to award such balance against the bank in favour of the landlords, and if not, how was he to deal with such C balance, if any, in his award?

The county court judge decided that there was no valid submission to arbitration, as the bank never were "tenants" of the holding within the meaning of the Agricultural Holdings Act, 1923. The charge on which the arbitration was based in no way vested the land or the benefit of the contract of tenancy in the bank, and as s. 16 (1) of the Act of 1923 only provided for arbitration between landlord and tenant, it followed that the D appointment of the arbitrator was invalid. On the other issues stated by the case, consideration was reserved.

The bank appealed.

The Agricultural Credits Act, 1927, provided:

> Section 5: "(7) For the purposes of this Part of this Act . . . 'other agricultural assets' means a tenant's right to compensation under the Agricultural Holdings E Act, 1923, for improvements, damage by game, disturbance or otherwise, and any other tenant right."

The Agricultural Holdings Act, 1923, provided:

> Section 16: "(1) Any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under this Act, F or for any such sums claimed to be due to the tenant from the landlord for any breach of contract or otherwise in respect of the holding, or out of any claim by the landlord against the tenant for waste wrongly committed or permitted by the tenant or for any breach of contract or otherwise in respect of the holding, and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding or G arising, whether during the tenancy or on the termination thereof, as to the construction of the contract of tenancy, and any other question which, under this Act, is referred to arbitration, shall be determined, notwithstanding any agreement under the contract of tenancy or otherwise providing for a different method of arbitration, by a single arbitrator in accordance with the provisions set out in the Second Schedule to this Act."
>
> H Section 57: "(1) In this Act, unless the context otherwise requires . . . 'tenant' means the holder of land under a contract of tenancy and includes the executors, administrators, assigns, guardian, committee of the estate or trustee in bankruptcy of a tenant, or other person deriving title from a tenant."

P. B. Morle and *Cyril Conner* for the bank.

Evershed, K.C., and *C. L. Henderson* for the landlords were not called upon.

I

GREER, L.J.—In this case the National Provincial Bank, Ltd., are entitled to a charge made under the provisions of the Agricultural Credits Act, 1928, upon "the agricultural assets" of a farmer named Bryan Nichols, the tenant of a holding under the Agricultural Holdings Act, 1923. "Other agricultural assets" are defined by s. 5 (7) of the Agricultural Credits Act, 1928, in these terms:

> "'Other agricultural assets' means a tenant's right to compensation under the Agricultural Holdings Act, 1923, for improvements, damage by game, disturbance or otherwise, and any other tenant right."

There can be no doubt that either under the provisions of that Act, or apart from that Act, a farmer can pledge to his bank his agricultural assets as so defined by the Act of 1928; but it does not follow from that that the assignee of those agricultural assets becomes the "tenant" within the meaning of the Agricultural Holdings Act, 1923, so as to entitle him to arbitration: the convenient method of having a tenant's rights determined with reference to, amongst other things, tenant right, and his right to compensation under the provisions of the Act of 1923. That statute, in s. 57 (1), defines "tenant" in these terms:

> "In this Act, unless the context otherwise requires . . . 'tenant' means the holder of land under a contract of tenancy, and includes the executors, administrators, assigns, guardian, committee of the estate, or trustee in bankruptcy, of a tenant or other person deriving a title from a tenant."

I cannot regard that definition as including those who are merely assignees of the assets of a tenant and not assigness of his tenancy agreement. For these reasons, on the question which was by the consent of both parties propounded for the decision of the county court judge, the landlords were right and the bank were wrong, and this appeal, therefore, must be dismissed.

Then the question arises as to whether, under these circumstances, these proceedings from the very commencement were null and void. There was no jurisdiction in the arbitrator either to determine the facts or to state a case. There was no jurisdiction in the judge to come to a determination on the Case Stated. There is, therefore, no jurisdiction in this court to deal with the matter at all, but I think that the appellants in this case, who have appealed on this question, ought not to be allowed to take a point of that sort and deprive this court of the power to order them to pay the costs of the appeal. The order will be that the appeal is dismissed with costs.

MAUGHAM, L.J.—I am of the same opinion. The case arises out of a tenancy of an agricultural holding granted by the Ecclesiastical Commissioners for England to one Bryan Nichols, to hold from Oct. 11, 1926, from year to year. By a charge under the Agricultural Credits Act, 1928, dated April 29, 1933, the tenant charged in favour of the National Provincial Bank, Ltd., who are the appellants here, his farming stock and "other agricultural assets" as defined in s. 5 (7) of the Agricultural Credits Act, 1928. The charge was duly registered on May 5 of that year, and by notice from the bank became a fixed charge on Oct. 14, 1933, and the bank on the same date appointed a receiver of the assets comprised in the charge. The tenant was in difficulties. On Dec. 5 a receiving order was made against him, he was adjudicated a bankrupt in due course and a trustee in bankruptcy was appointed. Within two months from the termination of the tenancy the bank under their charge made a claim to the whole of the sums due from the landlords to the tenant at the termination of the tenancy free from deductions. That claim has been disputed, and in particular the landlords claim to deduct arrears of rent and divers sums for dilapidations, for which the tenant was liable under his lease. An arbitrator was appointed under the Act by both parties. The matter comes before us on a special Case Stated by the arbitrator. It has been before the learned county court judge, who has decided that there was no valid submission to arbitration by reason of the fact that the bank never were "tenants" of the holding within the meaning of the Agricultural Holdings Act, 1923. That depends upon the definition of a "tenant" in s. 57 (1) of the Agricultural Holdings Act, 1923. The word "tenant" is defined as meaning

> "the holder of land under a contract of tenancy"—that certainly does not include the bank—"and includes the executors, administrators, assigns, guardian, committee of the estate, or trustee in bankruptcy, of a tenant, or other person deriving title from a tenant."

To my mind there is not a single word in that part of the definition which begins with the words "and includes," which points to the conclusion that "tenant" is intended to include a person who is not in any true sense a tenant or the assign of a tenant in any ordinary meaning of the word, or that it includes either a mere assign of farming stock

A or agricultural assets or a person who happens to be an assign of a right to compensation under the Agricultural Holdings Act, 1923.

There seems to me to be a number of difficulties in holding that, although the words do not point to a person or a company in the position of the bank, yet they ought to be held to include such a person. A tenant who is making a claim under the Agricultural Holdings Act, 1923, against his landlord is, of course, liable to have all sorts of counter- B claims made against him, and s. 16 of the Agricultural Holdings Act, 1923, clearly points to the fact that any counterclaim, so to speak, by the landlord has to be referred to arbitration in just the same way as the claim of the tenant. I will not read the section, but almost every line of it shows that that is the case, and it is quite clear that the arbitrator has to decide by whom a sum on balance is to be paid. The object of the bank here in bringing their claim in the way in which they have, as assigns of the tenant, C without having the trustee in bankruptcy or the original tenant before the arbitrator, admittedly has been based on the hope that they will thereby be entitled to obtain by virtue of a charge on the right to compensation, payment of the amount due by the landlord without allowing the landlord to make the counterclaim which he is justified in making under s. 16 of the Agricultural Holdings Act, 1923. It is sufficient, as my lord has pointed out, to decide that such a person as the bank is not a "tenant" within the D meaning of the Agricultural Holdings Act, 1923, and is therefore not entitled to arbitrate in his own name, as he has sought to do. I will only add that I conceive there are the very greatest difficulties in holding that a person who may be only an assign of some portion of the right to compensation payable to the tenant is entitled to the alleged rights which he claims here, not suing in equity in the name of the tenant or his assign and not making the tenant or his assign a party to the proceedings. Supposing the E lease were assigned to one person and the charge of "agricultural assets" were vested in some other person, how, in the absence of both parties, including the person who really is either the tenant or his assign in the usual sense, could the suggested arbitration take place? It seems to me reasonably clear that the bank is not a "tenant" within the meaning of the subsection, and that, therefore, these proceedings will not lie. I will only add that if proceedings take place in reliance on an equitable assignment it will be F well for the bank to remember that an assignee of moneys to arise under a contract (and a tenancy is a contract) will only be entitled to them subject to the conditions of the contract itself; and the advisers of the bank will no doubt consider the judgment of the Privy Council in *Newfoundland Government* v. *Newfoundland Rail. Co.* (1); I agree that this appeal must fail, with the consequences mentioned by my lord.

G **ROCHE, L.J.**—I agree that this appeal should be dismissed. The bank, who are appellants, were entitled to the benefit of an agricultural charge made under the short term credit provisions of the Agricultural Credits Act, 1928. The farmer who gave them the charge went bankrupt and also went out of the farm of which he was tenant. Certain of the assets situate on the farm had been charged in favour of the bank. Thereupon the bank preferred a claim which was, I will not say misconceived, because I dare H say the bank were quite aware of the difficulties that attended the making and prosecution of such a claim, that as they were entitled under their charge to the benefit of the agricultural assets of the tenant, which included his tenant right, therefore they could proceed, by way of arbitration under the Agricultural Holdings Act, 1923, to assert in their own name, and without the concurrence of the tenant, a claim under the Act and otherwise through an arbitration independent altogether of the rights of the tenant, in I the sense that the bank claimed to take all the benefits to which the tenant might be entitled as an outgoing tenant from his landlord without giving credit for any of the outgoings or dilapidations to which the claim of the tenant would be subject.

For the reasons given by GREER and MAUGHAM, L.JJ., such a claim is, in my opinion, altogether untenable and no such arbitration by virtue of an independent right is open to the bank. I should be surprised indeed if in an arbitration, any more than in equity, the bank, or the persons entitled to the benefit of a charge, should get any such rights as were claimed in this action. I agree also as to the costs of the proceedings, because the effect of what was done was that all parties asked the arbitrator to do what he otherwise could not do, decide as a preliminary point the extent of his own jurisdiction, and asked that a case should be stated by the arbitrator for the consideration of the county court judge and ultimately for the consideration of this court. In those circumstances the proper order seems to be that those who have failed should pay the costs of the proceedings.

Appeal dismissed.

Solicitors: *Wilde, Sapte, & Co.*; *Milles, Jennings White, & Foster.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

BROWN AND OTHERS *v.* MONMOUTHSHIRE COUNTY COUNCIL

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), March 11, 1935]

[Reported 153 L.T. 9; 99 J.P. 227; 51 T.L.R. 348; 79 Sol. Jo. 215; 33 L.G.R. 231]

Medical Practitioner—Midwifery—Medical assistance summoned by midwife—Doctor's right to fee—Midwives Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 43), *s.* 14 (1).

Section 14 (1) of the Midwives Act, 1918, provided that in the case of an emergency a midwife should call to her assistance a registered medical practitioner, "and the local supervising authority shall pay to such medical practitioner a sufficient fee . . . according to a scale to be fixed by the [Minister of Health]."

Held: under the subsection the only power given to the Minister was a power to fix the scale of fees, and a direction to local supervising authorities in a circular issued by him that in specified cases no fee should be paid was ultra vires.

Notes. The Midwives Act, 1918, was repealed by the Midwives Act, 1951, s. 14 (1) of the Act of 1918 being substantially reproduced in s. 14 (1) and (2) of the Act of 1951.

As to the law relating to midwives, see 22 HALSBURY'S LAWS (2nd Edn.) 363 et seq., and for cases, see 34 DIGEST 564, 565. For Midwives Act, 1951, see 30 HALSBURY'S STATUTES (2nd Edn.) 246.

Appeals from Newport (Mon.) County Court.

The plaintiffs, four doctors, had claimed in the county court fees in respect of services rendered to midwives who had called them in in cases of emergency. Section 14 (1) of the Midwives Act, 1918, provided that midwives should call in a doctor in the case of an emergency and that the local supervising authority should pay to him a sufficient fee with due allowance for mileage, according to a scale to be fixed by the Local Government Board and, later, the Ministry of Health. On Dec. 20, 1922, the Ministry sent out a circular containing what purported to be a scale of doctors' fees under the Act, cl. 8 of which provided that no fee should be payable by the local supervising authority, inter alia, where the doctor attended the patient under arrangement with the patient or any club, medical institute, or other association of which the patient or her husband was a member. In three cases there was an agreement under which the doctors concerned were retained by the Ebbw Vale Workmen's Medical Society to act as the doctors to that society. The plaintiff, Dr. Brown, had no written agreement, but attended persons who participated in a poundage system under which in certain circumstances they were entitled to the services of a medical man, which included midwifery attendance. The local supervising authority having refused to pay fees to the plaintiffs, the question arose whether cl. 8 was ultra vires the Minister of Health, and, therefore, under s. 14 a sufficient fee must be paid by the local supervising authority to the doctors. The county court judge decided in favour of the local authority on the ground that, if the

A local authority were satisfied, on considering what was a sufficient fee within the meaning of s. 14, that the plaintiffs had already been adequately remunerated in some other way, no fee should be payable because the quantum of remuneration had been ascertained and thus the question of sufficiency had been dealt with. The plaintiffs appealed.

H. C. Dickens for the appellants.

B *R. G. Micklethwaite* for the respondent council.

LORD HANWORTH, M.R.—These four cases involve a consideration of complex statutes and rules, and we have been assisted on both sides by a helpful argument. The problem that we have to determine is whether the circular letter which prescribes certain fees is in a certain part of it, namely, cl. 8, valid and intra vires.

The question arises upon certain facts which I must state. These are appeals by four C doctors who are appealing from a decision given by the learned county court judge in favour of the Monmouthshire County Council. Each of these doctors sought to recover certain fees outstanding and payable to him in respect of services he had rendered to midwives who had been faced with serious difficulties in attending upon mothers. The learned county court judge finds this, and I state it at once:

> D "In this case no question was raised as to the fact of an emergency not having arisen. It was admitted that in each of the cases the calling in of the doctor was proper, and that, if the claim of the plaintiffs was lawfully made, there would be no question at all about the amount or matters of that kind."

I must, therefore, state shortly why those findings are of importance. In 1902 there was a statute passed called the Midwives Act which was to secure the better training of E midwives and to regulate their practice. A plan was arranged under which they were to be certified, and there was to be a roll of those who were certified and rules were to be framed which, if approved by the Privy Council, were to be valid, and there was to be throughout the country a local supervision of midwives by means of the council of a county or a county borough. After that a further Act was passed, the Midwives Act of 1918, which further implemented the principle which had originally led to the passing F of the 1902 Act. I ought to have said that the Central Midwives Board was not constituted under the 1918 Act; it was amended, but was originally constituted under the Act of 1902. There were certain sections which dealt with the power of local supervising authorities to provide medical assistance in cases of emergency. I think the keynote of both these statutes is this, that it is to the interest of the State that a mother and her child should be so treated in the matter of child-bearing that the mother should G not be injured, but should be restored to health, and that the child should not suffer the disability which may arise by reason of parturition. That is the principle of it. Under s. 14 there is power for the midwife to obtain medical assistance in case of emergency. I will read the first subsection:

> "In case of any emergency, as defined in the rules framed under s. 3 (1) (*e*) of the [Act of 1902], a midwife shall call in to her assistance a registered medical practi-H tioner, and the local supervising authority shall pay to such medical practitioner a sufficient fee, with due allowance for mileage, according to a scale to be fixed by the Local Government Board."

That power of the midwife to call to her assistance a medical practitioner carries out the important and underlying feature of the Acts to which I have referred.

I In the present cases, in accordance with the passage I have read from the judgment, there was an emergency; there was a proper demand made by the midwives for the assistance of the doctors who rendered medical aid and who became entitled to the sums which were sued for by them. Dr. Brown sued for £21, Dr. Thom for 8 guineas, Dr. Partridge for 3 guineas and Dr. Buckley for 8 guineas as owing in respect of those services. Section 14 would seem to be explicit in its terms. There is a duty upon the midwife to call in the assistance of the medical practitioner, and, that assistance being rendered, there is a duty upon the local supervising authority to pay such medical practitioner a fee, a sufficient fee, with due allowance for mileage, according to a scale to be fixed by the Local Government Board, and a scale of fees for doctors called in by midwives was made. The circular I have before me—circular 358—is dated Dec. 20, 1922, and on the back of it it contains the scale: (1) Is a fee for all attendances of a doctor at parturition; (2) a fee for the attendance of a second doctor to give an anæsthetic; (3) a fee for suturing the perineum; (4) a fee for attendance at, or in connection with, an abortion or miscarriage; (5) a fee for visits to the mother and (or) child; (6) the usual mileage fee of the district to be paid for all attendances, and (7) fee for attendance on mother and (or) child at the doctor's residence or surgery. Clause (8) provides:

> "No fee shall be payable by the local supervising authority (1) where the doctor has agreed to attend the patient under arrangement made by or on behalf of the patient or by any club, medical institute or other association of which the patient or her husband is a member, or when the doctor is under obligation to give the treatment to the patient under the National Health Insurance Acts, 1911 to 1922; (2) where the doctor receives or agrees to receive a fee from the patient or her representative; (3) in respect of any services performed by the doctor on any date later than the tenth day from the date of his first attendance, unless he has reported to the local supervising authority that he considers, for reasons stated by him, that his further attendance is necessary."

It strikes one as curious that one should find a definite determination of certain cases where no fee is to be payable in a table which is prepared of the fees which are to be payable and the scale of which is to be fixed by the Local Government Board under s.14 (1). The local supervising authority is not of its own motion to determine that in certain cases no fee will be paid. What s. 14 demands of them is that they shall pay to a medical practitioner a sufficient fee in cases where they have been properly called in by the midwife, and that fee which shall be paid is one to be fixed by the Local Government Board, and was so fixed. Clause 8 seems to go on to determine other matters which do not properly belong, and ought not to be appended to, a mere scale of fees. It is quite true that sub-s. (4) of s. 14 gives the local supervising authority

> "power to recover the fee from the patient or from the husband or other person liable to maintain the patient either summarily or otherwise as a civil debt, unless it be shown to their satisfaction that the patient or her husband or such other person is unable by reason of poverty to pay such fee."

It will be noted that the authority is given power to recover the fee, but the duty is not laid upon it in all cases to recover the fee. There is in the later portion of the subsection a prohibition against their suing and attempting to recover the fee where the person who would have been sued is unable by reason of poverty to pay such fee. Clause 8 seems by anticipation to determine matters which may be suitable for consideration when proceedings are taken under the power given by sub-s. (4) to recover the fee from the patient, but which ought not to be determined and cannot be determined beforehand and added to a scale of fees which, in the first instance, are definitely to be paid to the medical practitioner who has rendered assistance.

With regard to these four cases, in the first three of them it was suggested that there was an agreement under which the plaintiffs were retained as the doctors by the Ebbw Vale Workmen's Medical Society, an approved society, to act as doctors to that society and each to give, under cl. 2,

> "to all persons on his list who are for the time being entitled to obtain treatment from him such treatment as is of a kind which can consistently with the best interest of the patient be properly undertaken by a general medical practitioner of ordinary professional competence and skill."

I do not think it is necessary finally to determine the point, but, having regard to cl. 10 under which the doctor is to comply with and to be subject to the regulations and conditions prevailing under the National Health Insurance Acts, it appears to me that that agreement relates to such medical benefit as comes directly under the National Health Insurance Acts, because the last words of cl. 10 are "in respect of insured persons who are entitled to medical benefits from the society." "Medical benefit" is defined in s. 10 of the consolidating Act of 1924 and medical benefit under s. 12 is to be administered by and through the Insurance Committee. It is true that in some societies it is possible to have additional benefits beyond the medical benefits. It may be contended that by sub-s. (1) (*e*) of s. 10 one of the additional benefits which are catalogued in Sched. III may introduce the benefit of midwifery, because in that schedule sub-cl (14) says,

> "such other additional benefits being of the same character as any of those hereinbefore mentioned as shall be prescribed."

But I think, when one bears in mind the distinction between "medical benefit" and "additional benefit" and then turns to look at this typical agreement between the doctor and the approved society, it would seem that the agreement related to the medical benefit and not otherwise. This approved society can give the benefit of midwifery, but only allow the doctor a fee of not more than 10s. 6d. The learned judge has held that there would be the possibility of the doctors recovering from these patients whom they attended because these patients were persons who were entitled, as I understand, to benefit under the Act, and, therefore, he held, inasmuch as that was so, that the doctors would receive a sufficient fee, and he held that the word "sufficient" was interpreted as to whether or not there was some other source from which the fee could be obtained. I cannot accept that view. It appears to me that the "sufficient" fee there is only intended to lay down that in propounding the scale of fees for the doctors called in by midwives the doctors shall be properly remunerated for the services that they render and that it has no relation to another source from which a payment may be made.

In the case of Dr. Buckley he was not a person who had any agreement at all; his position was different. It was said he was a person who had no written agreement, but he attended to a number of persons who participated in a poundage system under which in given circumstances they were entitled to the services of a medical man, and that the poundage system included midwifery attendance. It was said that the evidence called before the learned county court judge justified a finding that under the poundage system Dr. Buckley would be entitled to be remunerated by the persons who adhered to the poundage system, and, therefore, that he came within the prohibition of the payment of a fee by a person under cl. 8, r. 1, because he was a doctor who had agreed to attend the patient under an arrangement made

> "on behalf of the patient or by any club, medical institute or other association of which the patient or her husband is a member."

Curiously enough the learned county court judge did not give a separate judgment in the case of Dr. Buckley, and it is necessary in his case to determine, not merely what is the meaning of the word "sufficient," but also whether or not this prohibition in cl. 8, r. 1, does prevent his recovering.

For the reasons I have already given, I have come to the conclusion that cl. 8 is ultra vires. It forms no necessary part of the establishment of a scale of fees for the doctors; it seeks in advance to determine matters which may ultimately arise under sub-s. (4), and, in spite of the claim of counsel for the local authority that it stands good, I have come to the conclusion that cl. 8 is bad and ultra vires and cannot be supported, with the result that we have left the definite duty laid upon the local authority of paying to the medical practitioner a fee which is to be a "sufficient fee." What is a "sufficient fee" is laid down in the scale to which I have referred.

For these reasons the appeal must be allowed with costs and judgment must be entered in each case with costs for the sum for which the suit was brought.

SLESSER, L.J.—I am of the same opinion. I think it useful at the outset to state what I understand the learned county court judge to have decided. The learned county court judge seems to me to have come to a conclusion in favour of the local authority on a consideration of s. 14 sub-ss. (1) and (4) in particular, irrespective altogether of the conditions as to the scale of fees which have been prescribed by the central authority, the Ministry of Health. He refers to the fact that the statute provides for the payment of a "sufficient" fee, and continues:

> "If, when the local authority comes to consider what is a sufficient fee, they are satisfied that the medical gentleman concerned has already been adequately

> remunerated in some other way, then no fee at all should be payable because the quantum of remuneration has been ascertained by reference to the poundage payments" A

—he might have added, "and also the agreements in the cases of the other doctors"—"and thus the question of sufficiency has been dealt with."

In my opinion, in coming to that conclusion, the learned judge was wrong. I do not think that the question of sufficiency is one which the local authority had any B power to determine at all. The only discretion under s. 14 (1) which is given to the local authority is with regard to the allowance for mileage; the sufficiency of the fee is determined, to quote the language of the statute, "according to a scale to be fixed by the Local Government Board." In this case, as my Lord has said, these registered medical practitioners had, on the findings of the learned county court judge, done everything which primâ facie gives them a right to be paid their fees, and the only question, there- C fore, which can arise is whether those fees are payable to them according to a scale to be fixed by the Local Government Board. So that the considerations which the learned county court judge allowed himself to consider on this head when regarding the sufficiency of the fee, that these gentlemen might be said to have been already remunerated under the arrangements which they had made with the patient or with the patient's husband, give no power, in my view, to enable him to find in favour of the local authority. D

But counsel for the authority is, of course, entitled to uphold the judgment which he has obtained on the grounds other than those which commended themselves to the learned county court judge. The learned county court judge appears to have agreed with counsel for the plaintiffs that the conditions on which counsel for the authority is otherwise forced to rely, if he cannot rely upon the judgment, are ultra vires, but counsel says that is wrong, and you must regard the conditions here as intra vires. Those E conditions are contained in cl. 8 of a circular letter that was sent to the local authorities, and is said to have an appended scale of fees which the Ministry of Health had prescribed for the payment by local supervising authorities to medical practitioners called in by midwives under s. 14 of the Midwives Act, 1918. We were not favoured with the original circular, but so far as I can understand from the prefatory memorandum on this circular of Dec. 20, 1922, it looks as if the third condition of cl. 8, namely, that the doctor F shall not be entitled to a fee in respect of any services performed by him

> "on any date later than the tenth day from the date of his first attendance unless he has reported to the local supervising authority"

in a proper manner subject to certain conditions, was for the first time inserted in the circular of Dec. 20, 1922. The other two conditions which are material conditions in G this case, Nos. 1 and 2, to which my Lord has referred, appear to have been in the original circular. In my opinion, the learned judge was right if he came to the conclusion that those conditions were ultra vires, and whether he did or did not decisively so come to that conclusion I think they are ultra vires. Section 14 (1) gives power to the Local Government Board, now the Ministry of Health, to fix a scale of fees. I cannot see that it gives any other power at all. It is not suggested that there is any general H power of making regulations or conditions on which fees may or may not fall to be paid, but it is significant that in sub-s. (2) of s. 14 there is imposed by the statute in terms a condition. It says:

> "It shall be a condition of the payment of such fee that the medical practitioner so called in shall state in his claim to the local supervising authority the nature of the emergency." I

It is, of course, not conclusive, but it supports my view that the imposition of any other conditions to this scale is ultra vires, and that where the legislature has thought fit to make a condition of the payment of a fee it has so stated in terms.

For these reasons, I agree that this clause is ultra vires, and if the clause be ultra vires, and if the sufficiency of the fee be fixed by the clause, it follows that there is no ground except that of inconvenience which can be urged against the grammatical and natural construction of the section. It is said that these persons here paying may be called upon to pay twice over, but it is to be noticed that the obligation which is placed by the statute to call in the doctor is an obligation placed upon the midwife under the regulations of the Central Midwives Board. The midwife, in my opinion, is probably acting as the agent of the local supervising authority, constituted under s. 8 of the Act of 1902, and there is no contractual relation thereby constituted between the patient or the patient's husband and the doctor. Whatever arrangements they may or may not have thought fit to make by contract or any other system seems to me entirely outside this statutory obligation on the local authority to pay a doctor called in under the statute by their agent, the midwife, and, therefore, I do not think that the class of cases which deals with inconveniences and difficulties arising under the construction of a statute can be extended to cases where such inconvenience that may arise is one dealing with general policy or contractual arrangements outside the statute altogether. If arrangements are to be made, short of legislation altering the present position, they can be made by altering the contractual relations between these persons and the local clubs or associations or between the doctors and those people, and possibly, as my Lord is inclined to construe the agreement as it stands, by excluding midwifery altogether from such contracts.

ROMER, L.J.—I agree that cl. 8 of the Regulations made by the Ministry of Health in the scale of fees for doctors called in by midwives was ultra vires that Ministry, and I can state my reasons for arriving at that conclusion in comparatively few words. Section 14 (1) of the Act, as has been pointed out, provides that any registered medical practitioner who is called in for the assistance of a midwife in cases of emergency shall be paid by the local supervising authority a sufficient fee for his services. The subsection goes on to say "with due allowance for mileage according to a scale to be fixed by the Local Government Board." In my opinion, the Local Government Board, now the Ministry of Health, under that subsection can only prescribe a scale which will apply generally to every medical practitioner who is called in in pursuance of the liability imposed upon the midwife by the subsection. In my opinion, the Ministry of Health has no power when prescribing a scale to discriminate between one medical practitioner and another. It would have no power, for instance, to say that a medical practitioner who bears the degree of doctor of medicine shall be paid at a higher rate than a medical practitioner who has taken a lower degree. Still less can the Ministry of Health say that a doctor of medicine shall receive less than those of lower degrees because his general run of patients are a higher class than those of another medical practitioner and can afford to pay and do pay higher fees, so that the doctor of medicine can well afford to attend to these cases of emergency under the Act for a lesser fee.

In the present case it is said that the Ministry of Health has entered into an inquiry whether in certain cases the medical practitioner will not have been adequately remunerated from other sources, and that is why it has made this regulation in question. I would, however, venture to point out that the regulation is not in any way confined to doctors who have been inadequately remunerated. It is well known to everybody that there is no profession in the world that does so much work in numerous cases for no fees at all, and in other cases for wholly inadequate fees, as the medical profession. It would ill become me to make any comment upon the fees paid, say, by clubs, medical institutes or other associations to the medical men who attend to their members, but I can, at any rate, refer to the patients themselves, and in many cases when a doctor receives or agrees to receive a fee from the patient he is receiving or agreeing to receive a wholly inadequate fee. The Ministry, therefore, has not in this case made a regulation which only applies to doctors who have already been remunerated adequately from other sources. It has chosen to include in this regulation, and so exclude from the benefit of the provisions of this sub-s. (1) of 14, medical men who may have been wholly inadequately remunerated.

I would only add this in deference to the interesting argument we have had from counsel for the local authority. He says that, if we adopt this view as to the meaning of the section and the powers of the Ministry of Health, we shall be in effect deciding that in certain cases a medical man will be paid twice over for the services he has rendered. I do not myself see how that in strictness can be so. To take the case of a private patient, if a medical man is called in under s. 14, he is called in by the midwife and not by the private patient at all. Therefore he is entering into an implied contract with the midwife acting on behalf of the local authority, he is entering into no contract at all with the patient who is under no liability to make a payment to the doctor or anything. If the patient does agree to pay she is entering into an agreement for which there is no consideration. The doctor will not be paid by the patient in addition to the local authority, nor, indeed, will he be paid by the clubs or other associations mentioned in this clause, because it must be remembered that in all those cases the medical man is remunerated at a flat rate which covers all cases in which he is called in by the patients. He is not remunerated in respect of each time he is called in; he is paid so much in consideration for which he undertakes to respond to every reasonable call made by the contributor or person on his list. In these cases, as I have pointed out, when the medical man attends this urgent summons on the part of the midwife he is not summoned by the patient; she has nothing to do with the matter at all.

I would only add this. For the reasons that I have given, sub-clauses (1) and (2) of cl. 8 are ultra vires because the Ministry has sought to discriminate between one doctor and another, and under the subsection, in my opinion, it has no power to do that. But sub-cl. (3) is, in my opinion, still worse. Section 14 itself, as has been pointed out by SLESSER, L.J., does impose a condition upon the payment of the fee, that is to say, upon a doctor being able to recover his fee. Sub-s. (2) says:

> "It shall be a condition of the payment of such fee that the medical practitioner so called in shall state in his claim to the local supervising authority the nature of the emergency."

Clause 3 of this regulation purports to impose another condition under a power forsooth to prescribe a scale of charges. Clause 3 provides as follows:

> "In respect of any services performed by the doctor on any date later than the tenth day from the date of his first attendance, unless he has reported to the local supervising authority that he considers, for reasons stated by him, that his further attendance is necessary, or in respect of any services performed by the doctor after the expiry of four weeks from the day of birth"

he shall receive no fee. What right the Ministry of Health has to impose such a condition as that when the doctor has been called in on the arising of the second emergency, I cannot for the life of me see. It seems to me to be wholly ultra vires. For these reasons I agree that the appeals must be allowed.

Appeal allowed.

Solicitors: *Hempsons*, for *Le Brasseur & Co.*, Newport; *Le Brasseur & Oakley*, for *Le Brasseur & Co.*, Newport; *Andrew, Purves, Sutton, & Creery*, for *Thomas Hughes*, Newport.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re BAKER

[CHANCERY DIVISION (Farwell, J.), July 15, 1935]

[Reported [1906] Ch. 61; 105 L.J.Ch. 33; 154 L.T. 101; [1934–5] B. & C.R. 214]

Bankruptcy—Settlement—Voluntary settlement—Avoidance—Settlor's ability to pay debts at date of settlement—Power to raise larger sum than amount of debts—Power to revoke settlement with consent of trustees or Chancery judge—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 42 (1)*—Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 172 (1).

A settlor executed a voluntary deed of settlement, which was of such a nature that, if he became bankrupt within ten years of the date of the settlement, it would become void as against the trustee in bankruptcy under the provisions of the Bankruptcy Act, 1914, s. 42 (1), unless those entitled under the settlement could prove that "the settlor was at the time of the making of the settlement able to pay all his debts without the aid of the property comprised in the settlement." His debts at the date of the settlement amounted to about £80. By a clause in the settlement the settlor had power at any time without the consent of the trustees to raise the sum of £150. By another clause in the settlement absolute power was given to the settlor to revoke the whole of the trusts in the settlement with the consent either of the trustees or of a judge of the Chancery Division. Three years from the date of the settlement the settlor became bankrupt.

Held: (i) the words in s. 42 (1) "able to pay all his debts without the aid of the property comprised in the settlement" meant without the aid of the property which by the settlement passed to other people;

(ii) as the settlor had at the time of the settlement contracted debts amounting to less than £150, and had power under the settlement at any time to raise £150, he was, at the time of the making of the settlement, able to pay all his debts without the aid of the property comprised in the settlement within s. 42 (1) of the Act of 1914, and the settlement was not void under that subsection;

(iii) the settlement was not void under the Law of Property Act, 1925, s. 172 (1), as a settlement made to defraud creditors, because the clause whereby the settlor had absolute power to revoke all of the trusts subject to the consent of the trustees, or of a judge of the Chancery Division, was a general power exercisable by a trustee in bankruptcy, who, even if he did not obtain the consent of the trustees, would, in a proper case, obtain the consent of the judge, either to a complete revocation or to a revocation to the extent necessary to enable the debts to be paid, and so the trustee in bankruptcy would not be prevented from getting the benefit of whatever property there was available for the payment of the debts in a proper case.

Notes. As to avoidance of settlements in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 548 et seq., and as to evidence of fraud in relation to conveyances impeached as being in fraud of creditors, see 17 HALSBURY'S LAWS (3rd Edn.) 657, 658, and for cases, see 5 DIGEST 848 et seq., and 25 DIGEST 145 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321 and for Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

Case referred to:

(1) *Re Lowndes* (1887), 18 Q.B.D. 677; 56 L.J.Q.B. 425; 56 L.T. 575; 35 W.R. 549; 4 Morr. 139, D.C.; 5 Digest 850, *7148*.

Bankruptcy Motion

On March 19, 1932, the bankrupt executed a deed whereby he assigned to trustees all his reversionary interests under two wills. He also assigned: "All other, if any, the shares or interests to which the settlor is or may be or become in any manner entitled of and in the said estates or the investments and property representing the same or any part thereof to have and receive the same subject to the mortgages aforesaid unto the trustees absolutely upon the trusts hereinafter declared concerning the same." He further provided that: "The trustees shall stand possessed of the shares, interests and premises hereinbefore assigned and the investments for the time being representing the same (hereinafter called 'the trust fund') and of the annual income thereof upon the trusts and subject to the powers and provisions following (that is to say): (1) Upon trust during the lifetime of the settlor to apply the annual income of the trust fund for the maintenance support or otherwise for the benefit of all or any one or more exclusively of the other or others of the settlor and any wife and issue of his for the time being in existence and any persons who if he had died intestate would for the time being be entitled to the trust fund or the income thereof as the trustees in their absolute discretion without being liable to account for the exercise of such discretion think fit." Clause 5 provided that: "Notwithstanding any of the trusts hereinbefore contained the following provisions shall have effect. 1. The settlor shall have power without any consent at any time to raise for his own benefit by mortgage (at interest at any rate to which he may agree) of the trust fund or any part thereof any sum or sums not exceeding £150 and the trustees shall if required concur in any such mortgage to charge the trust fund with the repayment of the principal moneys and interest and other moneys secured thereon." Clause 2 (*c*) was as follows: "With the consent of the settlor any sum or sums up to the whole value of the trust fund and after payment thereout of all mortgages (if any) then affecting the trust fund or with the consent of the owners of such mortgage securities to pay or apply the said sum or sums in any manner to or for the benefit of all or any of them the settlor and his wife, children and remoter issue for the time being in existence and a decision of the trustees that the application of such sum or sums is for the benefit of all or some or one of such persons shall be binding on all persons interested in the trust fund." Clause 7 provided that: "It shall be lawful for the settlor at any time, with the approval of the trustees or of a judge of the Chancery Division of the High Court of Justice, subject and without prejudice to any mortgages or charges which shall have been created under any of the powers hereinbefore contained by deed, to revoke or vary wholly or partially the trusts hereby declared and the powers and provisions herein contained and at his option and with such approval as aforesaid to substitute therefor new trusts, powers and provisions for the benefit of the settlor, his wife and issue if any or any of them or any other persons or purposes whatsoever."

At the date of the execution of the deed the settlor had incurred debts to the extent of about £80. After the date of the execution of the deed the settlor contracted further debts, and on Feb. 18, 1935, a receiving order was made against him on a petition of moneylenders. On Feb. 22, 1935, he was adjudicated bankrupt, and the applicant was appointed a trustee in bankruptcy. This application was made by the trustee in bankruptcy, and it asked for a declaration that the deed of March 19, 1932, was void as against the trustee in bankruptcy under s. 42 (1) of the Bankruptcy Act, 1914, as a voluntary conveyance made within ten years of the bankruptcy, and that it was also void under s. 172 (1) of the Law of Property Act, 1925, as being made with the intention of defrauding creditors.

Grant, K.C., and *R. F. Levy* for the applicant.
A. H. Droop for the respondents, those entitled under the settlement.

FARWELL, J.—The question I have to determine is whether or not the settlement is void either under s. 42 of the Bankruptcy Act, 1914, or s. 172 of the Law of Property Act, 1925. Section 42 (1) of the Bankruptcy Act provides as follows:

> "Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy."

That event has not happened; the settlement was made in March, 1932, and the bankrupt did not become bankrupt until 1935, so the first part of the section does not apply at all. The second part of the subsection is the material part:

> "and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof."

It is said in this case that at the date of the settlement the bankrupt was not in a position to pay his debts without the property which was settled, and that, since these reversionary interests passed to the trustee of the settlement, it is necessarily void under that section. It has to be borne in mind that when this section speaks of a person being "able to pay all his debts without the aid of the property comprised in the settlement," these words must be read with this limitation upon them. They must be read as meaning: "without the aid of the property which by the settlement passes to other persons." That is the result of the decision in *Re Lowndes* (1), which, it seems to me, I ought to follow, and, accordingly, I have to consider whether this bankrupt was in a position at the date of the settlement to pay his debts without the property which by virtue of the settlement passed to other persons. Further, it is said on behalf of the trustee in bankruptcy that the onus of proving that the settlor was at the time of making the settlement able to pay his debts without the aid of the settled property, is upon the persons who claim under the settlement, and that that onus has not been discharged, since there is no evidence, upon which I can properly act, that the whole of the debts owing by the bankrupt at the date of the settlement did not exceed £150. It is pointed out that the one person who would know certainly as to this is the bankrupt himself, and that he has given no evidence, the only evidence before the court being an affidavit by one of the trustees who was the solicitor who acted in the matter.

The contention that the onus of proof is on those supporting the settlement is, no doubt, well founded, but, having regard to the evidence in this case, including the evidence given by the bankrupt at his examination, there is, in my judgment, sufficient to justify me in holding that the persons claiming under the settlement have proved that the debts due at the date of the settlement did not exceed £150. If that be so, was the bankrupt at the date of the settlement in a position to pay his debts without the property which passed to other people under the settlement? In that connection it must be remembered that the settlement expressly provides that the settlor shall have the power at any time, without anybody's consent at all, to raise the sum of £150 out of the settled funds. That sum was more than sufficient to pay in full the debts which the settlor had at the date of the settlement, and, in my judgment, the true result of that is that the position is exactly the same as if the settlor had retained in his own hands a sum of £150 with a view to settling these debts if he thought fit to do so. If he had retained £150 in his own hands, it would be impossible for the trustee in bankruptcy to say he had not at the date of the settlement enough to discharge his debts, which amounted to less than that sum. He was in a position at any time to raise £150, and that money, which was his own money, could have been used by him if he had thought fit to pay his creditors. For these reasons, in my judgment, this settlement does not come within s. 42 of the Bankruptcy Act, 1914, and is not void against the trustee in bankruptcy on the ground that the settlor was not in a position to pay his debts without the aid of the property at the time the settlement was made.

That being so, it remains for me to consider shortly whether, the settlement not being void under s. 42 of the Bankruptcy Act, it is voidable under s. 172 (1) of the Law of Property Act, 1925. That subsection provides as follows:

> "Save as provided in this section, every conveyance of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced."

The authorities establish that the question whether a particular settlement is voidable or not under that subsection is a matter which must be determined on the facts of the particular case. It may be that this settlement would have come within s. 172 had there been no such provision as is found in cl. 7. The settlor is settling the whole of his property upon certain trusts. Those trusts, apart from cl. 7 and except to the extent A of £150, take the property away from the bankrupt or his trustee in bankruptcy and put it in the hands of his trustees, who can deal with it in various ways adversely to him, and it may well be that apart from cl. 7 the settlement is one which might have resulted in defeating or defrauding creditors, and therefore might be voidable. But I cannot overlook the provision in cl. 7 of the settlement. That clause gives the settlor absolute power to revoke the whole of the trusts in this settlement with the consent either of the B trustees or of a judge of the Chancery Division. That is a general power which, in my judgment, is exercisable by a trustee in bankruptcy. The trustee in bankruptcy, if he cannot obtain the consent of the trustees to a revocation of the settlement, either wholly or in part, is entitled to apply to a judge of the Chancery Division for his sanction, and in a proper case he would, no doubt, obtain the sanction of the judge either to a complete revocation or to a revocation to the extent necessary to enable the debts to be C paid. If the only revocation necessary was a revocation of a portion of the trusts for the purpose of enabling the debts to be paid, leaving the rest of the property in settlement, such an arrangement might well be very greatly to the benefit of the settlor. However that may be, this is a power which, in my judgment, the trustee in bankruptcy can himself exercise, of revoking the settlement with the consent either of the trustees or a judge of the Chancery Division. D

In the face of that it appears to me to be impossible to hold that this was a settlement executed with an intent to defraud creditors. One cannot conceive that a judge in the Chancery Division in a proper case would refuse the sanction of the court to the revocation of the settlement to the extent necessary for paying debts. I am not saying that there might not be circumstances in which the court might think it right to refuse its sanction, but that the court would refuse its sanction in a case which, if the sanction E was refused, would result in a fraud on the creditors, I cannot believe. In my judgment, this power, inserted in the settlement in this form, shows that, so far from intending to defraud the creditors, the whole object of this settlement was to protect the bankrupt against himself, without preventing a trustee in bankruptcy getting the benefit of whatever property there was available for the payment of the debts in a proper case. It appears to me impossible to come to the conclusion that the settlement was void under F s. 172 of the Law of Property Act. The result is that the applicant takes nothing by the motion, and it must be dismissed with costs.

Application dismissed.

Solicitors: *Philip Goodenday & Co.*; *Hicks, Arnold, & Bender.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*] G

INLAND REVENUE COMMISSIONERS *v.* RAMSAY

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.), December 6, 1935]

[Reported 154 L.T. 141; 79 Sol. Jo. 987; 20 Tax Cas. 79]

Surtax—Deductions—Annual payments—Purchase of professional practice—Payment of purchase price by instalments—Instalments equal to twenty-five per cent. of annual net profits.

On Sept. 28, 1932, the taxpayer entered into an agreement to purchase the practice of a dentist in Wimpole-street, London. Clause 3 of the agreement stated that the primary price to be paid by the taxpayer should be £15,000, which sum was subject to increase or diminution as thereinafter provided. Under cl. 4, £5,000 was to be paid on the exchange of the agreement and the taxpayer was to pay to the vendor in respect of the balance of the purchase price (but without any interest thereon) each year for ten years from Aug. 16, 1932, such a sum as should be equal to 25 per cent. of the net profits of the practice, such sums to be paid to the vendor as capital sums in respect of the purchase price, and if the aggregate amounts paid during the ten years should be more or less than £10,000 the primary price of £15,000 was to be increased or diminished accordingly. By cl. 5 the balance of the purchase price for the time being remaining payable was charged on the goodwill, assets and profits of the practice into whosesoever hands the same might come, which, with the personal covenant of the taxpayer, was to be the primary security therefor, and £5,000, part of the balance of £10,000, was additionally secured by mortgage of a policy which was to be assigned by the taxpayer to the vendor to be re-assigned as soon as the vendor had received the £5,000. It was further provided that if the taxpayer should die before the full further sum of £5,000 should have been paid, the vendor should take the proceeds of the policy together with the sums already received by the vendor in respect of the balance of the purchase money in full satisfaction of such balance. One-fourth of the net profits for the year up to Aug. 16, 1933, amounted to £886 and the taxpayer paid that amount to the vendor in accordance with the agreement without deducting any tax. The taxpayer claimed to deduct that sum of £886 from his total income for the purposes of surtax for the year ending April 5, 1934.

Held: on the true construction of the agreement the practice was sold for a capital sum, part of which was payable by instalments in the circumstances mentioned, and, therefore, the £886 was a capital sum which was not an admissible deduction in computing the taxpayer's liability for surtax.

Notes. Considered: *Dott* v. *Brown*, [1936] 1 All E.R. 543. Distinguished: *Inland Revenue Commissioners* v. *Hogarth* (1940), 23 Tax. Cas. 491. Referred to: *British Salmson Aero Engines, Ltd.* v. *Inland Revenue Commissioners*, [1937] 3 All E.R. 464; *Inland Revenue Commissioners* v. *Ledgard*, [1937] 2 All E.R. 492; *Commercial Union Assurance Co.* v. *Inland Revenue Commissioners*, [1937] 4 All E.R. 159; *Inland Revenue Commissioners* v. *Pyman* (1937), 21 Tax Cas. 129; *Legge* v. *Flettons, Ltd.* [1939] 3 All E.R. 220; *Beck* v. *Howard de Walden* (1940), 84 Sol. Jo. 369; *Sothern-Smith* v. *Clancy*, [1940] 3 All E.R. 416; *Curtis-Wilson* v. *Inland Revenue Commissioners* (1950), 66 (pt. 2) T.L.R. 269.

As to deduction of annual payments in computing total income, see 20 HALSBURY'S LAWS (3rd Edn.) 180, 429; and for cases on the subject, see 28 DIGEST 111, 112, *685–689*.

Cases referred to:

(1) *Jones* v. *Inland Revenue Commissioners*, [1920] 1 K.B. 711; 89 L.J.K.B. 129; 121 L.T. 611; 7 Tax Cas. 310; 28 Digest 108, *667*.

(2) *Foley* v. *Fletcher* (1858), 3 H. & N. 769; 28 L.J.Ex. 100; 33 L.T.O.S. 11; 22 J.P. 819; 5 Jur. N.S. 342; 7 W.R. 141; 157 E.R. 678; 28 Digest 65, *336*.

(3) *Chadwick* v. *Pearl Life Assurance Co.*, [1905] 2 K.B. 507; 74 L.J.K.B. 671; 93 L.T. 25; 54 W.R. 78; 21 T.L.R. 456; 28 Digest 66, *347*.

(4) *Secretary of State in Council of India* v. *Scoble*, [1903] A.C. 299; 72 L.J.K.B. 617; 89 L.T. 1; 51 W.R. 675; 19 T.L.R. 550; 4 Tax Cas. 618, H.L.; 28 Digest 65, *337*.

Appeal by the Inland Revenue Commissioners from an order of FINLAY, J., dated July 25, 1935.

By a Case under the Finance Act, 1927, s. 42 (7), and Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts it was stated:

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held on Dec. 5, 1934, Mr. K. Paul Ramsay (hereinafter called the respondent) appealed against an assessment to surtax in the sum of £4,314 for the year ending April 5, 1934.

2. The respondent is a dental surgeon, and prior to the events hereinafter set out he was employed, under an agreement dated June 28, 1928, as assistant to Mr. Theodore Victor Smith in the latter's practice as a dental surgeon at 19, Wimpole-street, London.

3. It was provided by the said agreement of June 28, 1928, that in the case of the death of Mr. Theodore Victor Smith during the employment of the respondent under the said agreement the respondent would, if required by the personal representatives of the said Mr. Theodore Victor Smith, purchase the goodwill of the practice carried on by the said Mr. Theodore Victor Smith for a sum and upon terms therein mentioned and would also, if so required, purchase the dental equipment and materials used in connection with the said practice.

4. Mr. Theodore Victor Smith died on Aug. 21, 1931, having by his will appointed his widow, Mrs. Emma May Smith, to be the sole executrix thereof, and having devised and bequeathed to her all his residuary real and personal estate absolutely.

5. The respondent was not in a financial position to be able to pay a fixed sum for the said practice.

He received, however, a loan of £5,000 from a relative, and he effected a policy of assurance in his own name and on his own life in the Equitable Life Assurance Society for £5,000.

6. By an agreement made on Sept. 28, 1932, between the said Mrs. Emma May Smith (thereinafter called the vendor) of the one part and the respondent of the other part, it was agreed that the respondent should purchase from the vendor the goodwill of the said practice and the dental equipment and materials used in connection therewith on (inter alia) the following terms, which said terms were in substitution for the terms set out in the said agreement of June 28, 1928, referred to in para. 3 hereof:

(i) The said purchase should take effect as on and from Aug. 16, 1932.

(ii) The primary price to be paid by the respondent for the goodwill of the said practice and the said equipment and materials should be £15,000, subject to increase or diminution as thereinafter provided.

(iii) The respondent should, on the exchange of the said agreement, pay to the vendor £5,000 on account of the said purchase price and should, during a period of ten years to be computed from the said 16th August, 1932, pay to the vendor in respect of the balance of the said purchase price (but without any interest thereon) such a sum as should in each year during the said period be equal to 25 per cent. or one-fourth of the net profits of the said practice for each year, which said sums should be paid to and received by the vendor as capital sums paid in respect of the purchase price (the reference to the net profits of the said practice being for the purpose only of computing the capital sum to be paid in each year) and should be paid without any deduction.

(iv) The respondent should continue liable to pay the said capital sum in respect of each year of the said period of ten years notwithstanding that the sums so paid might in the aggregate amount to a greater sum than the balance of the said primary price, which in such case should be increased by the amount of such excess. And conversely, if the aggregate of the said capital sums paid during the said period of ten years should amount to a less sum than the balance of the said primary price the vendor should accept such sums in full satisfaction of such balance and the said primary price should be diminished by the amount of the deficiency.

(v) The balance of the purchase price for the time being remaining payable should stand charged on the goodwill assets and profits of the said practice into whosesoever hands the same might come, which, with the personal covenant or agreement of the respondent for the payment thereof, should be the primary security therefor. The sum of £5,000 part of the said balance should be additionally secured by a mortgage or charge on the said policy of assurance in the Equitable Life Assurance Society, which should be assigned by the respondent to the vendor by way of security therefor.

(vi) If the respondent should die before the full further sum of £5,000 should have been paid to the vendor, the vendor should take and receive the proceeds of the said policy together with the sums already received by the vendor in respect of the balance of the purchase money and together with the share of the profits accrued due up to the date of such death in full satisfaction and discharge of such balance and the goodwill of the said practice and the assets thereof should be taken by the personal representatives of the respondent as part of his estate without further payment.

7. The first accounts of the said practice purchased by the respondent were made up to Aug. 16, 1933, and 25 per cent. or one-fourth of the net profits thereof amounted to the sum of £886.

8. The respondent has paid to Mrs. Emma May Smith the said sum of £886 without deduction of tax in accordance with the terms of the said agreement of Sept. 28, 1932.

9. The respondent claims that the said sum of £886 is a proper deduction in computing his liability for the purposes of surtax for the year ending April 5, 1934.

10. It was contended on behalf of the respondent that:

(a) Upon the true construction of the terms of the said agreement of Sept. 28, 1932, the said practice was not sold for a fixed capital sum, but for £5,000 down and further yearly sums which varied according to the profits of the said practice and were in the nature of income payments.

(b) The commissioners were not bound by the description which the parties had chosen to give to the sums to be paid year by year under the agreement, but were entitled to consider whether that description was correct.

(c) The said sum of £886 was not an instalment of any capital sum but was an annual payment whereby the respondent's income was diminished during the year 1933–34; and was, therefore, an admissible deduction in computing his income for that year for surtax purposes.

11. It was contended on behalf of the Crown that:

(a) Under the terms of the said agreement of Sept. 28, 1932, the said sum of £886 was an instalment in the nature of capital of a fixed capital purchase price.

(b) The said sum of £886 was not an admissible deduction in computing the respondent's liability for surtax.

(c) The assessment under appeal should be confirmed.

12. Having considered the evidence and arguments adduced before them, the Commissioners held that upon the true construction of the said agreement of Sept. 28, 1932, the said practice was sold for a certain sum of £5,000 and in addition Mrs. Emma May Smith took an annual sum which was dependent in effect on the profits of the said practice, that is to say, she took something which rose and fell with the chances of the practice. The commissioners considered that the case was governed by the decision of Rowlatt, J., in *Jones* v. *Inland Revenue Commissioners* (1).

They allowed the appeal and accordingly reduced the assessment to £3,428.

13. The appellants immediately after the determination of the appeal declared to the Commissioners their dissatisfaction therewith as being erroneous in point of law and in due course required them to state a case for the opinion of the High Court pursuant to the Finance Act, 1927, s. 42 (7), and Income Tax Act, 1918, s. 149.

Finlay, J., agreed with the view of the Special Commissioners and dismissed the appeal.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *Reginald P. Hills* for the appellants.

J. N. Donovan for the respondent.

The arguments appear in the judgment of the Master of the Rolls.

LORD WRIGHT, M.R.—This is an appeal from the judgment of FINLAY, J., who has A taken the same view as the Special Commissioners, which is that the respondent is entitled in making his returns of total income for the purposes of super tax to deduct therefrom a sum of £886 which he has paid in accordance with the contract dated Sept. 28, 1932, made between himself and Mrs. Emma May Smith. The question involved in the case is the question which has so often to be debated where property has been sold, namely, whether the consideration is a sum of money, though payable in instal- B ments, or whether it is an annuity. It is, of course, quite clear that for a lump sum of money the right to receive periodical payments may be purchased, and in that case if the transaction constitutes the purchase of an annuity and each one of these payments is in the nature of income in the appropriate hands and in the appropriate manner, it is taxable as such, but if that is not the case and the instalments are not annuities in the proper sense of the term, but are merely the method and the manner and the form in C which a lump sum is paid, then the position is different, and the sums in question are not to be deemed income but capital, and accordingly in the hands of the payer when he comes to make his returns for super tax cannot be deducted under the provisions of s. 27 of the Income Tax Act of 1918.

There have been a great many cases, to some of which we have been referred, in which that very difficult question has been debated. There are certain guides or signposts. D I may refer to *Foley* v. *Fletcher* (2), where the distinction was clearly drawn. POLLOCK, C.B., there said (3 H. & N. at p. 779):

> "These instalments" (that is, the payments then in question) "are payments of money due as capital; the Act has made no provision for such a case."

That case is a case in which the question at issue is the right of the payer to deduct E income tax, but the principle is the same.

> "It professes to charge profits only, and we cannot say that capital is liable to the income tax because found in company with profits."

Similarly in 1905, in *Chadwick* v. *Pearl Life Insurance Co.* (3), WALTON, J., stated the position in this way ([1905] 2 K.B. at p. 514): F

> "It is obvious that there will be cases in which it will be very difficult to distinguish between an agreement to pay a debt by instalments, and an agreement for good consideration to make certain annual payments for a fixed number of years. In the one case there is an agreement for good consideration to pay a fixed gross amount and to pay it by instalments; in the other there is an agreement for good consideration not to pay any fixed gross amount, but to make a certain, or it may G be an uncertain, number of annual payments. The distinction is a fine one, and seems to depend on whether the agreement between the parties involves an obligation to pay a fixed gross sum."

That same principle was given effect to in *Secretary of State in Council of India* v. *Scoble* (4), where the instalments also included in themselves a sum for interest. The pur- H chasers there of the railway had bought it at a price which they might pay at their option either all at once as a lump sum or by instalments, in which latter event the instalments had to be increased by an amount attributable to interest. LORD HALSBURY says ([1903] A.C. at p. 303):

> "I cannot disagree with what all the three learned judges of the Court of Appeal pointed out, that you start upon the inquiry into this matter with the fact of an I antecedent debt which has got to be paid; and if these sums, which it cannot be denied are partly in liquidation of that debt which is due, are to be taxed as if they were income in each year, the result is that you are taxing part of the capital."

That is a general test which may be, and has been, found very difficult to apply, and I do not wish to suggest that there are any hard-and-fast rules which can be applied as a matter of course to any case. For instance, it cannot, I think, be said as a general rule that, if the amount of the instalments is one which is to fluctuate during the period in which they are payable according to certain circumstances, that is necessarily in-

A consistent with these instalments being instalments of capital, and that it necessarily involves that they must be treated as annual payments or annuities. *Jones* v. *Inland Revenue Commissioners* (1) contains a proposition to that effect by ROWLATT, J., in his judgment, but he was clearly there dealing with the facts of the case. There was a sale of property for a lump sum of £750 payable as to £300 by three instalments of £100 each and as to the balance of £450 by a royalty; and there was no question, as I follow the B case, that the whole of that £750 was treated as a capital sum. But there was a further clause

> "to pay by way of additional consideration a 'further royalty' of 10 per cent. upon the invoice price of all machines constructed under the said inventions and sold during a period of ten years,"

C and it was that latter sum, and that latter sum only, which was in question before ROWLATT, J., and about which he said, very naturally ([1920] 1 K.B. at p. 715):

> "The property was sold for a certain sum, and in addition the vendor took an annual sum which was dependent upon the volume of business done; that is to say, he took something which rose or fell with the chances of business. I think, when a man does that, he does take an income—that is what it is."

D In my judgment, the learned judge there was laying down that proposition with reference to the circumstances before him and did not intend, and I think could not rightly have intended, to state that as a universal proposition applicable to all cases of this character. The decision in any particular case can only be arrived at by considering what is the substance of the transaction in question, and what is the substance of that transaction can only be ascertained by a careful consideration of the contract which embodies E the transaction. That being so, in my judgment what has to be done here is to examine the particular clauses of the contract of sale, the agreement in question, and to see what is the appropriate conclusion, so far as relevant to this case, to be arrived at on the consideration of that agreement.

The agreement, as I have said, is dated Sept. 28, 1932, and the vendor is Mrs. Smith; she is the widow of a gentleman who carried on a practice as a dentist at 19, Wimpole-F street, in London, and the purchaser (the present respondent) is Mr. Kenneth Paul Ramsay, who is now carrying on, as I understand it, the same business at the same place. What he purchased was

> "the goodwill of the practice, and the dental equipment and materials hereinafter mentioned for the sum and upon the terms and conditions hereinafter provided."

G The clauses particularly relevant in this case are cls. 3, 4, and 5, and it is in these clauses that it is possible to find what is the sum mentioned in the recital which I have just read, and what are the terms and conditions relating, among other things, to that sum as provided in the agreement. Clause 3 is, to my mind, the governing clause:

> "The primary price to be paid by the purchaser for the goodwill of the said practice and equipment and materials aforesaid shall be the sum of £15,000, which said sum
> H shall be subject to increase or diminution as hereinafter provided."

Then come the provisions which determine whether or not the said sum shall be subject to increase or diminution and, among other things, specify certain circumstances which will determine when and how the sum is to be paid, but I conceive—and I shall indicate why in the sequel—that that sum of £15,000 is never lost sight of and is the purchase price from beginning to end of this agreement. Clause 4 deals with the mode of pay-I ment, and it deals with what was contemplated obviously as the probable course which would be followed in paying this sum of £15,000. The sum of £5,000 was to be paid on the exchange of the agreement. It appears, according to the findings, that the purchaser, the respondent, had been able to borrow that sum of money and was able to pay it in cash, but it also appears from the other terms of the agreement, and it was, indeed, only what one might reasonably anticipate might be often the case, that the respondent was looking to the profits of his carrying on the business as providing a fund out of which he might be able to pay the purchase price, and, indeed, apart from the sum of £5,000, it may well be that that was the only way in which the payment could be made.

Clause 4 accordingly spreads the period of payment over ten years, starting from Aug. 16, 1932, and in each year of those ten years, if everything goes on as contemplated, the respondent would pay to the vendor in respect of the balance of the said purchase price, that is to say, the £10,000 which is the balance, and the £5,000 which has been taken into account without interest,

> "such a sum to be secured and payable as hereinafter provided as shall in each and every year during the said period be equal to 25 per cent., or one-fourth, of the net profits of the practice,"

to be computed and ascertained as later provided in the agreement. The clause goes on to say that such

> "sums shall be paid to and received by the vendor as capital sums paid in respect of the purchase price."

That, of course, is not conclusive of anything, because whether they are capital sums or not must be determined by a consideration of the substance of the transaction—the terms of the contract; "and shall be paid without any deduction." That, it may be, is contrary to s. 23 of the Income Tax Act of 1918. Then the clause goes on:

> "The purchaser shall continue liable to pay such capital sum computed as aforesaid in respect of each year of the said period of ten years notwithstanding that the sums so paid may in the aggregate amount to a greater sum than the balance of the primary price" (that is to say, the balance of the £15,000) "which in such case shall be increased accordingly by the amount of such excess. And, conversely, if the aggregate of the capital sums paid during the said period of ten years shall amount to a less sum than the balance of the primary price the vendor shall take and accept such sums in full satisfaction of such balance, and the primary price shall be diminished by the amount of the deficiency."

Clause 4, therefore, contains a code which, if it operates during the whole ten years, will have this result, that the remaining debt of £10,000, which I regard it to be, shall be discharged, but discharged by the payment in the manner specified by a number of instalments which in the aggregate may amount to either more or less than the balance of £10,000.

It is to be noted that there is no question of income, and I cannot see why a creditor who has sold property for a particular price should not, in discharge of that price, agree to accept a fluctuating sum, if, as may be the case, and no doubt was the case here, there are sufficient reasons of convenience or other considerations, which make it desirable to adopt that method of payment. The mere fact that in the result the amount paid may be greater or less than what is called here the primary debt, that is to say, a specified balance, does not seem to me in itself to throw light on the position one way or the other. It will be noted that at the end of cl. 4 the language is: "The vendor shall take and accept such sums" (that is to say, either greater or less than the £10,000) "in full satisfaction of such balance"—that is to say, the £10,000—"and the primary price shall be diminished by the amount of the deficiency"—diminished, that is to say, as a result of what is paid. No further amount shall be claimable. Clause 4 obviously contemplates that the whole proceeding will go through conveniently, that the purchaser will not die or become disabled, or will not attempt to sell the business, and will not refuse to carry on the business from which these instalments, it is anticipated, will be forthcoming. I may say at once that as I read the contract, though there is no express obligation on the purchaser to continue to carry on the business for the period of ten years, yet, if he were to make default in that, he would commit a breach of his contract, because as I read the contract there is an implied term that he will not do some act or commit some default, which will disable him from fulfilling his contract; but there is no provision in terms for any of these events, except there is one provision which I shall refer to in a moment applicable to the case of his dying at a particular time. I may add that, as I read cl. 4, it is a clause personal to the purchaser, as, indeed, in a profession of this sort one would expect it to be, that is to say, it is he and he alone under cl. 4 who is to carry on the profession and to conduct the business; and that seems to be confirmed by cl. 9, which provides that the purchaser, that is to say the respondent, shall keep proper books of account at all times during the period of ten years.

Clause 5 is the next clause which fills up some of the gaps in cl. 4, and again, as I read it, it confirms the view that this contract is dealing with a definite purchase price. The beginning words are these:

> "The balance of the purchase price" (that is £15,000) "for the time being remaining payable shall stand charged on the goodwill assets and profits of the said practice into whosesoever hands the same may come, which, with the personal covenant or agreement of the purchaser for the payment thereof, shall be the primary security therefor."

You have there a mortgage or a charge, and you also have a personal covenant, and in each case the amount involved either in the mortgage or the personal covenant is fixed by a reference to the purchase price—that is, the amount fixed in cl. 3 of the contract—£15,000—and it is in respect of that specific amount that the particular rights involved are given to the vendor; she can enforce her security. I do not stop to consider what would happen if the business were sold to a purchaser for value without notice. That, I take it, might defeat the charge, but would be a breach of contract on the part of the purchaser, and then the purchaser would be liable on his personal covenant or agreement. There then follow certain specific provisions defining more narrowly what is to happen in particular events in which the contemplated procedure under cl. 4 has failed. Clause 5 provides that

> "The sum of £5,000, part of the said balance" (that is to say, part of the £10,000), "shall be additionally secured" (that is, in addition to the charge on the goodwill, and so on) "by a mortgage or charge of the said policy which shall be assigned by the purchaser to the vendor by way of security therefor, accordingly. If and when, during the life of the purchaser, the vendor shall have received the further sum of £5,000 on account of the purchase price" (that is to say, £10,000 in all) "the said policy shall at any time thereafter upon the request and at the cost of the purchaser be reassigned to him. If the purchaser shall die before the full further sum of £5,000 shall have been paid to the vendor, then and in such case the vendor shall take and receive the proceeds of the said policy together with the sums (if any) already received by the vendor in respect of the balance of the purchase money and together with the share of the profits accrued due up to the date of such death in full satisfaction and discharge of such balance."

That, again, is a further provision which would have the effect of diminishing the purchase price of £15,000. Then it goes on to say,

> "and the goodwill of the practice and the assets thereof shall be taken by the personal representatives of the purchaser as part of his estate without further payment."

There is still no provision made for certain eventualities which might occur, and which would be inconsistent with the due fulfilment of cl. 4, and would not fall within the special provision of cl. 5, to which I have just referred. For instance, the purchaser might die, after the payment of £10,000 has been made. He may break his agreement, as I think he would if he discontinued the conduct of the profession for which the payments were anticipated to be made, and as I say, there might be other contingencies. None of these is provided for in this contract, and the result is that the £15,000 would neither be increased nor diminished, because there would be no provision for the subsequent cl. 3 dealing with such increase or diminution applicable to these cases; and, therefore, the purchaser, or his estate, would have to make up the full purchase price which they have undertaken to do, because none of the qualifications attaching to that obligation specified in the contract would apply. That being so, the conclusion I have arrived at, with great respect to the learned judge, is that this is not the case of an annuity or a series of annual payments. It is a case in which a capital lump sum has been stipulated as the price of a piece of property, and it is none the less so because the payment of that sum is to be made by instalments, instalments at certain specific periods, no doubt, but not instalments of a fixed price. It is none the less, in my judgment, a capital sum because in the working-out of the transaction, and in the discharge of that capital sum, the vendor, according to the terms of the agreement, may have to be content with a lesser amount than the £15,000. The £15,000 is not an otiose figure; it is a figure which permeates the whole of the contract, and on which the whole contract depends. That being so, I think that the £886 in question was a sum in the nature of capital, and, therefore, that it was not competent for the respondent to deduct it in returning his total income. That being so, in my judgment the appeal should be allowed with costs.

ROMER, L.J.—I have come to the same conclusion. If a man has some property which he wishes to sell on terms which will result in his receiving for the next twenty years an annual sum of £500, he can do it in either of two methods. He can either sell his property in consideration of a payment by the purchaser to him of an annuity of £500 for the next twenty years, or he can sell his property to the purchaser for £10,000, the £10,000 to be paid by equal instalments of £500 over the next twenty years. If he adopts the former of the two methods, then the sums of £500 received by him each year are liable to income tax. If he adopts the second method, then the sums of £500 received by him in each year are not liable to income tax, and they do not become liable to income tax by it being said that in substance the transaction is the same as though he had sold for an annuity. The vendor has the power of choosing which of the two methods he will adopt, and he can adopt the second method if he thinks fit, for the purpose of avoiding having to pay income tax on the £500 a year. The question which method has been adopted must be a question of the proper construction to be placed on the documents by which the transaction is carried out. The only document with which we are confronted in the present case is this agreement of September, 1932, and, although I do not think that the draftsman of that agreement is to be congratulated on his efforts, I confess that, looking at it as a whole, I am satisfied that the vendor here has adopted the second of the two methods to which I have referred. In other words, that the vendor has in fact sold the property for a capital sum, part of which, in certain events, is payable by annual instalments. The agreement contains a recital to the effect that the purchaser has agreed to purchase the subject-matter of the agreement for the sum, and on the terms and conditions hereinafter provided. This document is, of course, executed by the purchaser, and therefore by that alone he becomes under a liability to the vendor to pay the sum for which he has purchased the business on the terms and conditions which are contained in the document. The sum is described in cl. 3 of the agreement, which is in these terms:

> "The primary price to be paid by the purchaser for the goodwill of the said practice and equipment and materials aforesaid shall be the sum of £15,000, which said sum shall be subject to increase or diminution as hereinafter provided."

It is a little awkwardly expressed, but I have not the least doubt that that means that, except in so far as under the conditions to be found in a later part of the document, the sum has increased or diminished, the purchase price to be paid, and which the purchaser has become under a liability to pay, is to be £15,000. Then we come to cl. 4, and I do not want to read the clause at length; it is sufficient to say that it provides that the purchase sum is to be paid by the purchaser as to £5,000 down. Then, as regards the balance, whatever that balance may be, the purchaser is given an option, or rather a concession is made to the purchaser, enabling him to pay it by annual instalments. There is this further concession made, that if, paying the annual instalments which are mentioned in the clause, at the end of the ten years those annual instalments, together with the £5,000, do not amount to £15,000, then the purchase money is pro tanto diminished. There is this compensating advantage to the vendor, however, that if during the ten years the sums paid, together with the £10,000, amount to more than the £15,000, the vendor is to receive pro tanto an increased purchase consideration. I do not think that cl. 4 in any way imposes on the purchaser any contractual obligation to carry on business during the ten years. I think the clause is meant as a concession to him, and as a conditional concession. If he carries on business during the ten years, and makes the annual payments out of the profits that are therein mentioned, then in certain circumstances the purchase money may be reduced, and he will be entitled in any event to pay the balance of the purchase money, whatever it may be, by annual instalments, instead of having to pay it down at the time of the execution of the agreement, or the completion of purchase. I say that I do not think that the purchaser is under any implied obligation to carry on the business for ten years, because, when one comes to cl. 5, it is apparent that the parties contemplated that the purchaser might assign the practice, and the other things that he had purchased under this agreement, to a third party, and thereupon it is provided that the vendor shall have a charge on the property transferred for the purpose of securing the balance of the purchase money. If after, say, two years of carrying on the business, the purchaser, instead of selling it to a third party, ceases to carry on the business altogether, in my opinion he becomes at once liable to pay the £15,000, so far as it has not already been paid by way of the first instalment of £5,000 and the share of profits handed over in respect of the first two years. In other words, he will not have performed the condition on which the concession was made to him. Throughout it seems to me that the parties have contemplated, and have arranged the transaction on the footing that there is to be a lump sum in respect of the purchase money. That lump sum may, in certain circumstances, be discharged by annual instalments, and they have also provided that in that event, that is to say, of its being discharged by annual instalments, the purchase money may be increased or may be diminished. For these reasons I have come to the conclusion, with all respect to Finlay, J., that this appeal should be allowed.

GREENE, L.J.—I agree, but out of respect for the opinion of the learned judge, I would like to add my reasons in a few words. The argument for the respondent is based on the view that the sum of £15,000 mentioned in the contract has no real existence at all, in this sense, that the contract would be exactly the same if all reference to that sum were omitted. That argument I am quite unable to accept. When cl. 3 is examined it is quite clear, in my opinion, that the primary obligation is the obligation to pay a sum of £15,000; that is the immediate obligation; and it only falls to be varied and the payment only falls to be postponed in so far as the provisions of cl. 4 are brought into operation. Under cl. 4 the purchaser covenants to pay certain sums each year for a period of ten years, and the only circumstances in which the vendor is willing to accept and is bound to accept a sum less than £15,000 are the circumstances mentioned at the conclusion of cl. 4, that is to say

> "if the aggregate of the capital sums paid during the said period of ten years shall amount to a less sum than the balance of the primary price the vendor shall take and accept such sums in full satisfaction of such balance."

In view of those words it appears to me quite impossible to say that the sum of £15,000 has no real existence for the purposes of the present question. That sum remains, and the purchaser cannot compel the vendor to accept anything less unless the conditions at the end of cl. 4 come into operation. That paragraph in cl. 4 is contemplating that the purchaser will continue to carry on the business for a period of ten years, and it is in the event of the payments during the ten years amounting to less than the balance of £15,000 that the vendor agrees to accept the less sum. If the purchaser were at the end of seven years at a time when, let me say £12,000 only had been paid, to decline to continue to carry on the business and were to close it down, the condition on which the vendor agrees to accept a reduction of the £15,000 would not have come into effect and, therefore, the original obligation to pay the £15,000 (less what had been paid) would, in my opinion, remain. It seems to me that the same result would follow if the purchaser failed to carry out his covenant to make annual payments, because the sum of £15,000 is only to be increased or diminished "as hereinafter provided." That imports a reference to the purchaser's covenant to make the annual payments, and unless the purchaser acts in strict accordance with cl. 4, he does not, in my opinion, get the twofold benefit of, first of all, a postponement of the payment of the purchase price, and, secondly, the possibility of diminution in the purchase price ultimately enuring to his benefit, coupled with, on the other side, the risk of an increase. It seems to me that, so far from the sum of £15,000 being mere surplusage in this agreement, it performs a very important and, indeed, essential task in the structure and operation of the agreement. With regard to the last submission that Mr. Donovan made, that with regard to this particular tax year you cannot correlate the payment made with any principal sum, in my opinion that argument cannot be sustained. The principal sum, the purchase price, is £15,000 unless and until certain events have happened, and the true statement to make with regard to that £886 is that it is in diminution of the purchase price, in part payment of the purchase price of £15,000, and that is so notwithstanding that in events which may happen in the future the full sum of £15,000 may be either diminished or increased. I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue*; *Arthur Benjamin & Cohen.*

[*Reported by* J. H. G. BULLER, ESQ., and GEOFFREY P. LANGWORTHY, ESQ., *Barristers-at-Law.*]

H.M. POSTMASTER-GENERAL *v.* BIRMINGHAM CORPORATION

[COURT OF APPEAL (Slesser and Roche, L.JJ., and Swift, J.), July 25, 26, 1935]

[Reported [1936] 1 K.B. 66; 105 L.J.K.B. 10; 153 L.T. 405; 99 J.P. 361; 51 T.L.R. 581; 79 Sol. Jo. 592; 33 L.G.R. 395]

Telegraphs—Level of street altered by highway authority under town planning scheme—Liability for cost of removal and re-erection of telegraph lines thereby necessitated—Telegraph Act, 1863 (26 *&* 27 *Vict.* c. 112), *s.* 15—*Telegraph Act*, 1878 (41 *&* 42 *Vict. c.* 76), *s.* 7 (3).

A highway authority, in carrying out town planning schemes authorised by the Housing, Town Planning, &c., Acts, 1909 and 1919, altered the level and width of certain streets, and so made it necessary to take down and re-erect the telegraph poles and lines therein. On the question whether s. 7 (3) of the Telegraph Act, 1878, which authorises the Postmaster-General to recover the expenses of such telegraph work "where provision is not otherwise made by enactment" applied, or whether it was excluded by s. 15 of the Telegraph Act, 1863, which provides that "in case the body having the control of any street . . . hereafter resolves to alter the line or level of any portion of such street . . . in, upon, over, along . . . which any work of the company . . . is placed, the company shall be bound . . . at their own expense to remove such work and to replace the same."

Held: (i) the authority were a body having "the control of [a] street or public road" and had resolved "to alter the line or level of any portion of such street or road," and, therefore, they were entitled to call upon the Postmaster-General to pay the expenses of the alterations to the telegraph lines under s. 15;

(ii) since s. 15 applied, provision was "otherwise made by enactment" and so s. 7 (3) did not apply.

QUÆRE, whether a body other than a highway authority (e.g., a non-county borough as regards a road for which the county council are highway authority) can rely on s. 15 when doing work on a highway under their town planning powers.

Notes. Section 15 of the Telegraph Act, 1863, has been repealed; see now the Public Utilities Street Works Act, 1950, Part II, Sched. 4 and Sched. 5. The relevant Town and Country Planning legislation is now contained in ss. 49 (under which orders to stop up or divert highways are made) and 117 (2) (4) (application of s. 7 of the Act of 1878) of the Town and Country Planning Act, 1947, as modified by Sched. 5 and Part II of the Act of 1950.

As to the liability of the Postmaster-General under s. 15 of the Telegraph Act, 1863, see 32 Halsbury's Laws (2nd Edn.) 18, para. 22; and as to alterations of a telegraph line involved by work done in the execution of an undertaking authorised by statute, see 32 Halsbury's Laws (2nd Edn.) 27–28, para. 33. For the Telegraph Act, 1863, s. 15, and the Telegraph Act, 1878, s. 7, see 24 Halsbury's Statutes (2nd Edn.) 971, 1018. For the Public Utilities Street Works Act, 1950, Part II, Sched. 5, see 29 Halsbury's Statutes (2nd Edn.) 345–352, 373–374, 376. For the Town and Country Planning Act, 1947, ss. 49, 117 (2), (4), see 25 Halsbury's Statutes (2nd Edn.) 558, 634.

Appeal from the decision of Goddard, J., on a special case for the argument of a point of law, set down under R.S.C., Ord. XXV, r. 2. The Corporation in the course of carrying out two town planning schemes widened and altered the level of certain streets in their area, and this necessitated the taking down and subsequent re-erection of a number of telegraph posts and lines, at a cost of £916 15s. 9d. The question in dispute was whether this cost had to be borne by the Postmaster-General or the Corporation.

The Telegraph Act, 1863, s. 15, provides:

> "In case the body having the control of any street or public road at any time hereafter resolves to alter the line or level of any portion of such street or road under, in, upon, over, along, or across which any work of the company constructed either before or after the passing of this Act is placed, the company shall from time to time be bound . . . at their own expense to remove such work and to replace the same. . . ."

It was not disputed that the Postmaster-General was to be treated as "the company" for the purposes of the above cited section. The Telegraph Act, 1878, provides: Section 2:

> "The expression 'Act of Parliament' means any Act of Parliament whether public, general, local and personal, or private, and includes the order confirmed by any such Act. . . . The expression 'undertaking' means the works or undertaking of whatever nature the execution of which is authorised by an Act of Parliament as above defined. . . . Section 7: Where any work proposed to be done in the execution of an undertaking authorised by an Act of Parliament involves . . . an alteration . . . in any telegraphic line of the Postmaster-General, and provision is not otherwise made by enactment agreement or otherwise with respect to such alteration . . . the following enactments shall apply . . . (3) if the Postmaster-General . . . states that it is his intention himself to make such alteration, it shall be lawful for such Postmaster-General . . . to make the same, and the undertakers . . . shall pay to the Postmaster-General all the expenses incurred by him of and incidental thereto. . . ."

Goddard, J., held that the expenses of the taking down and re-erection of the posts and lines arose out of work for which provision was "otherwise made by enactment" within the meaning of s. 7 of the Telegraph Act, 1878, and must therefore be borne by the Postmaster-General.

The Postmaster-General appealed.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *Harold Murphy* for the Postmaster-General.

Tyldesley Jones, K.C., and *Trustram Eve, K.C.*, for the Corporation.

SLESSER, L.J.—This is an appeal from a judgment of Goddard, J., giving judgment on a special Case Stated between the Postmaster-General, the plaintiff, and the Lord Mayor, Aldermen, and Citizens of the City of Birmingham, the defendants. The question which has to be determined is whether the Corporation of Birmingham can or cannot require the Postmaster-General to carry out certain alterations to telegraph lines at his own expense. The question arises in the following way. Under the provisions of the Housing, Town Planning, &c., Act, 1909, as amended by the Housing, Town Planning, &c., Act, 1919, there is power given to a local authority in the circumstances stated in those Acts to execute certain works in their area. It is not necessary for the purposes of this case to consider the provisions of that Act generally, because there is no question here but that in the two schemes which we have to consider everything was validly done. By s. 55 of the Housing, Town Planning, &c., Act, 1909,

> "The Local Government Board"—now the Ministry of Health—"may prescribe a set of general provisions . . . for carrying out the general objects of town planning schemes, and in particular for dealing with the matters set out in the Fourth Schedule to this Act."

In the Fourth Schedule are set out,

> "matters to be dealt with by general provisions prescribed by the Local Government Board."

Paragraph 1 is: "Streets, roads, and other ways, and stopping up, or diversion of existing highways." Power is also given to the Local Government Board, by s. 55 (2) of the Act of 1909, to define the area to which the scheme is to apply, and the authority who are to be responsible for enforcing the observance of the scheme, and for the execution of any works which under this scheme are to be executed by a local authority. The local authority, as defined by s. 65 (1), includes the council of any borough, urban, or rural district. The Housing, Town Planning, &c., Act, 1919, amending the 1909 Act, does not contain any amendment which is material, in my view, to any matter which has to be considered in this case. Acting under those two statutes, or, more exactly, acting under the Act of 1909 in the case of one scheme, and under the Act of 1909 as amended by the Act of 1919 in the other scheme, two town planning schemes were ordered in the county borough of Birmingham. Those schemes, as finally approved, are annexed to the case. Having recited in the case of the Birmingham (South) Town Planning Scheme, and in the case of the Quinton, Harborne, and Edgbaston Town Planning Scheme, that the Lord Mayor, Aldermen, and Citizens of the city of Birmingham have prepared town planning schemes, the schemes are approved. The Corporation is designated as the authority under cl. 2 of the scheme. New streets are defined in cl. 4 of the Birmingham scheme, and in cl. 4 of the Quinton scheme, as streets which are to be constructed or altered in accordance with these schemes.

It became necessary in the execution of those schemes to alter the positions of certain telegraph lines, and the question arises, at whose expense must those alterations be made. It is that

> "each of the widenings stated in para. 3 of the special case was carried out by them in pursuance of a resolution passed by the city council of Birmingham to carry out the work and in conformity with and for the purpose of carrying into effect the Birmingham (South) Town Planning Scheme and the Quinton, Harborne, and Edgbaston Town Planning Scheme. But the Corporation had power to carry out such widenings apart from the provisions of the scheme under the Birmingham Corporation (Consolidation) Act, 1883, the Highways Act, 1835, and the Public Health Act, 1875."

Later, the case says:

> "The construction of such new streets was carried out by the Corporation in pursuance of a resolution passed by the city council of Birmingham to carry out the work and in conformity with, and for the purpose of carrying into effect,"

the schemes.

In my opinion that is a finding in the case that the city Corporation of Birmingham, in carrying out this work involving expenditure on the telegraph lines, were carrying it out in pursuance of a resolution under the Housing, Town Planning Acts, and in no other way. The case points out that had the Corporation wished, they could have carried out these widenings under other Acts, but I think the finding is one that they did in fact purport to act under the Housing, Town Planning Acts. In those circumstances the question arises under which statute is this work to be covered. Is it under the Telegraph Act, 1878, or is it under the Telegraph Act, 1863?

Section 7 of the Telegraph Act, 1878, provides that:

> "Where any work proposed to be done in the execution of an undertaking authorised

> A by an Act of Parliament involves or is likely to involve an alteration either temporarily or permanently in any telegraphic line of the Postmaster-General, and provision is not otherwise made by enactment, agreement, or otherwise with respect to such alteration, or to giving notice to the Postmaster-General thereof, or to the expenses of or incidental thereto,"

B certain enactments shall apply. It is not suggested in the case that an agreement was made for any special provision for the alteration. If the provisions of the Act of 1878 do apply, then by sub-s. (3) of s. 7 it is provided:

> "If the Postmaster-General by his counter-notice states that it is his intention himself to make such alteration, it shall be lawful for such Postmaster-General by himself or his agents to make the same, and the undertakers or their agents shall C pay to the Postmaster-General all the expenses incurred by him of and incidental thereto, and the amount of any loss or damage sustained by him in consequence thereof."

In the present case it is argued by the Postmaster-General that, there being work proposed to be done in the execution of an undertaking authorised by an Act of Parliament, namely, this town planning scheme, of widening or altering these roads, which D involves or is likely to involve an alteration in the telegraph line of the Postmaster-General, there is a duty upon the Birmingham Corporation to pay to the Postmaster-General the expenses incurred by him of and incidental thereto.

On the other hand the Birmingham Corporation wish to take advantage of the words of s. 7, "and provision is not otherwise made by enactment." They say that provision has been otherwise made by enactment with regard to this work proposed to be done in E the execution of an undertaking authorised by an Act of Parliament, and they say that the enactment which so provides is to be found in an earlier Act dealing with telegraphs, an Act which was passed before the telegraphs came under the control of the Post Office at all, when they were still in the powers of private companies. Section 15 of the Telegraph Act, 1863, which really is the critical section for our consideration, is to the following effect:

F

> "In case the body having control of any street or public road at any time hereafter resolves to alter the line or level of any portion of such street or road under, in, upon, over, along or across which any work of the company constructed either before or after the passing of this Act is placed, the company shall from time to time be bound, on receiving one month's notice of such intended alteration, and at their own G expense, to remove such work and to replace the same . . . as may be required by such body."

There is no question here but that the Birmingham Corporation, as the highway authority for Birmingham, the urban authority under the Public Health Acts, are in control of the streets and public roads herein affected, but certain questions arise for consideration in order to decide whether or not they can take advantage of s. 15 of the Act of 1863. H If they can, they can call upon the Postmaster-General, who is the legal successor of the companies, to do the work at his own expense.

The two matters which have to be considered are as follows: First, the Postmaster-General contends that the language of s. 7 of the Telegraph Act, 1878, is not appropriate to deal with the case of any other general Act at all. He puts the case in this way: It is true that the earlier part of s. 7 refers to an undertaking authorised by an Act of I Parliament, but when the section goes on to say, "and provision is not otherwise made by enactment," the particular enactment which deals with a specific alteration of works authorised is indicated, and unless such provision is made in the particular enactment, the undertakers—that is, the corporation—are liable for the expenses. Now here it is not suggested by the Birmingham Corporation that there are any particular provisions made as to the expenses being paid by the Postmaster-General in the particular Act, and if they are to succeed they must have recourse to general legislation, other than this particular Act, empowering them to do the works. As a matter of fact they are not here empowered by an Act: they are empowered by a scheme under the Act, which, under the Housing, Town Planning Acts, it is said, has to be read as if it were part of an Act of Parliament. The definition of an Act of Parliament in s. 2 of the Act of 1878 includes an order confirmed by any such Act. So no question can arise on that point. In my opinion, and it is an opinion in confirmation of the view of GODDARD, J., it is not possible so to limit the language of s. 7 of the Act of 1878. I think that the words "provision is not otherwise made by enactment" mean what they say, and that the language is general in its application. GODDARD, J., says this ([1935] 1 K.B. at p. 411):

> "In spite of the powerful argument of counsel for the Postmaster-General I do not think that I should limit the meaning of the word 'enactment' in the way that is suggested. If that had been the intention of the legislature it could have been made much clearer by s. 7; I think that the proviso to s. 7 means that if there is an enactment with respect to 'such alteration'—that is to say, the alteration involved in the carrying out of this work—then that enactment is to apply and not s. 7; and, as this work alters the line or level of the portion of the street or road, I hold that it falls within s. 15"

—that is, s. 15 of the Act of 1863.

In those circumstances all I can say is that I entirely agree with the view expressed by GODDARD, J.. Counsel for the Corporation, apart from relying upon the unqualified language of this provision, points out another reason why we should take the view which the language itself on the face of it suggests. He points out that in the closing words of s. 7 of the Act of 1878 occurs this language:

> "And where under s. 8 of the Telegraph Act, 1863, any body to or by whom any such pipe as in that section mentioned belongs or is used require that the position of any telegraphic line of the Postmaster-General or any part thereof should be altered, the enactments of the present section shall apply, and for such purposes any such body shall be deemed to be 'undertakers.'"

Under the Act of 1863 there is a provision made for the powers of the company, as it then was, and among others under s. 8 it is provided:

> "In the exercise of the aforesaid powers, the company shall also be subject to the following restrictions: (1) They shall cause as little detriment or inconvenience as circumstances admit to the body or person to or by whom any pipe for the supply of water or gas belongs or is used; (2) before they alter the position of any such pipe they shall give to the body to whom the same belongs notice of their intention to do so."

In such a case, therefore, it is clear that at that time, under s. 15 of the Act of 1863, the expenses had to fall upon the company and, moreover, under sub-s. (4) of s. 8, the one dealing with pipes, there is this specific provision:

> "The company shall pay all reasonable expenses to which such body may be put on account of such superintendence,"

one of the matters required under sub-s. (3) is that there shall be superintendence. Were it not, therefore, for the provisions in the Act of 1878, the company—now the Postmaster-General—would continue to be liable for the expenses stated in s. 8 of the Act of 1863, but it is in terms provided that the enactment of the present section (s. 7) shall apply, and the enactment of the present section, as I have pointed out, puts the expense upon the persons incurring the work. Counsel for the Corporation argues, and I think the argument is a very persuasive one, that this dealing specifically with the pipes in a particular way, leaving other expenses incurred untouched, points to the generality of this legislation and does not deal with any specific provision in a particular Act as such. Again, in another argument he points out that the definition of an Act of Parliament in s. 2 of the Act of 1878 "means any Act of Parliament whether public, general, local and personal, or private," and that indicates again the generality of the provision.

I have come to the conclusion, therefore, without any doubt that on this point counsel for the Corporation is right, and that if he can point to any enactment which contains provisions for doing the work proposed to be done in the execution of an undertaking authorised by Act of Parliament, he is entitled to say he is outside the ambit of s. 7 of the Act of 1878. The Act on which he relies is the Telegraph Act, 1863, and the whole case resolves itself into this question, whether he can or cannot bring himself within the ambit of s. 15 of that Act? If he cannot, however general the provisions of s. 7 of the Act of 1878, he still comes within it for want of finding any specific enactment to take him out of it.

The difficulty which I have felt in this case is as follows: this section, in my opinion, contemplated at the time of its passing that the body having the control of the street or public road would in most cases resolve to alter the line or level, if such resolution was to be made at all, in its capacity as such a body, that is to say, the highway authority. Counsel for the corporation points out that the powers of a highway authority to alter the line or level of a street are entirely statutory. With regard to the power of widening it is not necessary to go back to the earlier Acts of the eighteenth century. It is sufficient to say that by the Highways Act, 1835, specific powers are given to the highway authority to widen highways and also in regard to the alteration of level. At the time of the passing of the Act of 1863 there was specific power given to alter the level of highways. Therefore the powers which existed in 1863 were statutory powers. Now in the present case, in my view of the finding in this case, the works which are to be executed are not executed by the highway authority under its highway powers at all. The Corporation could, on the finding in the case, have executed them under the Highways Act, but as I read it they have not done so. They have done it in pursuance of their powers under the Housing, Town Planning Acts, but nevertheless the Corporation of Birmingham is a highway authority for all purposes in Birmingham.

As I indicated in the course of the argument, in the case of a non-county borough difficulties might arise which do not arise in this case. In the case of a non-county borough, by the operation of Part III of the Local Government Act, 1929, particularly s. 31, the county council are the authority with respect to classified roads. A classified road means a road classified by the Minister of Transport under s. 17 (2) of the Ministry of Transport Act, 1919, and may include a road in a non-county borough, which non-county borough nevertheless may be a local authority under the Housing, Town Planning Acts for the purpose of altering the highway under the general provisions of those Acts. In certain cases, therefore, difficulties may arise. It may have to be considered hereafter whether it can properly be said that a non-county borough, in so far as it is dealing under its housing and town planning powers with a road of which the county council are the highway authority (of which road, therefore, it may, in my view, be said that the county council are the body having control of the street), is within the ambit of s. 15 of the Act of 1863 at all. In such a case it may be that a telegraph pole which is moved in a street which does come within the control of the non-county borough falls within s. 15, with consequent expense to the Postmaster-General, and that a telegraph pole moved in a street which is not under the control of the non-county borough may come to be paid for under the later Act by the local authority. I do not think in this case it is necessary to consider that problem. It may well be that the Ministry of Health, who are the central authority under both Acts, may make provision when housing and town planning schemes are to be undertaken by non-county boroughs, that they shall not have the power to deal with highways which are not under their control without the concurrence of the county council.

However that may be, I have come to the conclusion that, in so far as the Birmingham Corporation are in any view a body having the control of the street, and as they have resolved to alter the line of that street, it does not matter for the present purpose whether they acted under the Housing, Town Planning Acts, or whether they acted under the Highways Act. I think the finding that they can act under the Highways Act if they wish to do so is an important one, and may distinguish such a case from the case of a non-county borough, an urban district council, or a rural authority exercising power under the Housing, Town Planning Acts. The case of the rural authority could scarcely now arise because, for the most part, they have no control over roads at all under the Local Government Act, 1929. However that may be, I think that the Birmingham Corporation in this case satisfy the conditions of s. 15 of the Act of 1863.

They are the body having control of the street; they have resolved to alter the line or level of the street under their statutory powers and obligations under the town planning schemes, and being, therefore, a body which is so authorised, they can exclude themselves from the provisions of the statute of 1878. They fall within s. 15 of the earlier Act, and in consequence I think that the case must be answered in favour of the Corporation, and that they are entitled to call upon the Postmaster-General to pay the expenses of the alteration to these telegraph lines.

The appeal, therefore, will be dismissed.

ROCHE, L.J.—I agree in thinking that the judgment of GODDARD, J., is right, and that this appeal should be dismissed. My Lord has stated the facts and relevant enactments so fully that it is unnecessary for me to do more than to express compendiously my grounds for agreeing with his conclusion.

The matter presents itself to me as follows: The effect of the Telegraph Act, 1863, is in substance this: It gave the company, whose successor is the Postmaster-General, power under certain conditions to construct works in or under roads or streets. It provided that if the line or level of the roads or streets had to be altered, the owners of the telegraph lines should make any consequential removal or replacement of their works at their expense. The Act of 1878 would enable the Postmaster-General to recover the sums in question unless the Act of 1863 applied to make them payable by himself as owner of the telegraph lines. In my opinion it does apply, and I am unable to accept the ingenious argument that the enactment, in s. 7 of the Act of 1878, refers to special or ad hoc enactments dealing with specific works and does not refer to general enactments such as that of 1863. No such limitation upon the word "enactment" is expressed, and, in my judgment, none can or should be implied. On the contrary, I regard the observations of counsel for the Corporation as to the matter of water- and gas-pipes as very weighty. The Act of 1878 (see s. 7) expressly dealt with provisions of the earlier Act of 1863 by way of variation or exclusion. If it had been intended to vary or exclude from operation the road or street provision, one would certainly have expected similar express language to be employed. In reference to the capacity in which the Corporation altered the line and level of these streets, a body having the control of a street or road requires statutory authority to alter the line or level of any street or road. That authority may be derived from a general or special Act. In the present case the authority came from the Housing, Town Planning Acts and the schemes made thereunder. In my judgment, the resolve of the Corporation to alter the line and level of the streets was the resolve of a body which had the control of those streets, none the less because the resolve was due to and was justified by the Town Planning Acts and the schemes made thereunder.

For these reasons in my opinion the appeal should be dismissed, with costs.

SWIFT, J.—I agree, and I do not wish to add anything to the reasons which have been given by my Lords, or the result at which the court has arrived.

Appeal dismissed.

Solicitors: *Sir Raymond Woods*; *Sharpe, Pritchard, & Co.*, for *F. H. C. Wiltshire*, Town Clerk, Birmingham.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

THE NJEGOS

[Probate, Divorce and Admiralty Division (Sir Boyd Merriman, P.), October 31, November 1, 7, 8, December 19, 1935]

[Reported [1936] P. 90; 105 L.J.P. 49; 155 L.T. 109; 52 T.L.R. 216; 18 Asp. M.L.C. 609; 41 Com. Cas. 149]

Shipping—Bill of lading—Incorporation of charterparty—Law governing bill of lading—Interpretation of charterparty according to English law—Exceptions clause—No express statement as to law of interpretation—Arbitration clause not incorporated in bill of lading.

By a charterparty in the form of the Chamber of Shipping River Plate "Centrocon" Charterparty, 1914, entered into in London on May 19, 1932, between an English company as agents for the shipowners and the English branch of a French company as agents for the charterers, a company incorporated under the laws of Argentina, the Yugoslav ship *N.* was chartered to load a cargo of grain at Rosario and Buenos Aires and proceed to ports in Europe. After the *N.* had loaded part of her cargo at Rosario, she proceeded to Buenos Aires, and while she was there fire broke out on two occasions in her port bunker. The fires were extinguished, but water damaged part of the cargo. The damaged cargo was discharged into lighters and sold. On arrival at the Scandinavian ports to which the vessel was bound it was found that the cargo was short, and the plaintiffs, as indorsees of the bills of lading, claimed from the Yugoslavian shipowners damages for the short delivery. The plaintiffs alleged that the fires were due to heating of the bunkers through insufficiency of ventilation or through the shipowners or their servants having permitted them to become damp, and that the ship was, therefore, unseaworthy and unfit for the reception or carriage of the cargo. The defendants, while denying that the *N.* was unseaworthy, claimed that they were protected by an exceptions clause in the charterparty which, they said, was incorporated in the bills of lading. By an amended defence the defendants pleaded that the law governing the bills of lading contracts was the law of the flag, i.e., Yugoslavian law, under which, provided that the shipowners had exercised due diligence to keep their ship seaworthy, the exceptions in the charterparty would apply without the warranty of seaworthiness which was to be implied under English law. On the hearing of a preliminary issue as to what law was applicable to the bills of lading the defendants admitted that the proper law of the charterparty was English law.

Held: there was no necessary presumption that the law of the flag applied; the incorporation in a bill of lading by reference to whatever in a charterparty was germane to the receipt, carriage, or delivery of the cargo or the payment of the freight did not offend against the rule that the doctrine of constructive notice had no application to commercial documents; where it was proper, according to mercantile usage, to tender as one of the shipping documents a bill of lading incorporating by reference provisions of an English charterparty in the customary form, the true inference was that the sensible business man must be assumed to intend that the bill of lading should be read with the English interpretation which admittedly attached to the charterparty, although that interpretation was nowhere expressly stated, but was to be inferred from indications scattered throughout the charterparty and notwithstanding that one of the indications—namely, an arbitration clause in the usual English form—was not included among the provisions incorporated in the bill of lading; and, therefore, the law governing the bill of lading was not that of the kingdom of Yugoslavia, but was English law.

Notes. Distinguished: *The Metamorphis*, [1953] 1 All E.R. 723. Considered: *The Assunzione*, [1954] 1 All E.R. 278.

As to incorporation of charterparty in bill of lading, see 30 Halsbury's Laws (2nd Edn.) 414–416, and for cases, see 41 Digest 404 et seq.

Cases referred to:

(1) *Hamlyn* v. *Talisker Distillery*, [1894] A.C. 202; 71 L.T. 1; 58 J.P. 540; 10 T.L.R. 479; 6 R. 188, H.L.; 11 Digest (Repl.) 423, *724*.

(2) *N. V. Kwik Hoo Tong Handel Maatschappij* v. *James Finlay & Co., Ltd.*, [1927] A.C. 604; 137 L.T. 458; Digest Supp.

(3) *Thomas* v. *Portsea Steamship Co., Ltd.*, [1912] A.C. 1; 105 L.T. Rep. 257.

(4) *A/S August Freuchen* v. *Steen Hansen*, 1 Ll.L.Rep. 393.

(5) *Rodocanachi* v. *Milburn* (1886), 18 Q.B.D. 67; 56 L.J.Q.B. 202; 56 L.T. 594; 35 W.R. 241; 3 T.L.R. 115; 6 Asp. M.L.C. 100, C.A.; 39 Digest 669, *2570*.

(6) *Leduc* v. *Ward* (1888), 20 Q.B.D. 475; 57 L.J.Q.B. 379; 58 L.T. 908; 36 W.R. 537; 4 T.L.R. 313; 6 Asp. M.L.C. 290, C.A.; 17 Digest (Repl.) 315, *1221*.

(7) *Burstall* v. *Grimsdale* (1906), 11 Com. Cas. 290; 17 Digest (Repl.) 55, *635*.

(8) *Manchester Trust* v. *Furness*, [1895] 2 Q.B. 539; 73 L.T. 110; 44 W.R. 178; 8 Asp. M.L.C. 57; 1 Com. Cas. 39; 14 R. 739; 64 L.J.Q.B. 766; 11 T.L.R. 530, C.A.; 20 Digest 319, *659*.

(9) *Hogarth Shipping Co.* v. *Blyth, Greene, Jourdain, & Co.*, [1917] 2 K.B. 534; 117 L.T. 290; 86 L.J.K.B. 1426; 22 Com. Cas. 334; 61 Sol. Jo. 544; 33 T.L.R. 429; 14 Asp. M.L.C. 124, C.A.

(10) *Fort Shipping Co.* v. *Pederson*, 19 Ll.L.Rep. 26.

(11) *Vergottis* v. *Robinson David & Co.*, 31 Ll.L.Rep. 23.

(12) *Lloyd* v. *Guibert* (1865), L.R. 1 Q.B. 115; 6 B. & S. 100; 35 L.J.Q.B. 74; 13 L.T. 602; 2 Mar. L.C. 283; 122 E.R. 1134, Ex. Ch.; 12 Digest (Repl.) 418, *3243*.

(13) *The Adriatic*, [1931] P. 241; 100 L.J.P. 138; 145 L.T. 580; 47 T.L.R. 638; 18 Asp. M.L.C. 259; 11 Digest (Repl.) 433, *785*.

(14) *Re Missouri Steamship Co.* (1889), 42 Ch.D. 321; 58 L.J.Ch. 721; 37 W.R. 696; 61 L.T. 316; 5 T.L.R. 438; 6 Asp. M.L.C. 423, C.A.; 11 Digest (Repl.) 424, *728*.

(15) *The Industrie*, [1894] P. 58; 63 L.J.P. 84; 70 L.T. 791; 42 W.R. 280; 7 Asp. M.L.C. 457; 6 R. 681, C.A.; 11 Digest (Repl.) 433, *784*.

Preliminary Issue tried on an agreed statement of facts, the question being whether the law governing the contracts of affreightment in the bills of lading for River Plate grain cargoes in the Yugoslavian steamship *Njegos* was or was not the law of the flag.

The plaintiffs were the Norwegian and Danish receivers of certain quantities of maize and pollards shipped at Rosario and Buenos Aires in May and June, 1932, on board the steamship *Njegos*. The defendants, the Yugoslavenski Lloyd, a.d., incorporated under the laws of Yugoslavia, with their head office at Zagreb, were the owners of the *Njegos*.

By a charterparty in the form of the Chamber of Shipping River Plate "Centrocon" Charterparty, 1914, entered into in London on May 19, 1932, between Baburizza & Co., Ltd., a company registered in England, as agents for the defendants, the shipowners, and Louis Dreyfus & Co., the English branch of Louis Dreyfus et Cie, of Paris, as agents for the charterers, Sociedad Anonima Comercial de Exportacion e Importacion (Louis Dreyfus y Cia) Limitada, of Buenos Aires, a company incorporated under the laws of the Republic of Argentina (hereinafter referred to as "the Sociedad"), the *Njegos* was chartered to load a full cargo of maize and pollards at Rosario and Buenos Aires. The *Njegos* commenced loading at Rosario on May 31, 1932, and there took in a part cargo of yellow maize. On June 6 she proceeded to Buenos Aires to complete her loading, and arrived there on June 7. On June 10 and before any cargo had been loaded in the *Njegos* at Buenos Aires, a fire broke out in the vessel's port bunker. This was extinguished and on the same day the *Njegos* commenced to load a cargo which included 2,396 bags of pollards. In the afternoon of June 11 a second fire broke out in the port bunker and part of the cargo was damaged by water used to extinguish the fire. The damaged cargo, which consisted partly of the maize taken in at Rosario and partly of a portion of the parcel of 2,396 bags of pollards shipped at Buenos Aires, had to be discharged and sold. On July 9, having finished loading the cargo originally intended for her at Buenos Aires, and also a further quantity of maize and pollards to replace the cargo which had been damaged, discharged, and sold, the *Njegos* proceeded on her homeward voyage. She discharged her cargo at three ports in Norway and one in Denmark, the discharge being completed on Sept. 6, 1932.

A Two bills of lading, dated respectively May 31 and June 6, 1932, had been signed by the master in respect of the yellow maize shipped at Rosario, and he had also signed another bill of lading dated June 10, 1932, in respect of the parcel of pollards loaded at Buenos Aires. These bills of lading acknowledged the shipment in good order and condition of various quantities of the said goods by the Sociedad at Rosario and Buenos Aires,

B

> "for carriage to a port as ordered and delivery in the like good order and condition unto Louis Dreyfus et Cie or their assigns."

The Sociedad sold the goods to the plaintiffs on the terms of the London Corn Trade Association contracts.

In November, 1934, the *Njegos*, having for the first time since the occurrences here in C question come to British waters, was arrested at Hartlepool and a writ was issued against her. She was subsequently released on bail being given on behalf of the defendants.

The plaintiffs, the indorsees of the bills of lading, to whom the property in the goods represented by the bills of lading had passed by reason of the indorsement of the bills of lading, claimed damages against the defendants for the breach of the contracts contained in the said bills of lading by reason of the short delivery of some 251,000 kilos of D the said yellow maize shipped at Rosario and of 9,784 kilos of pollards loaded at Buenos Aires. According to the statement of claim, which alleged that two fires had broken out before the vessel loaded at Buenos Aires and that, by the fire brigade's accumulation of water, cargo had been damaged, a large quantity of cargo was discharged into lighters and sold by the shipowners' agents at Buenos Aires, who retained the proceeds. The plaintiffs alleged that the steamship was damaged and that an average agreement in E Lloyds form was signed in London and the sum of £1,750 deposited thereunder by Louis Dreyfus & Co. for the plaintiffs, and that on Dec. 7, 1932, £750 was paid to the shipowners out of the deposit without prejudice to the plaintiffs' liability in general average. They said that the fire was due to heating of the bunkers through insufficiency of ventilation or through permitting them to become damp, and that the steamship was, therefore, unseaworthy and unfit for the reception or carriage of the cargo.

F The case for the defendants was that the bills of lading incorporated all the terms and exceptions, including the negligence clause of a charterparty dated in London May 19, 1932, and made between the defendants and the Buenos Aires branch of Louis Dreyfus et Cie, of Paris. Clause 29 of the said charterparty provided as follows:

> "The steamship shall not be liable for loss or damage occasioned by . . . perils of the sea . . . fire from any cause or wheresoever occurring . . . or any latent defects G in . . . appurtenances . . . even when occasioned by the negligence default or error of judgment of the . . . master, mariners or other servants of the shipowners or persons for whom they are responsible (not resulting, however, in any case from want of due diligence by the owners of the steamer or by the ship's husband or manager). . . ."

The defendants said that, if there were short delivery, the short delivery was due to H one of the excepted causes included in the above cl. 29 of the charterparty. After setting out the circumstances of the fires at Buenos Aires and their extinction by the local fire brigade, the defendants in their particulars said that by reason of the said fires it was necessary to discharge the cargo from the spaces where the fires had broken out and (or) into which water had percolated in order to separate the sound from the damaged cargo and to preserve the sound cargo. The sound cargo was subsequently re- I loaded and the damaged cargo was sold at Buenos Aires and the defendants said that they had given credit to the plaintiffs in general average in the sum of £254 0s. 8d. in respect of the proceeds of the sale. The defendants denied that the *Njegos* was unseaworthy or unfit as alleged by the plaintiffs, and in the alternative they said that if the vessel was unseaworthy the defendants were not liable for any part of the alleged short delivery by reasons of the provisions contained in the charterparty. By an amended defence, the defendants further said that the law governing the bills of lading was Yugoslavian law, that they had complied with the regulations of Yugoslav law in respect of the *Njegos*, and that such compliance was deemed under Yugoslav law to constitute the exercise of due diligence to make the ship seaworthy. In Yugoslav law that was enough, as, under that law, an absolute condition precedent of seaworthiness was not implied in contracts of affreightment and there was no liability upon them such as was required of a common carrier under English law.

The arguments of counsel and the cases relied on by them respectively are set out or referred to with sufficient particularity in the judgment of the President.

Sir Robert Aske, K.C., and *Harry Atkins* for the plaintiffs.

Willink, K.C., and *Cyril Miller* for the defendants.

Cur. adv. vult.

Dec. 19. **SIR BOYD MERRIMAN, P.,** read the following judgment. This is an argument of a point of law on an agreed statement of facts. The plaintiffs claim, as indorsees of the bills of lading, in respect of the short delivery of a certain quantity of maize and pollards which were damaged as the result of a fire on board the defendants' vessel *Njegos*, in which the goods were shipped. The plaintiffs alleged that the fire was caused by the unseaworthiness of the vessel. The defendants pleaded that the bills of lading incorporated all the terms, conditions and exceptions, including the negligence clause, of the charterparty made between themselves and the shippers, and counterclaimed for a general average contribution. In their reply and defence to counterclaim, the plaintiffs relied on the allegation of unseaworthiness in answer to the negligence clause. Up to this point, therefore, it was the defendants who were relying on the incorporation of the charterparty in the bills of lading, and the issue in effect was whether the damage was or was not caused by the unseaworthiness of the vessel. By an amendment of the defence, however, the defendants alleged that the law governing the bills of lading was Yugoslav law. It was agreed between the parties that this issue should be tried as a preliminary point of law. The assumption is that, if it is established that Yugoslav law governs the contract of affreightment, the exceptions would apply without any implied warranty of seaworthiness and that the defendants, therefore, would not be liable on the claim and would recover on the counterclaim. But it is not to be taken that it was proved or admitted that this would necessarily be the effect of Yugoslav law. By a convenient arrangement a statement of facts was agreed, and this statement must be taken to be incorporated in this judgment. It is only necessary for me to add, by way of summary, that the law of the flag of the ship was Yugoslav; that the charterparty was made in England, in an English form and in the English language, between an English company, as agents for the Yugoslav owners, and the English branch of a French company, as agents for Argentine shippers; that the bills of lading were in an English form and in the English language; and that the destination of the goods were ports in Norway and Denmark respectively. It was also assumed, though it was not expressly stated, that the receivers of the goods were Norwegian or Danish nationals and that the shipping documents were to be taken up in those countries respectively. I was also informed that the bills of lading were in the common form adopted for this particular trade as long ago as 1914. As appears from the agreed statement, the charterparty was in the "Centrocon" form. This means, as the charterparty itself shows, the Chamber of Shipping River Plate Charterparty, 1914 (Homewards), in the form arranged and agreed with the Centro de Cereales of Buenos Aires and adopted by the Documentary Council of the Baltic and White Sea Conference. Counsel for the defendants expressly admitted that the proper law of that contract was English. I may just add that I have not failed to observe that the form as given to me was as amended in the 1934 edition. The charterparty in this case was of 1932.

This summary of the position shows that the choice of laws governing the contract of affreightment, in accordance with recognised principles, is almost as wide as it can be. The parties, however, themselves confined the choice of laws governing the contract to two alternatives. Counsel for the plaintiffs argued that the contract was governed by English law and his opponent that it was governed by the law of the flag, that is to say, by Yugoslav law. The point is an interesting one and was admirably argued on both sides.

Before dealing with the main argument, I will dispose of a subsidiary point raised, not very hopefully, by counsel for the plaintiffs. The charterparty contains the usual English arbitration clause. A well-known line of authorities lays down that this, taken by itself, may be regarded as decisive as to the application of English law to the contract: see *Hamlyn* v. *Talisker Distillery* (1) and *N. V. Kwik Hoo Tong Handel Maatschappij* v. *James Finlay & Co., Ltd.* (2). He argued that this clause was incorporated, among others, in the bills of lading, with the result that English law would automatically apply to them also. I am of opinion that this point is unsound. The principle underlying the cases governing the incorporation of the terms of a charterparty in bills of lading, to some of which I shall have to refer later, seems to me to be inconsistent with the incorporation of the arbitration clause as such: see, for example, *Thomas* v. *Portsea Steamship Co., Ltd.* (3). Both counsel agreed, and their experience in these matters is unrivalled, that since the adoption of this form of bill of lading in 1914, attempts made in chambers, under the bill of lading to enforce the arbitration clause in the charterparty had uniformly failed, and that no one had been hardy enough to test the matter in court. I stopped counsel for the defendants in his argument upon this point and I decide it against the plaintiffs.

This brings me, however, to what, stated in various forms in the course of an interesting argument, is really the kernel of the matter. Counsel for the defendants argued that it was the existence of the arbitration clause alone which made English law the proper law of that contract. If, therefore, it was decided that this clause was not incorporated in the bill of lading, it followed that such clauses of the charterparty as were incorporated in the bill of lading were to be written into it without, as it were, any label or indication that they were to be interpreted by English law. The material words in the bills of lading are

> "to be delivered in the like good order and condition at the port of 'as ordered' unto Louis Dreyfus & Cie, or their assigns, they paying freight for the said goods in accordance with the charterparty dated London, May 19, 1932. All the terms, conditions and exceptions of which charterparty, including the negligence clause, are incorporated herewith."

The real crux of the matter is whether cl. 29 of the charterparty, the material words of which are set out in the defence, which clause, as usual, is labelled marginally "Exceptions," is to be taken to be incorporated in the bills of lading verbatim, but entirely isolated from its context and with no indication of the proper law governing the contract from which it is taken, or whether it is to be taken to be incorporated as an extract from a contract to which English law is known to be applicable.

I do not agree with counsel for the defendants that the arbitration clause is the sole test of the nationality of the charterparty. I think there are several indicia all pointing the same way—for instance, the English language and the English form of these clauses which are admittedly incorporated and which include what GREER, L.J., described in *A/S August Freuchen* v. *Steen Hansen* (4) as "many old friends"; the fact that the freight is payable in sterling; that the measurements of capacity and the guarantee of grain space are in English measures; and not least important, the exceptions clause itself. Even so, however, counsel urges that the point remains the same. Only so much of the charterparty as is actually covered by the words I have quoted is to be incorporated into the bills of lading. The rest is to be ignored completely, and that which is incorporated carries with it no label of nationality derived from that which is to be ignored. It is not disputed, however, that the exceptions clause as a whole is included.

Both counsel start with the principle that the question, what law governs the contract, must be decided by the intention, actual or presumed, of the parties to the contract: see DICEY'S CONFLICT OF LAWS (5th Edn.), p. 628, and CHESHIRE'S PRIVATE INTERNATIONAL LAW, pp. 182 to 185. But, to quote PROFESSOR DICEY at p. 666:

> "Here, as in other branches of law, an inquiry into the intention of the parties is really an inquiry, not into the actual intention of X. and A., for it possibly never had any real existence, but into the intention which would have been formed by sensible

persons in the position of X. and A. if their attention had been directed to contingencies which escaped their notice."

Counsel for the defendants relies on the well-settled principle that, as between shipowners and shippers, the charterparty alone forms the contract, and the bills of lading are nothing but an acknowledgment of the shipment of the goods: *Rodoconachi* v. *Milburn* (5), per Lord Esher, M.R. (18 Q.B.D. at p. 75). But the contract in issue here, as he points out, is not the charterparty, but the contract between the shipowners and the ultimate receivers arising from the indorsement to them and the acceptance by them of the bills of lading in accordance with commercial usage. The bills of lading are the record of this contract: *Leduc* v. *Ward* (6). But as a matter of commercial practice the receivers can have no means of knowing the terms even of the bills of lading until the moment when, under their obligation to their sellers, they take up the shipping documents. I gather from a document which was put in as a typical contract of sale, that the receivers are in fact sub-purchasers of part of a quantity of unascertained goods not specified as being loaded in any particular ship, which had been sold by the shippers to the Norwegian State Grain Monopoly, and that this sale contract was governed by English law. But even when they take up the shipping documents the receivers have no means, in practice, of acquainting themselves with such terms of the actual charterparty as must be taken to be incorporated by the very terms of the bills of lading by which they are bound. Although, therefore, the receivers bind themselves, unseen, by the terms of the bills of lading, provided always that these are in a form usual and proper for the trade: see *Burstall* v. *Grimsdale* (7), (11 Com. Cas. at p. 290) and although these terms include such terms, conditions and exceptions of the charterparty as are held to be incorporated in the bills of lading, there is no room, it is argued, for any implication from these unseen terms as to the law by which the contract is to be governed.

I entirely agree with counsel for the defendants that the doctrine of constructive notice has no application to commercial documents: see *Manchester Trust* v. *Furness* (8); but it seems to me that there is all the difference in the world between an attempt, such as was made in the case cited, to import from a charterparty into a bill of lading contract, by constructive notice, an abnormal provision which was not germane to the payment of freight or the other conditions to be performed on the delivery of the cargo, and importing, with those clauses of the charterparty which are undoubtedly incorporated, the proper law by which they are governed, when it must be recognised that the charterparty will necessarily have a proper law, and that this will probably appear, expressly or by inference, on its face. There is no suggestion in the judgments in the Court of Appeal in *Manchester Trust* v. *Furness* (8) that the incorporation by reference of whatever in the charterparty is "germane to the receipt, carriage, or delivery of the cargo or the payment of the freight" (to quote the words of Lord Atkinson in *Thomas* v. *Portsea Steamship Co., Ltd.* (3) ([1912] A.C. at p. 6); and see Lord Gorell, ibid., at p. 8) offends the rule against applying the doctrine of constructive notice to commercial transactions. Indeed, Lord Lindley ([1895] 2 Q.B. at p. 545) recognises that this is the effect of the reference to a charterparty in a bill of lading.

In the absence of any expressed intention as to the law governing the contract, I am, as Professor Dicey points out, confronted with the difficult, but not unfamiliar, problem of deciding what that hypothetical person, the sensible business man, must be taken to intend when he is content to be bound by a contract in writing of which, by commercial usage, he is unable to see the actual terms beforehand, and with which, in practice, he does not really trouble himself in the least.

The charterparty in this case, as I have already said, is in the standard form adopted by the trade in 1914. When, therefore, a sensible business man contracts on the terms of bills of lading in a form also adopted by the trade in the same year, it seems to me, even if I am not permitted to suspect that he would actually know that the charterparty therein referred to would probably be in the "Centrocon" form and would, therefore, be governed by English law, that it is pressing too far the well-recognised principle that everything in the charterparty that is insensible must be rejected: see, for example, *Hogarth Shipping Co.* v. *Blyth, Greene, Jourdain, & Co.* (9); *Fort Shipping Co.* v. *Pederson* (10) and *Vergottis* v. *Robinson David & Co.* (11); to argue that the proper law of the charterparty is to be ignored when incorporating the material provisions in the bills of lading. I do not myself profess to understand how anyone contracting on the basis that the liabilities of the shipowner in connection with the receipt, carriage, and delivery of the cargo are subject to the exceptions contained in a separate document can know the terms on which he is contracting, unless and until he informs himself as to the system of law by which those exceptions are governed. It is not improbable that by this time the warranty of seaworthiness is implicit, unless it is expressly excluded, and that some other systems of law differ in this respect.

If, therefore, negotiations could take place between the shipowner and the receiver as to the incorporation in a bill of lading contract in English of certain specific clauses extracted from a charterparty in English, including an exceptions clause in the well-known English form, sensible business men would naturally wish to ascertain whether it was proposed that the contract should be read with the English implication or not. Otherwise, the exceptions to the liabilities of the shipowner would not be clearly defined. But even if this would be too much to expect with regard to a warranty which is read into the exceptions by implication, one would suppose that, at any rate, they would wish to define by what system of law the expressed exception of negligence was to be measured. If nothing was said to the contrary, I should assume that the intention was that the contract should be interpreted in light of the law by reference to which its clauses were drawn.

What, then, is the proper inference when the exigencies of commerce preclude any antecedent negotiations, and in the absence of any expressed intention? Provided always that it is proper, according to mercantile usage in the circumstances of the case, to tender as one of the shipping documents a bill of lading incorporating by reference certain provisions of an English charterparty in the customary form, I think that the true inference is that the sensible business man must be assumed to intend that the contract shall be read with the English interpretation which admittedly attaches to the charterparty as such, though that interpretation is nowhere expressly stated, but is to be inferred from several indications scattered throughout the charterparty, and, notwithstanding that one of the indications, namely, the arbitration clause, is not included among the provisions incorporated in his contract.

On the basis, however, that the incorporated provisions of the charterparty afforded no guide as to the proper law of the contract, counsel for the defendants argued that there were only four possible alternatives as to the proper law, namely, the lex loci contractus, the lex loci solutionis, the law of the flag, or that law which best gives efficacy to the contract. Of these he maintained that in connection with the contract of affreightment it is settled that the law of the flag should be preferred: *Lloyd* v. *Guibert* (12). Of these possibilities he asked me to reject the lex loci contractus and the lex loci solutionis. I agree with him, but I think that the reason why I was invited to reject these alternatives is worth noticing. The lex loci contractus with regard, for example, to some of the bills of lading would be Oslo, for it was there that the shipping documents were to be taken up; but as counsel pointed out, the place might have been anywhere in the Baltic, according as the bills of lading were indorsed to a national of one country or another. For the same reason the lex loci solutionis might be a port in one of several Baltic states. And, however willing the receiver might be to be bound by the law of his own State, there was, he said, no reason why the shipowner should be supposed to be ready to leave it to chance by what law he was to be bound.

I will refer in a moment to the authorities relating to the law of the flag, but in passing I would point out that there seems to be no particular business reason why the parties to this contract should wish to be bound by the law of the flag. The shipowner has already discarded the law of the flag in connection with the charterparty, though his own law. The receiver has actually bound himself to take the usual shipping documents by a contract which gave him no guidance whatever as to what the law of the flag might be expected to be. But counsel argued that there were only four reported cases in which the law of the flag had been ignored in connection with a contract of affreightment. They are *A/S August Freuchen* v. *Steen Hansen* (4), where GREER, J., preferred the English law of the charterparty for the sake of uniformity; the *Adriatic* (13), in which LANGTON, J., while not wholly convinced by the argument of uniformity, rejected A the law of the flag on the ground that none of the parties was in the least concerned with the nationality of the ship; in *Re Missouri Steamship Co.* (14), where the lex loci contractus, which incidentally was the law of the flag, was rejected in favour of English law on the ground that the contract of affreightment was in the English form and contained an exceptions clause valid in English law but invalid in the United States of America, where the contract was made (*cf. Hamlyn* v. *Talisker Distillery*, (1)); and, finally, the B *Industrie* (15), where the Court of Appeal laid special stress on the English form of the charterparty. LORD ESHER's judgment in this last case seems to me to be particularly valuable as showing what are the real limits of the presumption in favour of the law of the flag in connection with a contract of affreightment. It seems quite plain that, in connection with such contracts as the master may be driven to make by necessity in the course of the voyage, the law of the flag should prevail, for it is that law which C governs his relations with his owners; but that, as is pointed out by LORD ESHER, M.R. ([1894] P. at p. 76), is by no means inconsistent with the proper law of the contract of affreightment being a different law.

In my opinion, all these cases show very clearly that, as regards the contract of affreightment as a whole, there is no necessary presumption that the law of the flag applies. I can well imagine that if the parties in this case had been in a position to form D an actual intention as to the law to govern their contract, the sensible shipowner would almost inevitably have stipulated that his rights and obligations in connection with the receipt, carriage and delivery of the cargo or the payment of the freight, should be the same in the two contracts formed respectively by the charterparty itself and by the bills of lading incorporating the relevant clauses of the charterparty. Nor, in the circumstances of this case, can I see any valid reason which would have induced the indorsees E of the bills of lading to dissent from that proposal.

Both on what, I think, should be presumed to be the intention of the parties and on the ground of business efficacy, I am prepared to hold that the law of the kingdom of Yugoslavia is not the law governing this contract. I am not expressly invited to say what the proper law is; but in case it may be of assistance to the parties if I express my opinion, and I have not already made it plain what that opinion is, I say that I think F the proper law of the contract is English law. The plaintiffs will have the costs. I have decided the preliminary point of law in the plaintiffs' favour, and given them the costs. I am not pronouncing any ultimate judgment in the case.

Decision on preliminary point.

Solicitors: *Waltons & Co.*; *Richards, Butler, Stokes, & Woodham Smith.* G

[*Reported by* J. A. PETRIE, ESQ., *Barrister-at-Law.*]

Re BRINE AND DAVIES'S CONTRACT

[CHANCERY DIVISION (Farwell, J.), January 24, 25, 1935]

[Reported [1935] Ch. 388; 104 L.J.Ch. 139; 152 L.T. 552]

Sale of Land—Possessory title—Need to disclose in contract—Disclosure in abstract—Objection to title out of time.

A vendor and a purchaser entered into a contract for the sale of the vendor's registered freehold house. The contract was subject to the National Conditions of Sale (12th Edn.), Condition 4 of which provided that, if the purchaser did not take any objection to the title within fourteen days of the delivery of the abstract, he should be deemed to have accepted it. The abstract of title disclosed that the property had been registered with only a possessory title. Twenty-seven days after the delivery of the abstract the purchaser objected to the possessory title as not being sufficient.

Held: on the true construction of the contract the purchaser was entitled to assume that the abstract would show an absolute title; if the vendor could give only a possessory title, he should have stated that fact in the contract; as he had not done so the contract was misleading; and, therefore, the vendor was not entitled to rely on the fact that the objection to the title was not taken within the stipulated time.

Notes. As to disclosure of defects of title, see 29 HALSBURY'S LAWS (2nd Edn.) 256 et seq., and as to time for objections, see ibid., 285 et seq., and for cases, see 40 DIGEST 86 et seq., and 134 et seq.

Adjourned Summons

By a contract dated July 11, 1934, Archibald John Brine agreed to sell to Herbert Walter Davies a registered freehold house and premises known as 74, Ivy-road, Old Southgate, in the county of Middlesex. The property was sold subject to the National Conditions of Sale (12th Edn.). The date of completion was Aug. 11, 1934. An abstract of title was delivered to the purchaser's solicitors on July 12, 1934. From the abstract it appeared that the property had been registered merely with a possessory title. By s. 2 of condition 4 of the National Conditions of Sale, it is provided as follows:

> "The purchaser shall deliver his objections and requisitions (if any) in respect of the title and of all matters appearing in the abstract particulars or conditions of sale at the office of the vendor's solicitors within fourteen days from the actual delivery of the abstract . . . and in default of such objections and requisitions (if any) the purchaser shall be deemed to have accepted the title."

Before the delivery of the abstract the purchaser had reason to believe that the contract was for sale with an absolute title. On Aug. 8, 1934, that is to say, twenty-seven days after the delivery of the abstract of title, the purchaser's solicitors wrote to the vendor's solicitors and asked to be supplied with an earlier title, giving as their reason for such request that a possessory title was not sufficient. The vendor's solicitors failed to supply any title other than a possessory one, but they claimed that, as the purchaser had not delivered his objections or requisitions within the fourteen days required by condition 4 of the National Conditions, he must be deemed to have accepted the title in accordance with the provisions of that condition. The vendor did not bring any action for specific performance of the contract, and the purchaser took out a summons in which he asked for a declaration that the vendor had not shown a good title to the property in accordance with the contract and for the return of the deposit.

T. K. Wigan (*R. M. Formoy* with him) for the purchaser.
C. R. D. Richmount for the vendor.

FARWELL, J. [after stating the facts, continued:] The question to be decided is: What is the true meaning of the contract? In my judgment, anyone reading it would be entitled to assume that the abstract to be supplied would show an absolute title. If the vendor could give only a possessory title, he should have stated the fact in the contract. He did not do so, and, consequently, the contract is misleading, since the vendor represented that he could give an absolute title on the register, whereas, in fact, he had only a possessory title. If that be so, the vendor must be taken to have contracted to sell the property registered with an absolute title. The statutory declaration does not constitute such a title. In those circumstances, is the vendor entitled to rely on the fact that the objection to title was not taken within the time stipulated? In my judgment, he is not. The test in such a case is whether or not the court, in the circumstances, would grant the vendor specific performance of the contract, and, in my opinion, the answer to that question must be in the negative. The vendor here offers to the purchaser something substantially different from that which the purchaser contracted to purchase, and the vendor, therefore, cannot rely on "Condition 4." In the result the purchaser is entitled to the declaration which he seeks, and the vendor must pay the cost of the summons.

Solicitors: *Hudson, Simmons & Co.*; *Saunders, Sobell, Greenburg, & Co.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

SALLIS AND ANOTHER *v.* JONES

[PROBATE, DIVORCE, AND ADMIRALTY DIVISION (Bennett, J.), November 12, 1935]

[Reported [1936] P. 43; 105 L.J.P. 17; 154 L.T. 112; 52 T.L.R. 113; 79 Sol. Jo. 880]

Will—Revocation—Will made in contemplation of marriage—Need for express reference in will to particular marriage later solemnised—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict., c.* 26), *s.* 18—*Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 177 (1).

A will, dated June 27, 1927, ended with the words: "I hereby declare that this will is made in contemplation of marriage." On Nov. 7, 1927, the testator married the defendant and on Nov. 17, 1934, he died.

Held: to bring into effect s. 177 (1) of the Law of Property Act, 1925, so as to prevent s. 18 of the Wills Act, 1837, from operating to revoke a will made before a testator's marriage there must be an express reference in that will to a marriage, and afterwards a solemnisation of that marriage; in the present case there was merely a general declaration of contemplation of marriage; and, therefore, the will was revoked by the subsequent marriage.

Notes. Considered: *Re Langston,* [1953] 1 All E.R. 928.

As to revocation of wills, see 34 HALSBURY'S LAWS (2nd Edn.) 73 et seq., and for cases, see 44 DIGEST 315 et seq. For Wills Act, 1837, and Law of Property Act, 1925, see 26 HALSBURY'S STATUTES (2nd Edn.) 1326, and 20, ibid., 427 respectively.

Case referred to:

(1) *Pilot* v. *Gainfort,* [1931] P. 103; 100 L.J.P. 60; 145 L.T. 22; 47 T.L.R. 376; 75 Sol. Jo. 490; Digest Supp.

Probate Action

The plaintiffs, Muriel Ceinwen Sallis and Irene Sylvania Evans (who were daughters of the testator Evan Jones, who died on Nov. 17, 1934), propounded a will of the testator dated June 27, 1927, under which they were the executrices and residuary legatees. The defendant, Mrs. Annie Jones, claimed that the will was revoked by the marriage of the testator to her on Nov. 7, 1927.

The will, under which there were specific legacies of land to the testator's daughters (the plaintiffs), left the residue to them in equal shares as tenants in common, and ended with the following words: "And I hereby declare that this will is made in contemplation of marriage." It was stated in evidence that the first wife of the testator died on Feb. 28, 1927. In June, 1927, the testator told one of his daughters that he was going to marry the defendant, but that he would make a will which would put his daughters in a secure position. Later in the same month he made the will, and in August, 1927, he proposed marriage to the defendant and was accepted. Other material facts are stated in the judgment.

By s. 18 of the Wills Act, 1837:

> "Every will made by a man or woman shall be revoked by his or her marriage. . . ."

By s. 177 of the Law of Property Act, 1925:

> "(1) A will expressed to be made in contemplation of a marriage shall, notwithstanding anything in section 18 of the Wills Act, 1837, or any other statutory provision or rule of law to the contrary, not be revoked by the solemnisation of the marriage contemplated."

F. S. H. Bryant (*Clifford Mortimer* with him) for the plaintiffs.—The will comes within the operation of the Law of Property Act, 1925, s. 177 (1) because it can be deduced from the surrounding circumstances that the testator contemplated this particular marriage. The fact that the testator mentioned the name of his intended wife to the solicitor who drafted the clause in contemplation of the marriage was sufficient evidence that it was his coming marriage to her that was contemplated.

P. B. Morle for the defendant.—An inevitable requirement of the section is that the name of the intended spouse should be mentioned in the will. The will has to be made specifically in contemplation of an intended marriage, not, as in this case, in contemplation of marriage generally. In the only reported case on this section in the Probate Division, *Pilot* v. *Gainfort* (1), the woman who, after the will was made, became the wife of the testator was clearly identified in the will. The present case does not come within the operation of s. 177.

BENNETT, J.—The plaintiffs have proved that the will which they propound was executed by the testator in accordance with the requirements of the Wills Act, 1837, but the defendant, who is the widow of the deceased, defends the action and resists the claim to have the will admitted to probate on the ground that it was revoked by the marriage of the testator to her on Nov. 7, 1927. The only question which I have to decide is whether the defendant's marriage to the deceased in November, 1927, revoked the will of June 27, 1927.

Before the year 1926, when the Law of Property Act, 1925, came into operation, the case would have been clear. Section 18 of the Wills Act, 1837 provided, without qualification, that

> "every will made by a man or woman shall be revoked by his or her marriage"

subject to an exception as to a will made in exercise of a power of appointment in certain circumstances. The will in this case is not within that exception, and before the Act of 1925 came into effect the will would plainly have been revoked by the marriage of the testator. But s. 177 of the Law of Property Act, 1925, restricts in certain circumstances the operation of s. 18 of the Wills Act, 1837. [His Lordship recited the terms of s. 177 and continued:] The will which the plaintiffs propound ends with this sentence: "And I hereby declare that this will is made in contemplation of marriage." There has been evidence in this case which I admitted de bene esse and there has been some conflict as to what the position of the testator with regard to the lady who became his wife in November, 1927, was on June 27, 1927, when he made his will. Evidence has been called by the plaintiffs for the purpose of proving that at that date the testator had in mind marriage with the defendant. The evidence consisted of statements said to have been made by him before June 27 to his brother-in-law, his sister, and a daughter, statements to the effect, according to the evidence, that the testator had in mind marriage with the defendant. On behalf of the defendant, evidence has been called which quite plainly establishes that, whatever the testator may have had in mind, he had not proposed to the defendant or been accepted by her until some date in August, 1927, after the will was made.

I accept the evidence of the defendant that she never promised to marry the testator until some date in August, 1927, and then only on the terms that the marriage was not to take place until twelve months from the death of his first wife. The terms which were arranged between the testator and the defendant were modified because the plaintiff Mrs. Evans, who had lived with her father, the testator, had married, and when she married she left her father's home. I do not think it is necessary for me to decide, having regard to the view which I take of the section, whether or not the evidence is admissible.

It is plain, in my judgment, that, in order that the operation of s. 18 of the Wills Act, 1837, may be excluded and prevented from operating to revoke a will made before a testator's marriage, there must be in that will an express reference to a marriage and there must afterwards be a solemnisation of that marriage. It is plain, in my judgment, that, on the strict construction of s. 177, it has no operation unless there is found in the will something more than a declaration or a reference to marriage generally. All that is found in the will which the plaintiffs are propounding is a declaration that the will is made in contemplation of marriage and nothing more. In my judgment, that is not a declaration that the will is made in contemplation of a marriage followed by the solemnisation of that marriage. Accordingly, the will propounded by the plaintiffs was revoked by the subsequent marriage of the deceased and I pronounce against the will.

Solicitors: *John T. Lewis & Woods*, for *W. H. Lewis*, Aberayron; *Horace W. Davies* for *D. Emrys Williams*, Aberystwyth.

[*Reported by* William Latey, Esq., *Barrister-at-Law.*]

VAN DEN BERGHS, LTD. *v.* CLARK (INSPECTOR OF TAXES)

[House of Lords (Lord Atkin, Lord Tomlin, Lord Russell, Lord Macmillan and Lord Wright), March 4, 5, 7, April 8, 1935]

[Reported [1935] A.C. 431; 104 L.J.K.B. 345; 153 L.T. 171; 51 T.L.R. 393; 19 Tax Cas. 390]

Income Tax—Income—Payment of lump sum for termination of profit-sharing agreement.

In 1908 V.D.B., Ltd., entered into an agreement of an elaborate character with a Dutch company to share their respective profits and losses and to regulate their respective activities. By one of a series of supplemental agreements regulating the relations between the parties, it was agreed that the original agreement should continue in force until 1940. During the war of 1914–18, the agreements could not be operated, and after that period further agreements were made in order to render workable the original agreement, which was still in force. A dispute arose between the parties as to the adjustments to be made between them in respect of profits earned during the war period, and, after arbitration proceedings had been continuing for some two years, on Sept. 24, 1927, the parties entered into a further agreement. This agreement recited that the Dutch company had expressed to V.D.B., Ltd., a desire to determine the existing agreements, and that V.D.B., Ltd., had agreed thereto in consideration of the payment of £450,000 to them by the Dutch company as "damages." By the operative part of the agreement of 1927, (i) the parties agreed that the earlier agreements should be determined as from Dec. 31, 1927, and each party released the other from all claims thereunder; and, (ii) the Dutch company undertook to pay to V.D.B., Ltd., £100,000 immediately and to hand them promissory notes for £350,000. In fact the total sum of £450,000 was paid in cash before the end of 1927. The Crown claimed to take that sum into account in computing the profits of V.D.B., Ltd., for 1927 and in assessing V.D.B., Ltd., to income tax for 1928–1929.

Held: the £450,000 was a capital receipt and not liable to income tax because the payment was made in respect of the cancellation of agreements which were not mere commercial agreements relating to the disposal of the products of V.D.B., Ltd., or the engagement of employees or agents, but related to the whole structure of the profit-making apparatus of V.D.B., Ltd., and were fundamental to their activities.

Notes. Distinguished: *Greyhound Racing Association* (*Liverpool*), *Ltd.* v. *Cooper*, [1936] 2 All E.R. 742. Considered: *Collins* v. *Adamson & Co.*, [1937] 4 All E.R. 236; *Southern* v. *Borax Consolidated, Ltd.* [1940] 4 All E.R. 412. Referred to: *Du Cros* v. *Ryall* (1935), 19 Tax Cas. 444; *Bush, Beach & Gent, Ltd.* v. *Road*, [1939] 3 All E.R. 302; *Kelsall Parsons & Co.* v. *Inland Revenue Commissioners* (1938), 21 Tax Cas. 608; *Scammell & Nephew, Ltd.* v. *Rowles*, [1939] 1 All E.R. 337; *Bean* v. *Doncaster Amalgamated Collieries, Ltd.*, [1944] 2 All E.R. 279; *Higgs* v. *Olivier*, [1951] Ch. 899; [1952] Ch. 311; *Household* v. *Grimshaw*, [1953] 2 All E.R. 12.

As to distinction between income and capital payments, see 21 HALSBURY'S LAWS (3rd Edn.) 248, 249, para. 454.

Cases referred to:

(1) *Chibbett* v. *Joseph Robinson & Sons* (1924), 132 L.T. 26; 9 Tax Cas. 48.

(2) *Inland Revenue Commissioners* v. *Northfleet Coal and Ballast Co., Ltd.* (1927), 12 Tax Cas. 1102.

(3) *Burmah Steamship Co., Ltd.* v. *Inland Revenue Commissioners*, 1931 S.C. 156; 142 L.T. 609; 99 L.J.K.B. 305; 16 Tax Cas. 67; Digest Supp.

(4) *Dailuaine-Talisker Distilleries, Ltd.* v. *Inland Revenue Commissioners*, 1930 S.C. 878; 15 Tax Cas. 613; Digest Supp.

(5) *Mills* v. *Jones* (1929), 142 L.T. 337; 46 T.L.R. 118; 14 Tax Cas. 769, H.L.; Digest Supp.

(6) *Constantinesco* v. *R.* (1926), 42 T.L.R. 383; 11 Tax Cas. 730; 28 Digest 19, *97*.

(7) *Short Brothers, Ltd.* v. *Inland Revenue Commissioners* (1927), 136 L.T. 689; 12 Tax Cas. 955, C.A.

(8) *Newcastle Breweries, Ltd.* v. *Inland Revenue Commissioners* (1927), 96 L.J.K.B. 735; 137 L.T. 426; 43 T.L.R. 476; 12 Tax Cas. 927, H.L.; Digest Supp.

(9) *Sterling Trust, Ltd.* v. *Inland Revenue Commissioners* (1925), 12 Tax Cas. 868.

(10) *Glenboig Union Fireclay Co., Ltd.* v. *Inland Revenue Commissioners*, 1921 S.C. 400; 12 Tax Cas. 427; 58 S.L.R. 376; affirmed, 1922 S.C. 112; 12 Tax Cas. 461; 59 S.L.R. 162, H.L.

(11) *Hart* v. *Hart* (1881), 18 Ch.D. 670; 50 L.J.Ch. 697; 45 L.T. 13; 30 W.R. 8; 17 Digest (Repl.) 326, *1321*.

(12) *Isaac Holden & Sons* v. *Inland Revenue Commissioners* (1924), 12 Tax Cas. 768.

(13) *British Insulated and Helsby Cables, Ltd.* v. *Atherton*, [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 42 T.L.R. 187, H.L.; 28 Digest 52, *264*.

(14) *Anglo-Persian Oil Co.* v. *Dale* (*Inspector of Taxes*), [1932] 1 K.B. 124; 100 L.J.K.B. 504; 145 L.T. 529; 47 T.L.R. 487; 75 Sol. Jo. 408; 16 Tax Cas. 253, C.A.; Digest Supp.

(15) *John Smith & Son* v. *Moore*, [1921] 2 A.C. 13; 125 L.T. 481; 90 L.J.P.C. 149; 37 T.L.R. 613; 95 Sol. Jo. 492; 12 Tax Cas. 280, H.L.

(16) *Mallet* v. *Staveley Coal and Iron Co., Ltd.*, [1928] 2 K.B. 405; 97 L.J.K.B. 475; 139 L.T. 241; 13 Tax Cas. 772, C.A.; Digest Supp.

(17) *Gliksten & Son, Ltd.* v. *Green*, [1929] A.C. 381; 98 L.J.K.B. 363; 140 L.T. 625; 45 T.L.R. 274; 14 Tax Cas. 364, H.L.; Digest Supp.

(18) *Mitchell* v. *B. W. Noble, Ltd.*, [1927] 1 K.B. 719; 96 L.J.K.B. 484; 137 L.T. 33; 43 T.L.R. 245; 71 Sol. Jo. 175; 11 Tax Cas. 372, C.A.; Digest Supp.

Appeal from the decision of the Court of Appeal (LORD HANWORTH, M.R., SLESSER

and ROMER, L.JJ.) (151 L.T. 435) on a Case stated by the Commissioners for the A
general purposes of the Income Tax Act for the City of London pursuant to s. 149 of the Income Tax Act, 1918, for the opinion of the High Court of Justice.

The Case stated as follows:

1. At a meeting of the said commissioners held at Gresham College, Basinghall-street, in the said city, on Dec. 14, 1931, Van den Berghs, Ltd., an incorporated company having its registered office at Unilever House, Blackfriars, E.C. 4 (hereinafter called B
"the appellants"), appealed against an assessment to income tax made upon them under the rules applicable to Sched. D of the Income Tax Act, 1918, and subsequent amending Acts, for the year ending April 5, 1929, in the sum of £650,000.

2. The question for the determination of the commissioners was whether or no a sum of £450,000 forming part of the said assessment was an income or trade receipt of the appellants for the year ended Dec. 31, 1927, that being the preceding year by reference C
to which the company's profits were computed for the year 1928–1929. No question was raised before us as to the exact amount of the assessment, it being agreed that the above-mentioned assessment should be adjusted in any event.

3. The appellants were incorporated on March 9, 1895, as a company with a capital of £950,000 divided into 90,000 £5 preference shares and 100,000 ordinary shares of £5 each. D

The objects of the company as contained in its memorandum of association comprised (inter alia) the following:

> "(B) To carry on business as manufacturers of margarine, oleo margarine, and other substitutes for butter, butter merchants, merchants, dealers, brokers or factors in all kinds of provisions, either wholesale or retail; importers and dealers of E
> oil and other oleaginous or fatty matters, seed crushers and merchants, farmers, dairy produce dealers, and dealers in condensed milk, cow-keepers, graziers, cattle breeders, shipowners, charterers or brokers, carriers, forwarding agents, warehousemen, wharfingers, lightermen, and any other business which the said Messrs. Van den Berghs may have been engaged in or connected with ancillary to their principal business of margarine manufacturers and merchants, or which may be in the opinion F
> of the company conveniently carried on in conjunction with any of the businesses aforesaid, or calculated directly or indirectly to enhance the value of or render profitable any of the company's property or rights. . . .
>
> "(D) To enter into partnership or into any arrangement for sharing profits, union of interest, co-operation, joint adventure, reciprocal concession, or otherwise, with any person or company carrying on, or engaged in, or about to carry on, or G
> engage in any business or transaction which this company is authorised to carry on, or to engage in any business or transaction capable of being conducted so as directly or indirectly to benefit this company, and to take and otherwise acquire and hold, sell, reissue, or otherwise deal with shares or stocks in or securities or obligations of and to subsidise or otherwise assist any such company and to guarantee the principal and (or) interest of any such securities or obligations and (or) the capital and (or) H
> dividends of any such shares or stock."

4. At the date of the assessment now under appeal the capital of the company was £3,575,000 divided into 90,000 cumulative 6 per cent. preference shares of £5 each, 1,000,000 cumulative 6 per cent. B preference shares of £1 each, 1,000,000 cumulative 7 per cent. C preference shares of £1 each, 3,750,000 15 per cent. preferred ordinary shares of 5s. each and 750,000 ordinary shares of 5s. each. The capital was later further I
increased. The general voting power of the company was confined to the holders of ordinary shares. Of the said ordinary shares members of the Van den Bergh family held 260,000 and through a subsidiary company held a further 152,000, so that the control of the voting power of the company was vested in the Van den Bergh family. The bulk of the remaining capital, namely, the preferred ordinary and preference share capital, was held by the public.

5. The appellants had for many years been in keen business competition with another firm of margarine manufacturers, Anton Jurgens Vereenigde Fabrieken of Holland

A (hereinafter referred to as the Dutch company), and in the year 1908 these two companies thought it would be to the advantage of their respective trades and of the companies controlled by them to enter into an agreement for profit sharing and other purposes, and accordingly made the agreement next hereinafter mentioned. Within the various groups of companies controlled by the appellants and between the said controlled companies there were other pooling agreements. These agreements, however, B were not of the same type as the agreement next referred to: they related to the regulation of prices.

6. By an agreement dated Feb. 13, 1908 (which with the agreements referred to in paras. 7 and 9 hereof are hereafter referred to as the "pooling agreements"), and made between the Dutch company of the first part, the appellants of the second part, and certain directors and managers of the third and fourth parts, after reciting (inter alia) C that the companies (the appellants and the Dutch company) carry on margarine business (which expression includes the business of manufacturing, buying, selling, exporting, importing and dealing in margarine and other butter substitutes), and in addition thereto carry on certain other businesses (therein referred to as the "outside businesses"), and that the companies are desirous of working in friendly alliance on the terms therein set forth, it was agreed (inter alia) as follows:

D

> "(1) 'The five-year period' means the period comprised in the years 1902, 1903, 1904, 1905, 1906.
>
> "(2) As between the two companies this agreement is to be treated as having come into operation on the first day of January, 1908, and is to continue in force until it is determined as hereinafter provided, that is to say, until the expiration of E one and a half years after one of the two companies shall have given to the other notice in writing determining this agreement, but so that such notice shall not be capable of being given before the first day of July 1926, or until it is determined under cl. 28.
>
> "(3) The two companies shall during the continuance of this agreement work in friendly alliance and shall as regards each year commencing with the year 1908 F share the profits and losses made or sustained in their respective margarine businesses in proportion to the yearly average amount of the profits (as ascertained in accordance with the regulations contained in cl. 4), of their respective margarine businesses during the five-year period. [Then follow certain provisions dealing with the case of one company making a loss.]
>
> "(4) The profits of the margarine business of each of the two companies made G during the five-year period shall be ascertained as follows, that is to say:
>
> "(1) The profit of 1902 and 1903 shall be taken to be as follows:—
>
> "Of the Dutch company for 1902, £67,533.
> "Of the Dutch company for 1903, £84,120.
> "Of the English company for 1902, £81,249.
> "Of the English company for 1903, £143,656.

H

> "(2) The amount of the profits of each of the two companies, and of the scheduled companies under their control, of their respective margarine businesses for 1904, 1905 and 1906 respectively, shall be ascertained and certified in writing by two firms of accountants, one to be appointed by each of the two companies upon the execution hereof and the joint certificate in writing of such accountants is to be made and signed within two calendar months from the date hereof or within such enlarged I period as the two companies shall in writing agree on, and such certificate may be absolute or may be conditional that is to say: If any differences shall have arisen between the two accountant firms which shall not have been settled the certificate may be made subject to the determination of such differences, and in such case the differences shall be specified in the certificate and shall be treated as differences between the two companies and shall be referred to an arbitrator to be appointed by the two accountant firms, or if they do not make the appointment forthwith, then to an arbitrator to be appointed by the two companies, and if the certificate is not made within the period or enlarged period aforesaid then the amount of the

profits aforesaid shall be considered a matter of difference between the two companies, and such difference shall be referred to arbitration as hereinafter provided. . . .

"(5) At the conclusion of the year 1908, and at the conclusion of each subsequent year during the continuance of this agreement, the profits of the margarine business of each of the two companies and the scheduled companies under their control shall be ascertained and certified by two firms of accountants, one to be appointed by each of the two companies, and para. 2 of cl. 4 hereof shall apply as if the same were here repeated mutatis mutandis. . . .

"(*g*) The income, dividends, or profits from the investments specified in the Fourth Schedule hereto are to be treated as profits divisible under this agreement apportioned for the period. . . .

"(*i*) On all increased capital introduced, employed or appropriated after Dec. 31, 1906, in respect of the margarine businesses, or to provide funds for the purchasing of any investments, the profits or income from which is, or shall be, treated as profits divisible under this agreement, whether introduced, employed, or appropriated as share capital, appropriation of profits to reserve funds, or profits unappropriated into or by either or both of the two companies or any or all of the scheduled companies, there shall be allowed as a debit in the respective profit and loss accounts interest at the rate of five per cent. per annum.

"Except that this clause shall not apply to any capital for which either of the two companies or any or all of the scheduled companies are under contract to pay a fixed rate of interest. In such cases the actual rate of interest paid shall be deducted from the profit or added to the loss as the case may be.

"(*j*) On all diminutions of capital after Dec. 31, 1906, by either one or both of the two companies, or any or all of the scheduled companies, there shall be added to the profits or deducted from the losses, as the case may be, in the respective profit and loss accounts, interest at the rate of five per cent. per annum.

"(6) When and so soon as the profit or loss of both of the two companies of any year shall have been ascertained and certified as aforesaid the two accountant firms or arbitrator shall then ascertain what sum on either side has to be paid for adjusting the rights of the two companies under cl. 3 hereof and shall certify accordingly, and a copy of such certificate shall be sent to each of the two companies, and the company which under such certificate has to pay any sum to the other company shall within thirty days of the date of the two accountancy firms' certificate or of the arbitrator's award make payment thereof accordingly either in Dutch currency or in sterling.

"(11) During the continuance of this agreement neither of the two companies shall enter into or permit or suffer any of the scheduled companies in which it is interested or any other company for the time being under its control to enter into any working or pooling arrangement or any arrangement relating to contract or selling prices or any other arrangement with any other company or companies, firm or firms, person or persons, which may by either of the two companies be deemed inimical to the interest of the two companies under this agreement, and each of the two companies shall be true and loyal to the other of them and shall do all in the power of such company to promote the commercial, technical, pecuniary, buying and selling, and other interests of the parties hereto in relation to the margarine business, and if any difference shall arise under or in relation to the provisions of this clause such difference shall be referred to arbitration, and if it shall be determined by any means that either party has acted in contravention of this agreement, such party shall pay to the other party as and by way of liquidated damages and without references to the actual damage (if any) sustained the sum of two shillings in respect of every kilogram of margarine bought, sold, manufactured, or dealt in in contravention of such provision. . . ."

7. By an agreement in writing, dated July 17, 1913, and made between the Dutch

company of the one part, and the appellants of the other part, supplemental to the said agreement of Feb. 13, 1908, after reciting that the Dutch company had discovered a process of hardening oils and that the parties were desirous of formulating a scheme for the merger of assets or unification of financial and commercial interests of the respective parties hereto and their subsidiary companies, and for the regulation and allocation of the turnover, but no such scheme can at the present time be fully elaborated to the satisfaction of both parties hereto and it is desirable to regulate their mutual relations in the meantime and to modify and extend the principal agreement in the manner hereinafter appearing, it was agreed (inter alia) as follows:

> "(1) This agreement is to be for a period of one year from Jan. 1, 1913, until Dec. 31, 1913, except where otherwise provided. . . .
>
> "(6) The provisions of the principal agreement relating to the ascertainment and sharing of profits and losses shall continue in force until Dec. 31, 1940, subject to the following modifications:
>
>> "(*a*) There shall be included in the profits and losses to be shared all profits and losses made or sustained by the respective parties hereto from all sources whatsoever subject to sub-cl. (*e*) of this clause, including (among other things) all profits or losses made or sustained by them respectively from the acquisition or exploitation of any process or patent for hardening oil or from or in connection with the hardening of oils for any purpose but excluding any profits or losses made or sustained by the English company in connection with any condensed milk or bacon business carried on by them or in which they may be interested and (in the event of the sale before Sept. 30, 1913, contemplated in the proviso to cl. 4 (*b*) hereof), excluding any profits or losses made or sustained by the English company in connection with the manufacture and sale of soap prior to the date of such contemplated sale.
>>
>> (*b*) All profits and losses shall be shared by the parties hereto equally instead of in the proportions mentioned in cl. 3 of the principal agreement. . . .
>
> "(7) A committee shall be formed consisting of two persons to represent the Dutch company and two persons to represent the English company for the purpose of endeavouring to devise and, if thought advisable, by and subject to the consent of both parties hereto agreeing upon a scheme for the merger of the assets or unification of the financial and commercial interests of the parties hereto and their subsidiary companies and for the regulation and allocation of their turnover.
>
> "(8) Should the parties hereto fail to agree before Dec. 15, 1913, the scheme contemplated in the last preceding clause they will cause to be prepared and executed a contract whereby the provisions hereof then in operation (particularly cl. 6 hereof) and the provisions of the document set forth in the Second Schedule hereto (particularly with regard to diversion of profits from the pool) shall be confirmed and extended for the period from Jan. 1, 1914, to Dec. 31, 1940."

8. Each company carried on its business independently, but in general the parties observed the terms of the said agreements for each of the years 1908 to 1913 and the profits of the two companies were accounted for for those years. Payments were in fact made by and to the appellants under the said agreements in these years. Such payments when made to the Dutch company were deducted as an expense, and when made by the Dutch company were brought in as a receipt in making up the appellants' profit and loss accounts for the years in which the payments were made or received. In computing the appellants' income tax liability for the said years the amount of such payments or receipts were deducted or brought into the taxable profit respectively and the income tax paid accordingly. It was also agreed by the appellants when liability for income tax and excess profits duty was under consideration for years subsequent to 1913 that the results of working the said agreements should be charged to income tax and excess profits duty as trading receipts and payments.

From the commencement of the war in 1914 down to 1919 the two companies did not communicate and were unable to compute their profits owing to the various difficulties caused by the war, so that it was found desirable that a fresh agreement should be entered into in an endeavour to make the above-mentioned agreements (which were then running and would not terminate until 1940) workable. In the result the agreement next hereinafter referred to was entered into.

9. By an agreement in writing dated Oct. 15, 1920, and made between the Dutch company of the one part and the appellants of the other part supplemental to the said agreement of Feb. 13, 1908, and the said agreement of July 17, 1913, reciting that some of the provisions of the principal agreement and the 1913 agreement had proved to be obsolete or impracticable it was agreed (inter alia) as follows:

> "1. The principal agreement should remain in full force and effect except as amended or added to by this agreement until Dec. 31, 1940. . . .
>
> "3. The provisions of the principal agreement relating to the ascertainment and sharing of profits and losses shall continue in force until Dec. 31, 1940, subject to the following modifications.
>
>> "(A) There shall be included in the profits and losses to be shared all profits and losses made or sustained by the respective parties hereto from all sources whatsoever (subject to sub-cl. (*e*) of this clause) including in particular the profits and (or) income less losses, if any, and losses less profits and (or) income, if any, of the two companies and (or) the scheduled companies and the profits and (or) income and (or) loss derived sustained or accruing by or to either or any of them from any further companies or businesses or investments of any kind in which either or both of the two companies or any of the scheduled companies is now or at any time may have been or hereafter may be interested (unless excluded under sub-cl. (*e*) of this clause) and including the income and (or) profits and (or) losses derived from the investments specified in the fourth schedule to the principal agreement but excluding any profits or losses made sustained or accruing by or to the English company in connection with any condensed milk or bacon business carried on by it or in which it may now be or at any time have been or hereafter may be interested or by any scheduled companies or any businesses or investment so far as it relates to condensed milk or bacon in which the English company may now be or may at any time have been or hereafter may be interested. The accountants shall for the purposes of cl. 5 of the principal agreement as amended by sub-cl. (f) of this clause have regard to the amount of capital and (or) borrowed money employed in relation to any such condensed milk or bacon business or investment as aforesaid. The accountants shall also ascertain what amount shall be credited to the English company on account of increased capital (including therein 'goodwill') introduced owing to the bringing into the pool of the results of the Naamlooze Vennootschap Vereenigde Zeep-Fabrieken of Zwijndrecht.
>>
>> "(B) All profits and (or) income and (or) losses shall as from Jan. 1, 1914, be shared by the parties hereto equally instead of in the proportion mentioned in cl. 3 of the principal agreement. . . .
>>
>> "(L) The accountants of both parties hereto shall ascertain the results relating to the year 1914 and all subsequent years during the currency of this agreement in accordance with the provisions of the principal agreement, the 1913 agreement, and this agreement, but in so doing they shall not be bound to follow any principles, rules, or precedents previously laid down, made, followed, or acted upon by accountants in ascertaining or certifying the results of previous years, and if and whenever the regulations and provisions of the said three agreements do not provide for any circumstance which may arise or have arisen, or in case the accountants do not agree as to the meaning or intention of any of the said regulations and provisions, the accountants shall decide in such manner as shall in their opinion be fair and equitable having regard to the general intention of the agreements (subject to specific provisions) that the results of each year shall be divided equally between the parties hereto. Nothing in this agreement shall prevent the accountants when ascertaining the profits and (or) income and (or)

A losses to be brought into account from controlled companies, controlled businesses, or controlled investments, from bringing into account, where equitable, profits capitalised and (or) not received and (or) losses not directly sustained or provided for. . . ."

9. In the event of any dispute of whatsoever nature arising out of or in connection with this agreement the same shall be decided by arbitration in accordance with the B provisions of the Arbitration Act, 1889.

10. In the year 1919 the appellants had endeavoured to estimate what they considered was due to them under the pooling agreements, and they decided with the assistance of their auditors on the sum of £715,000, and took credit in their profit and loss account for the four-and-a-half years ended June 30, 1919, for that amount, a corresponding amount being included in the balance sheet under the heading "sundry C debtors." In 1920 it was considered necessary that a fresh estimate should be made and as a result of the said estimate the amount of £715,000 was debited in the profit and loss account, and in lieu of that figure a sum of £380,665 was credited in the profit and loss account for the year ended Dec. 31, 1920, and a corresponding amount was included in the balance sheet under the heading of debtors. In the profit and loss account for the year ended Dec. 31, 1921, as a result of further estimate a further D amount of £55,060 was credited, and at that date the total (£435,725) was included in debtors in the balance sheet (£380,665 plus £55,060), and finally in 1922 calculating interest on the said £435,725 the appellants raised the figure estimated as due under the agreements to £449,042, at which figure it continued in the balance sheets included under the heading "sundry debtors" until 1927. These amounts were not admitted to be due by or on behalf of the Dutch company and were excluded by the appellants E in computing their profits for income tax purposes for the relevant years. The Dutch company in fact claimed that on balance the appellant company was indebted to it.

11. The said companies being unable to agree as to the construction of the said agreements and their respective rights thereunder, in particular as to the computation of profits 1914 to 1924 for the purpose of sharing under the agreements, it was agreed in the year 1925 that the matter should be referred to arbitration. The arbitration proved F an extremely complicated matter, the differences involved being very considerable. On the one side the Dutch company claimed £1,073,000 from the appellants, and on the other side the appellants claimed £1,408,000 from the Dutch company. Three arbitrators in all were appointed; the points in dispute in the arbitration covered the period from 1914 to 1924. In the year 1927 the arbitration being still far from finished, and the delay and expense already being prodigious and no accounts for the years 1925 G to 1927 having as yet been taken, the parties in contemplation of a merger of interests negotiated with a view to settling the dispute. The Dutch company had refused to admit that any payment was due to the appellants under the pooling agreements, while the appellants on the other hand insisted that at any rate the sum of £449,042 which had been included in their own accounts for profit and loss and balance sheet purposes must be paid to them under these agreements. The appellants also alleged that the H capital of the Dutch company between the years 1919 to 1927 had been increased by £13,847,000 as against an increase of £4,848,000 in the appellants' capital, and they produced a table of such increases. They contended that as the profits on the capital in the business in excess of five per cent. (and in fact these profits largely exceeded five per cent.) belonged equally to the Dutch company and the appellants, the surrender of the thirteen years which the pooling agreements still had to run would be to their I disadvantage. The appellants intimated that £449,042 was the minimum sum for which they would agree to cancel the old agreements, because if they did not receive at least that amount their balance sheets would be incorrect and unjustified. They tried to get more, but could not upon the figures available to them substantiate their claim to more. Finally a sum of £450,000 was paid. This sum was credited as to £449,042 to the Dutch company's account in the appellants' books, and the balance of £958 was credited in the appellants' profit and loss account for the year ending Dec. 31, 1927.

12. The settlement arrived at as above stated was carried out by the three agreements next hereinafter mentioned, all dated Sept. 24, 1927.

"(*a*) By the first agreement the members of the Jurgens family and the members of the Van den Bergh family agreed to consolidate their respective interests in a Dutch holding company and an English holding company on the terms therein mentioned.

"(*b*) By the second agreement after reciting that the said arbitration was not yet concluded, but the expense thereof was continuing, and that the parties had been advised by their legal advisers that there was every probability that the said arbitration might be indefinitely prolonged, it was agreed as follows:—

> "(1) Each party withdraws all claims against the other party under the pooling agreements for the years 1914 to 1927 inclusive and both parties mutually discharge each other from any liability arising under these contracts before Dec. 31, 1927.
>
> "(2) Each party undertakes to do all things necessary to put an end to the said arbitration.

"(*c*) By the third agreement after reciting pooling agreements whereunder parties had agreed to divide between them the results of their respective businesses as therein provided until Dec. 31, 1940, and that the Dutch company had expressed to the English company a desire to determine the said agreements contrary to the provisions therein contained, and that the English company had consented hereto in consideration of the payment by the Dutch company to the English company of the sum of £450,000 as damages, it was agreed—

> "(1) The said agreements as between the parties hereto are hereby determined as from Dec. 31, 1927, and each party hereto releases the other party from all claims thereunder.
>
> "(2) The Dutch company shall forthwith pay to the English company the sum of £100,000 in cash and shall forthwith hand over to the English company promissory notes (carrying interest at the rate of five per cent. per annum from Jan. 1, 1928) for a further amount of £350,000, such promissory notes falling due as follows: As to £150,000 on Sept. 1, 1928, and as to £200,000 on Sept. 1, 1929."

In fact, the full amount of £450,000 was paid in cash in the year ended Dec. 31, 1927, and this sum was taken into account in arriving at the estimated assessment to income tax now under appeal.

13. The directors' reports for the years 1919 and 1926 referred to the outstanding questions which had arisen due to the war and which were unsettled, including (inter alia) the dispute with the Dutch company, but the existence of the pooling agreements was at no time disclosed to the shareholders owing to the clause in the pooling agreements requiring secrecy. In the report on the year to Dec. 31, 1927, the directors stated that the last of the outstanding items had been satisfactorily settled. This last report referred to the dispute with the Dutch company set out above. The auditors' reports for the said years referred to the estimates of sums due to the company as having been reasonably made, but stated it had not been possible to verify such estimates. This referred (inter alia) to the dispute with the Dutch company, but the nature of the claims was not specified.

14. For the appellants it was contended:

(1) That the said sum of £450,000 was paid to the appellants as compensation for surrendering their future prospects under the pooling agreements, which had thirteen years to run.

(2) That a sum paid as compensation for loss of anticipated future profits is not an income receipt at all but is capital.

(3) That the £449,042 was merely the measure applied by the appellants to arrive at the amount of compensation to be paid thereon.

(4) That the pooling agreements were not contracts which it was usual for the company to make in the course of its trade as sellers of margarine, but were in the nature of partnership agreements with the Dutch company.

(5) Alternatively that if the sum of £450,000 was to be regarded as payment of

amounts due on income account, namely, sums due to the appellants as their share of profits under the pooling agreements for the years 1914–1922, such profits or share of profits formed no part of their profits and gains for the year ended Dec. 31, 1927, and ought not to be included in the computation of their profits for assessment for the year 1928–1929.

(6) That the £450,000 should be excluded from computation of the appellant's profits chargeable to tax for the year under appeal.

15. For the Inspector of Taxes it was contended:

(1) That any amounts received by the appellants under the pooling agreements were receipts of their trade to be brought into account in computing the balance of profits and gains for income tax purposes.

(2) That the sum of £450,000 was a sum paid in settlement of all the appellants' claims and rights under the pooling agreements and was a receipt of the appellants' trade for the year ended Dec. 31, 1927.

(3) That even if the said sum was wholly or partly paid to cancel the pooling agreements for the future it was a receipt of the trade and not capital.

(4) That the pooling agreements do not create a partnership or any relationship in the nature of partnership between the Dutch company and the appellants.

(5) That the said sum of £450,000 was rightly brought into the computation of profits for the year ended Dec. 31, 1927, and consequently the assessment for 1928–29 was correct in principle and should be confirmed in figures to be agreed.

16. The following cases were referred to: *Chibbett* v. *Joseph Robinson & Sons* (1), *Inland Revenue Commissioners* v. *Northfleet Coal and Ballast Co., Ltd.* (2), *Burmah Steamship Co., Ltd.* v. *Inland Revenue Commissioners* (3), *Dailuaine-Talisker Distilleries, Ltd.* v. *Inland Revenue Commissioners* (4), *Mills* v. *Jones* (5), *Constantinesco* v. *R.* (6), *Short Brothers, Ltd.* v. *Inland Revenue Commissioners* (7), *Newcastle Breweries, Ltd.* v. *Inland Revenue Commissioners* (8), *Sterling Trust, Ltd.* v. *Inland Revenue Commissioners* (9), *Glenboig Union Fireclay Co., Ltd.* v. *Inland Revenue Commissioners* (10), *Hart* v. *Hart* (11), and *Isaac Holden & Sons* v. *Inland Revenue Commissioners* (12).

The commissioners held that the £450,000 was paid in respect of the pooling agreements and must be brought in for the purpose of arriving at the balance of profits and gains of the appellants for the year ending Dec. 31, 1927.

The appellants thereupon expressed dissatisfaction at the decision of the commissioners as being erroneous in point of law and required them to state a case for the opinion of the High Court of Justice.

The Court of Appeal held, reversing the decision of FINLAY, J., that the agreements were not entered into for the purchase of a capital asset or for the discharge of a capital asset, and the proper method to determine the question was to decide whether the money was received into the fixed or circulating capital of the appellant company; the appellant company received it as circulating capital, therefore the claim of the Crown to have it taken into account for the purposes of computing the profits or gains of the appellant company for income tax purposes was right. Van den Berghs, Ltd., appealed.

Sir William Jowitt, K.C., *Latter, K.C.*, and *Cyril L. King* for the appellants.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *Reginald P. Hills* for the respondent.

The House took time for consideration.

Cur. adv. vult.

April 8. **LORD ATKIN.**—I have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend LORD MACMILLAN. I agree with it, and have nothing to add.

LORD TOMLIN.—I also have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend, LORD MACMILLAN, and I concur in it in all respects and have nothing to add.

LORD MACMILLAN.—In the year 1927 the appellants received payment of a sum of £450,000 from Anton Jurgens Vereenigde Fabrieken of Holland (whom I shall call "the Dutch company") pursuant to the terms of an agreement between the appellants and the Dutch company dated Sept. 24, 1927. The question is whether this sum ought to be taken into account in computing the balance of the profits or gains of the appellants' trade for the year 1927 on which they are chargeable to tax for the year 1928–29 under Sched. D of the Income Tax Act, 1918.

The appellants say that the £450,000 was a capital receipt and ought not to be reckoned as forming part of the profits arising from the carrying on of their trade. The Crown says that the £450,000 was a trade receipt which ought to be included in the computation of the appellants' profits or gains for income tax purposes.

The circumstances in which the appellants received the payment which has now to be examined are set out in the stated Case, from which I select the salient facts. The appellants were incorporated as a limited company in this country in 1895 and have since carried on the business of manufacturing and dealing in margarine and similar products on a very extensive scale both here and abroad. They had as their keenest competitors the Dutch company, which was engaged in the same business in Holland. On Feb. 13, 1908, the two companies entered into an agreement whereby they bound themselves for the future to "work in friendly alliance" and to share their profits and losses in conformity with an elaborate scheme detailed in the agreement. Each of the two companies had a controlling interest in a number of other companies and they undertook that, if either of them or any of the companies which they controlled should acquire an interest in any other margarine concern, the fact should be communicated to the other party, who should have an option to require such interest to be brought within the operation of the agreement. Both companies further undertook on behalf of themselves and of their controlled companies not to enter into any pooling or price arrangements with third parties which might be deemed inimical to the interests of the two companies under the agreement. The directors and managers of the respective companies were parties to the agreement and bound themselves for twenty years not to engage in any margarine business other than that of the two companies. Provision was also made for the setting up of a representative joint committee which was empowered to make arrangements with outside companies and firms as to the selling and buying prices of margarine and the limitation of areas of supply. It was further comprehensively agreed that

> "each of the two companies shall be true and loyal to the other of them and shall do all in the power of such company to promote the commercial, technical, pecuniary, buying and selling, and other interests of the parties hereto in relation to the margarine business."

It is not necessary to set out the detailed provisions of the agreement, but its elaborate character is sufficiently indicated by the fact that it consists of thirty-five articles (with numerous sub-heads) and five schedules, and extends to twenty-two pages of print in the case before your Lordships.

A supplemental agreement was entered into between the parties on July 17, 1913, which recited that the Dutch company had acquired rights in a process for hardening oils and that the parties were desirous of formulating a scheme for the merger of their assets or the unification of their financial and commercial interests and for the regulation and allocation of their turnover, but that such a scheme could not at present be fully elaborated to their satisfaction, and it was desirable in the meantime to regulate their mutual relations and modify and extend the principal agreement in the manner provided in the supplemental agreement. By this second agreement the parties modified the original basis of ascertaining and sharing profits and subject thereto agreed to continue in force the relative provisions of the principal agreement until Dec. 31, 1940. Provision was made for the formation of a committee to endeavour to devise the scheme of merger or unification mentioned in the recital, and, failing agreement upon such a scheme by Dec. 15, 1913, the parties bound themselves to execute a contract confirming and extending to Dec. 31, 1940, the provisions of the supplemental agreement and of a scheduled document setting out agreed alterations in their existing pool contract.

According to the stated Case

> "each company carried on its business independently but in general the parties observed the terms of the said agreements for each of the years 1908 to 1913 and the profits of the two companies were accounted for for those years. Payments were in fact made by and to the appellants under the said agreements in these years. Such payments when made to the Dutch company were deducted as an expense and when made by the Dutch company were brought in as a receipt in making up the appellants' profit and loss accounts for the years in which the payments were made or received. In computing the appellants' income tax liability for the said years the amount of such payments or receipts were deducted or brought into the taxable profit respectively and the income tax paid accordingly. It was also agreed by the appellants when liability for income tax and excess profits duty was under consideration for years subsequent to 1913 that the results of working the said agreements should be charged to income tax and excess profits duty as trading receipts and payments."

During the war the two companies did not operate the agreements, and after peace was restored they found it desirable to enter into a fresh agreement in an endeavour to render workable the two previous agreements which were then running and would not terminate till 1940. This third agreement, which was dated Oct. 15, 1920, recited that some of the provisions of the previous agreements had become obsolete or impracticable. It then proceeded to provide that, subject to the amendments and additions thereby effected, the principal agreement should remain in force till Dec. 31, 1940. Further provision was made for the mutual communication of information relating to manufacturing processes, the basis of the ascertainment and division of profits was modified, the branches of business embraced were extended and various other matters were regulated. As in the case of the two previous agreements, all disputes were referred to arbitration.

Meantime the appellants had been endeavouring to estimate the sum which they believed had accrued due to them by the Dutch company over the war period. After various tentative calculations they brought out in 1922 a sum of £449,042, which they alleged was owing to them. The Dutch company disputed this figure and claimed that on the contrary the appellants were on balance indebted to them. The matter went to arbitration in 1925. The proceedings dragged on inconclusively at "prodigious" expense, until in 1927 the parties came to an arrangement which was embodied in three agreements all dated Sept. 24, 1927.

By the first of these agreements the members of the Jurgens family and the members of the Van den Bergh family agreed to consolidate their respective interests in a Dutch holding company and an English holding company on the terms therein mentioned.

By the second of these agreements each party withdrew all claims against the other party under the agreements of 1908, 1913, and 1920 for the years 1914 to 1927 inclusive, and both parties mutually discharged each other from any liability arising thereunder before Dec. 31, 1927. Each party further undertook to do everything necessary to put an end to the arbitration.

The third of these agreements recited that the Dutch company had expressed to the appellants a desire to determine the agreements of 1908, 1913, and 1920 contrary to the provisions therein contained, and that the appellants had consented thereto in consideration of the payment to them by the Dutch company of £450,000 "as damages." The agreement consists of two articles only. By the first article the parties agreed that the three agreements of 1908, 1913, and 1920 should be thereby determined as from Dec. 31, 1927, and each party released the other party from all claims thereunder. By the second article the Dutch company undertook forthwith to pay to the appellants a sum of £100,000 and to hand to them promissory notes for a further sum of £350,000 payable as therein stated. In point of fact the total sum of £450,000 was paid in cash by the Dutch company to the appellants before the expiry of the year 1927. This is the sum in dispute in the present appeal.

The Special Commissioners held that

> "the £450,000 was paid in respect of the pooling agreements and must be brought

> in for the purpose of arriving at the balance of profits and gains of the appellants for the year ending Dec. 31, 1927." A

That is their sole finding; it is not informative, for everyone agrees that the sum in question was paid "in respect of the pooling agreements," but there can be no doubt, if regard be had to the contentions submitted to them, that the commissioners' view was that the sum in question was an income receipt. B

FINLAY, J., reversed the determination of the Special Commissioners, and held that the agreements which were cancelled were "a capital asset" of the appellants, and that the £450,000 was "not an income receipt at all." The Court of Appeal unanimously reversed this judgment and restored the determination of the Special Commissioners, holding that the sum was not received by the appellants in consideration of the surrender of a fixed capital asset, but arose from a transaction attributable to circulating capital, and was consequently an income receipt. C

The problem of discriminating between an income receipt and a capital receipt and between an income disbursement and a capital disbursement is one which in recent years has frequently engaged your Lordships' attention. In general the distinction is well recognised and easily applied, but from time to time cases arise where the item lies on the borderline and the task of assigning it to income or to capital becomes one of much refinement, as the decisions show. D The Income Tax Acts nowhere define "income" any more than they define "capital"; they describe sources of income and prescribe methods of computing income, but what constitutes income they discreetly refrain from saying. Nor do they define "profits or gains"; while as for "trade," the "interpretation" section of the 1918 Act only informs us, with a fine disregard of logic, that it "includes every trade, manufacture, adventure or concern in the nature of trade." E Consequently it is to the decided cases that one must go in search of light. While each case is found to turn on its own facts, and no infallible criterion emerges, nevertheless the decisions are useful as illustrations and as affording indications of the kind of considerations which may relevantly be borne in mind in approaching the problem.

The reported cases fall into two categories, those in which the subject is found claiming that an item of receipt ought not to be included in computing his profits and those F in which the subject is found claiming that an item of disbursement ought to be included among the admissible deductions in computing his profits. In the former case the Crown is found maintaining that the item is an item of income; in the latter, that it is a capital item. Consequently the argumentative position alternates according as it is an item of receipt or an item of disbursement that is in question, and the taxpayer and the Crown are found alternately arguing for the restriction or the expansion of the conception of income. G

I propose to refer first to *British Insulated and Helsby Cables, Ltd.* v. *Atherton* (13). This case has been generally recognised as the leading modern authority on the subject, though I fear that ROMER, L.J., was unduly optimistic when he said that it "placed beyond the realms of controversy" the law applicable to the matter (*Anglo-Persian Oil Co.* v. *Dale* (*Inspector of Taxes*) (14) ([1932] 1 K. B. at p. 145)). The facts were that the H appellant company claimed to deduct in the computation of its trade profits a sum which it had provided to form the nucleus of a pension fund for its employees. The Crown argued that the sum ought to be debited to capital on the ground that it "was not in its nature recurrent but was made once for all" and that it was a case of the "provision of a capital sum which will for ever after relieve the company from making any further payment whatsoever." This argument prevailed. LORD CAVE, L.C., ([1926] A.C. at p. 213) found in the decisions "considerable authority" for the view which he I recommended to the House to adopt, namely, that

> "when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade . . . there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital"

LORD ATKINSON ([1926] A.C. at p. 222) indicated that the word "asset" ought not to be confined to "something material," and, in further elucidation of the principle, ROMER, L.J., has added that the advantage paid for need not be "of a positive character" and "may consist in the getting rid of an item of fixed capital that is of an onerous character" (*Anglo-Persian Oil Co.* v. *Dale* (*Inspector of Taxes*) (14) ([1932] 1 K.B. at p. 146)).

If the numerous decisions are examined and classified, they will be found to exhibit a satisfactory measure of consistency with LORD CAVE'S principle of discrimination. Certain of them relate to excess profits duty and not to income tax, but for the present purpose this distinction is immaterial. A sum provided to establish a pension fund for employees, as has already been seen, is a capital disbursement (*British Insulated and Helsby Cables, Ltd.* v. *Atherton* (13)), so is a sum paid by a coal merchant for the acquisition of the right to a number of current contracts to supply of coal (*John Smith & Son* v. *Moore* (15)); so is a payment by a colliery company as the price of being allowed to surrender unprofitable seams included in its leasehold (*Mallet* v. *Staveley Coal and Iron Co., Ltd.* (16)). Similarly a sum received by a fireclay company as compensation for leaving unworked the fireclay under a railway was held to be a capital receipt (*Glenboig Union Fireclay Co., Ltd.* v. *Inland Revenue Commissioners* (10)).

On the other hand a sum awarded by the War Compensation Court to a company carrying on the business of brewers and wine and spirit merchants in respect of the compulsory taking over of its stock of rum by the Admiralty was held to be a trade or income receipt (*Inland Revenue Commissioners* v. *Newcastle Breweries, Ltd.* (8)); so was a sum paid to a shipbuilding company for the cancellation of a contract to build a ship (*Short Brothers, Ltd.* v. *Inland Revenue Commissioners* (7)); so was a lump sum payment received by a quarry company in lieu of four annual payments in consideration of which the company had relieved a customer of his contract to purchase a quantity of chalk yearly for ten years and build a wharf at which it could be loaded (*Inland Revenue Commissioners* v. *Northfleet Coal and Ballast Co., Ltd.* (2)); so was a sum recovered from insurers by a timber company in respect of the destruction by fire of their stock of timber (*Gliksten & Son, Ltd.* v. *Green* (17)). Conversely, where a company paid a sum as the price of getting rid of a life director, whose presence on the board was regarded as detrimental to the profitable conduct of the company's business, the payment was held to be an income disbursement (*Mitchell* v. *B. W. Noble, Ltd.* (18)); so was the payment made in the case of the *Anglo-Persian Oil Co.* v. *Dale* (*Inspector of Taxes*) (14) in order to disembarrass the company of an onerous agency agreement. There are further instances in the reports, but I have quoted enough for the purposes of illustration.

With the guidance thus afforded I now address myself to the question whether the £450,000 received by the appellants in the circumstances already narrated can properly be described as an item of profit arising or accruing to them from the carrying on of their trade, which ought to be credited as an income receipt. It is important to bear in mind at the outset that the trade of the appellants is to manufacture and deal in margarine, for the nature of a receipt may vary according to the nature of the trade in connection with which it arises. The price of the sale of a factory is ordinarily a capital receipt, but it may be an income receipt in the case of a person whose business it is to buy and sell factories.

The learned Attorney-General stated that he was content to take the agreements of 1927 as meaning what they say. The sum of £450,000 is accordingly to be taken as having been paid by the Dutch company to the appellants in consideration of the appellants consenting to the agreements of 1908, 1913 and 1920 being terminated as at Dec. 31, 1927, instead of running their course to Dec. 31, 1940. If the payment had been in respect of a balance of profits due to the appellants by the Dutch company for years 1914 to 1927, different considerations might have applied, but it is agreed that it is not to be so regarded.

Now what were the appellants giving up? They gave up their whole rights under the agreements for thirteen years ahead. These agreements are called in the stated Case "pooling agreements," but that is a very inadequate description of them, for they did much more than merely embody a system of pooling and sharing profits. If the appellants were merely receiving in one sum down the aggregate of profits which they would

A otherwise have received over a series of years the lump sum might be regarded as of the same nature as the ingredients of which it was composed. But even if a payment is measured by annual receipts, it is not necessarily itself an item of income. As LORD BUCKMASTER pointed out in *Glenboig Union Fireclay Co.* v. *Inland Revenue Commissioners* (10) (1922 S.C. at p. 115):

> B "There is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the test."

The three agreements which the appellants consented to cancel were not ordinary commercial contracts made in the course of carrying on their trade; they were not contracts for the disposal of their products or for the engagement of agents or other employees necessary for the conduct of their business; nor were they merely agreements as C to how their trading profits, when earned, should be distributed as between the contracting parties. On the contrary, the cancelled agreements related to the whole structure of the appellants' profit-making apparatus. They regulated the appellants' activities, defined what they might and what they might not do, and affected the whole conduct of their business. I have difficulty in seeing how money laid out to secure, or money received for the cancellation of, so fundamental an organisation of a trader's D activities can be regarded as an income disbursement or an income receipt. Counsel for the respondent very properly warned your Lordships against being misled as to the legal character of the payment by its magnitude, for magnitude is a relative term and we are dealing with companies which think in millions. But the magnitude of a transaction is not an entirely irrelevant consideration. The legal distinction between a repair and a renewal may be influenced by the expense involved. In the present case, however, E it is not the largeness of the sum that is important but the nature of the asset that was surrendered. In my opinion that asset, the congeries of rights which the appellants enjoyed under the agreements and which, for a price they surrendered, was a capital asset.

I have not overlooked the criterion afforded by the economists' differentiation between fixed and circulating capital which LORD HALDANE invoked in *John Smith & Son* v. F *Moore* (15), and on which the Court of Appeal relied in the present case, but I confess that I have not found it very helpful. Circulating capital is capital which is turned over and in the process of being turned over yields profit or loss. Fixed capital is not involved directly in that process, and remains unaffected by it. If this is to be the test, I fail to see how the appellants could be said to have been engaged in turning over the asset which the agreements in question constituted. The agreements formed the fixed frame- G work within which their circulating capital operated; they were not incidental to the working of their profit-making machine but were essential parts of the mechanism itself. They provided the means of making profits, but they themselves did not yield profits. The profits of the appellants arose from manufacturing and dealing in margarine.

For these reasons I am of opinion that the judgment of the Court of Appeal should be reversed with costs and the judgment of FINLAY, J., restored.

H

LORD WRIGHT.—I am in full agreement with the opinion which has just been delivered by my noble and learned friend LORD MACMILLAN, and I have nothing to add.

LORD ATKIN.—I am asked by my noble and learned friend, **LORD RUSSELL**, to say that he has read the opinion which has just been delivered, and that he agrees with it.

Appeal allowed. I

Solicitors: *Goulden, Mesquita & Co.*; *Solicitor of Inland Revenue.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re MACIVER'S SETTLEMENT. MACIVER *v.* RAE

[Chancery Division (Farwell, J.), October 17, 1935]

[Reported [1936] Ch. 198; 105 L.J.Ch. 21; 154 L.T. 399; 52 T.L.R. 25]

Settlement—Income—Preference shares held by trustees—Dividends in arrear—Ordinary shares transferred to preference shareholders on waiver of right to arrears.

Trustees under a settlement held preference shares in a company. The dividends of the preference shares had for several years fallen into arrears, and, under a scheme approved by the ordinary shareholders and sanctioned by the court, the ordinary shareholders surrendered part of their holdings of ordinary shares and transferred the same to the preference shareholders, who on their part agreed to waive their rights to the arrears of dividends on the preference shares held by them.

Held: that the ordinary shares thus received by the trustees should be treated as income of the tenant for life.

Notes. Considered: *Re Smith's Will Trusts, Smith* v. *Melville*, [1936] 2 All E.R. 1210.

As to income of a tenant for life, see 29 Halsbury's Laws (2nd Edn.) 644 et seq., and for cases, see 40 Digest 654 et seq.

Cases referred to:

(1) *Re Wakley*, [1920] 2 Ch. 205; 89 L.J.Ch. 321; 123 L.T. 150; 36 T.L.R. 325; 64 Sol. Jo. 357, C.A.; 9 Digest (Repl.) 641, *4262*.

(2) *Re Tedlie* (1922), 91 L.J.Ch. 346; 126 L.T. 644; 66 Sol. Jo. 250; 40 Digest 661, *1996*.

Originating Summons.

The summons was taken out by the trustees of the settlement at the request of Mrs. Rae, who was the tenant for life under the settlement made by her late father, and it asked whether a block of 5,365 ordinary shares received by the trustees under the scheme in lieu of the dividends of their holding of preference shares should be treated as capital or income of the settled shares of Mrs. Rae under the settlement (or whether they ought to be apportioned in any or what way between income and capital).

Harold Brown for the plaintiffs.

J. B. Lindon for the tenant for life.

FARWELL, J.—The plaintiffs are the trustees of a settlement dated Aug. 12, 1916, made by Mr. E. E. MacIver under which certain shares were settled on trust to pay the income to the settlor's daughter, the defendant Mrs. Rae, during her life, and in the event of her dying in her husband's lifetime to her husband for life, and subject thereto for the benefit of the children of the marriage, and in the event of her surviving her husband for Mrs. Rae absolutely. Mr. and Mrs. Rae are still living, and there are three children of the marriage who are infants. The shares which were the original subject-matter of the settlement have been sold, and part of the proceeds invested in 3,000 cumulative preference shares of Richard Thomas & Co., Ltd. That company has an authorised capital of £9,000,000, of which £4,000,000 consisted of 6½ per cent. cumulative preference shares of £1 each and the balance ordinary shares.

By the articles of association of the company the preference shares are to be paid off in full in priority to the ordinary shares in the event of a winding-up, but have no right to any further share in the assets. For the seven years ending March 31, 1934, no dividends on the preference capital were paid, with the result that by that time the preference dividends were over £1,800,000 in arrears. It was decided by the Court of Appeal in *Re Wakley* (1) that preference shareholders have no absolute, but only a conditional, right to arrears of dividend, but that, if and when a company acquires assets sufficient to pay off the arrears and declare a dividend, that dividend belongs to the persons who are then the registered holders of the preference shares.

In the present case Richard Thomas & Co., Ltd., arranged to discharge all liability for unpaid dividends by a scheme which was approved by the shareholders and subsequently sanctioned by the court. Under that scheme the preference shareholders waived their conditional right to arrears of dividend; the ordinary shareholders surrendered the equivalent of 1,800,000 shares which had been subdivided so as to reduce the value of the ordinary shares from £1 to 6s. 8d. each; and the shares so surrendered were distributed among the preference shareholders in consideration of their consenting to the wiping out of all arrears of their dividends.

The scheme was approved by the court early in 1935. The result was that the preference shareholders agreed to sell their claim to arrears of dividends and in consideration thereof to receive ordinary shares provided by the ordinary shareholders, who gave up two-thirds of their holdings. In pursuance of that scheme the trustees received a large holding of ordinary shares of the company.

It is quite plain that, if the company had been in a position to pay dividends sufficient to wipe out the arrears, the whole of the sum so paid would have belonged to the tenant for life. The question is whether it makes any difference that the trustees, instead of receiving cash, received ordinary shares. There is nothing in the scheme by which the company capitalised any moneys. It is said that this Case is covered by a decision of Eve, J., in *Re Tedlie* (2), but that is quite a different case. On the whole, I have come to the conclusion that the ordinary shares so allotted to the preference shareholders must be treated as income and not as capital, and, therefore, belong to the persons who would have been entitled to the arrears of preference dividend if they had been paid in cash. The costs of all parties will be paid out of the fund.

Solicitors: *Alsop, Stevens & Collins Robinson*, Liverpool.

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

STUART *v.* HAUGHLEY PAROCHIAL CHURCH COUNCIL

[Chancery Division (Bennett, J.), February 28, March 1, 5, 1935]

[Court of Appeal (Lord Hanworth, M.R., Romer and Maugham, L.JJ.), July 16, 17, 1935].

[Reported [1935] Ch. 452; 51 T.L.R. 331; 79 Sol. Jo. 232; 153 L.T. 163, Ch.D; [1936] Ch. 32; 104 L.J.Ch. 314; 153 L.T. 311; 51 T.L.R. 538; 79 Sol. Jo. 559, C.A.]

Ecclesiastical Law—Representation of laity—Lay electoral commission—Appeal against removal of name from church electoral roll—Grounds stated in writing by church council considered, but neither vicar nor council heard by commission—Representation of the Laity Measure, 1929 (19 *&* 20 *Geo.* 5, *No.* 2), *Sched.*, *r.* 18 (1) (*b*).

The court will not interfere with the decision of a lay electoral commission which has not acted in a way contrary to natural justice.

Rule 2 (1) of the Rules for the Representation of the Laity contained in the schedule to the Representation of the Laity Measure, 1929, provides for the representation of the laity in parochial church councils, ruridecanal conferences, diocesan conferences, and the House of Laity. By r. 3 (1) there shall be a church electoral roll in every parish, and by r. 18 (1): "There shall be a right of appeal by any person aggrieved against . . . (*b*) the removal of any name, or the refusal to remove any name, from the roll of a parish." By r. 18 (3) a lay electoral commission shall be constituted in every diocese, and any appeal shall be considered and decided by such two or more members of the commission as the commission shall appoint, and their decision shall be final.

The plaintiff's name was removed by the parochial church council of H. from the electoral roll, and he appealed to the electoral commission against the removal. The commission requested, and obtained, from the parochial church council a statement of the grounds on which the council had removed the plaintiff's name from the electoral roll, but they did not hear the vicar, or the secretary, or any member of the council. Having considered the statement of the council, the commission decided that the plaintiff's name had been wrongly removed from the electoral roll and they directed his name to be restored to it. The parochial church council failed to comply with these directions, and the plaintiff brought an action for a declaration that he was entitled to have his name reinstated in the roll and an injunction restraining the council from preventing him attending and voting at church parochial meetings.

Held: the commission in coming to their decision had acted honestly and in good faith, and there was nothing contrary to natural justice in the way in which they had dealt with the appeal, and, therefore, the court had no jurisdiction to vary or set aside their decision, and the name of the plaintiff must be restored to the roll.

Maclean v. *The Workers' Union* (1), [1929] 1 Ch. 602, applied.

Notes. The Representation of the Laity Measure, 1929, is repealed by the Representation of the Laity Measure, 1956, the Schedule, rr. 2 and 27 of which replace rr. 2 and 18 of the 1929 Measure.

As to the electoral roll, see 13 Halsbury's Laws (3rd Edn.) 163. For Representation of the Laity Measure, 1929, see 7 Halsbury's Statutes (2nd Edn.) 86, and for the Representation of the Laity Measure, 1956, see 36 Halsbury's Statutes (2nd Edn.) 282.

Case referred to:

(1) *Maclean* v. *The Workers' Union*, [1929] 1 Ch. 602; 14 L.T. 83; 45 T.L.R. 256; 43 Digest 101, *1046*.

Action for a declaration that the plaintiff was entitled to have his name re-instated in the church electoral roll of the parish of Haughley, and for an injunction.

The following statement of the facts is taken from his Lordship's judgment:

The parties to this action are as plaintiff Mr. Edmund Cuthbert Stuart and as defendants the parochial church council of the parish of Haughley, the Reverend Walter Grange White, who is the vicar of that parish, and Mr. Frederick Harper and Mr. John W. Nunn, the first of whom has been, and the second is, the secretary of the parochial church council of the parish of Haughley. The action is brought by the plaintiff for the purpose of establishing his right to be on the church electoral roll of the parish of Haughley and to have attended the parochial church meeting of that parish which was held on Feb. 1, 1934. The rights which the plaintiff is asserting are not without importance to those persons who desire to exercise the rights which Parliament has conferred upon them of taking their part as laymen in the affairs of the Church of England.

The plaintiff's rights depend upon the provisions of the Representation of the Laity Measure, 1929, a measure passed by the National Assembly of the Church of England, in the schedule to which are stated the rights conferred upon laymen in regard to their representation in matters of ecclesiastical government. Rule 2 (1) of the schedule provides:

> "The laity shall meet in parochial church meetings and be represented in—(i) parochial church councils; (ii) ruridecanal conferences where such conferences exist; (iii) diocesan conferences; and (iv) the House of Laity, by representatives of either sex (in these rules referred to as 'lay representatives') who are actual lay communicant members of the Church of England of twenty-one years of age and upwards."

Rule 3 provides by sub-r. (1) that:

> "There shall be a church electoral roll (in these rules referred to as 'the roll') in every parish."

By sub-r. (2):

> "The persons entitled to have their names entered upon the roll of a parish shall be lay members of the Church of England of either sex, of eighteen years of age and upwards, who—(*a*) are baptised and declare that they are members of the Church of England and that they do not belong to any religious body which is not in communion with the Church of England; and (*b*) are resident in the parish or (whether or not so resident) have habitually attended public worship in the parish during a period of six months prior to enrolment; and (*c*) have signed the form of application for enrolment set out in appendix I to these rules."

By sub-r. (3):

> "No person shall be entitled to be upon the roll of more than one parish in the same diocese."

Sub-r. (4):

> "The roll shall, until a parochial church council (in these rules referred to as 'the council') has been constituted in a parish, be formed and revised by the minister and churchwardens (if any), and shall, after a council has been constituted, be kept and revised by the council."

Sub-r. (5):

> "The names of persons who are entitled to have their names entered upon the roll of a parish shall, subject to the provisions of these rules, be from time to time added to the roll by or under the direction of the council."

Sub-r. (6):

> "The names of persons who have ceased to be entitled to be upon the roll of a parish, or who have signified in writing their desire that their names shall be removed from the roll, may, subject to the provisions of these rules, be at any time removed from the roll by or under the direction of the council."

Sub-r. (7):

> "The roll of a parish shall be revised annually by or under the direction of the council, such revision being effected pursuant to a public notice in the form set out in appendix II to these rules (or in a substantially similar form), given not less than fourteen days before the commencement of the revision. The revision shall be completed not less than fifteen days or more than twenty-eight days before the annual parochial church meeting."

Sub-r. (8):

> "Upon every revision all enrolments or removals from the roll which have been effected since the date of the last revision (or since the formation of the roll if there has been no previous revision) shall be verified, and such further enrolments or removals from the roll as may be required shall be effected."

Sub-r. (9):

> "After the completion of the revision the roll as revised (or the roll as originally formed in any case where there has not been any revision thereof) shall, together with a list of the names of the persons removed from the roll since the last revision, be published by being exhibited continuously for not less than fourteen days before the annual parochial church meeting on or near to the principal door of the church in such manner as the council shall appoint, and no name shall be entered upon or removed from the roll during the period in any year between the completion of the revision and the annual parochial church meeting."

Sub-r. (10):

> "Any person desiring to continue upon the roll of a parish after he has ceased to be resident in that parish, and being qualified by habitual attendance at public worship, shall make a fresh application for enrolment in the form set out in appendix I to these rules."

Those are the provisions with respect to the church electoral roll. Rule 5 provides for the annual parochial church meeting. By sub-r. (1) of that rule it is provided:

> "In every parish there shall be held annually not later in the year than in Easter week or in the following week the annual parochial church meeting of all persons whose names are entered upon the roll of the parish (in these rules referred to as 'the annual meeting')."

Then there are provisions for the convention of the parochial church meeting and the chairman of it, and r. 8 specifies the business to be transacted at the annual parochial church meeting. That rule provides:

> "(1) The annual church meeting shall receive from the council, and shall be free to discuss—(*a*) a copy or copies of the roll; . . . (2) The annual meeting shall elect parochial lay representatives—(*a*) to the diocesan conference, unless the diocesan conference shall otherwise determine; (*b*) to the ruridecanal conference, when it exists; and (*c*) to the council of the parish, subject to and in accordance with the rules hereinafter contained relating to such elections respectively. . . ."

It is apparent from these provisions that the right to take part in the affairs of the Church of England has as its basis the fact that a person has his name on the church electoral roll. The importance of that fact is, I think, recognised by r. 18, which provides by sub-r. (1):

> "There shall be a right of appeal by any person aggrieved against—(*a*) any enrolment, or refusal of enrolment, on the roll of a parish; (*b*) the removal of any name, or the refusal to remove any name, from the roll of a parish; (*c*) the allowance or disallowance of any vote given or tendered under the foregoing rules; and (*d*) the result of any election held or purporting to be held under the foregoing rules."

Sub-r. (2):

> "Notice of any such appeal shall be given in writing to the rural dean, or if there be no rural dean, to the archdeacon. Such notice shall be given—(*a*) in the case of an appeal against an enrolment or a refusal of enrolment, or in the case of an appeal against the removal of any name or the refusal to remove any name from the roll, not later than seven days after the date of the annual meeting next following such enrolment or refusal of enrolment, or removal or refusal to remove; (*b*) in the case of an appeal against the allowance or disallowance of a vote, within seven days after the date of such allowance or disallowance; and (*c*) in the case of an appeal against the result of an election, within seven days after the result thereof has been announced."

Sub-r. (3):

> "A lay electoral commission shall be constituted in each diocese by the diocesan conference, and any appeal shall be considered and decided by such two or more members of the commission as the commission shall appoint, and their decision shall be final."

Sub-r. (4):

> "For the purpose of such consideration and decision, the members of the commission so appointed shall consider all the relevant circumstances, and shall be entitled to inspect all documents and papers relating to the subject-matter of the appeal, and to be furnished with all information respecting the same which they may require."

Before the year 1932 the plaintiff's name was on the electoral roll of the parish of Haughley, and in the revision, which took place, of that roll by the defendant council in January, 1932, his name was removed from it. On Jan. 28 he and other persons whose names had been removed from the electoral roll of the parish gave notice of appeal to the rural dean of Stow, in accordance with the provisions of r. 18 in the schedule to the Representation of the Laity Measure, 1929. The lay electoral commission thereupon had to decide, as between the plaintiff and the other persons concerned and the parochial church council of the parish, whether the parochial church council had rightly removed their names from the parochial church roll. The lay commission who were entrusted to determine the matter were Mr. Singleton Cooper, who, as well as being secretary, was a member of the commission, and two others, and on Feb. 9, 1932, Mr. Singleton Cooper, as secretary of the lay electoral commission, wrote to the secretary of the parochial church council a letter in these terms: "Dear Sir,—I have received a protest from the under-mentioned parishioners of Haughley in regard to the removal of their names from the electoral roll. I have also ascertained that their names are on no other electoral roll. As in consequence of their appeal we have to hold a commission, I shall be glad to have the reasons of the church council for removing the said names. You are doubtless aware that it is very difficult when names are once on the roll to remove them so long as those to whom the names belong still remain in the parish. I should like your observations as soon as possible." There follows a list of ten names including the name of the plaintiff. To that letter the defendant Harper, who was then the secretary of the parochial church council, replied on Feb. 10, 1932: "Dear Sir,—I beg to acknowledge your letter re electoral roll dated Feb. 9, which I received from the Reverend White to-day. I wish to state that your letter shall be brought before the church council at their next meeting. Unfortunately for its consideration the church council held its first meeting of the year last night, Feb. 9, otherwise if it had arrived a day sooner it could have been dealt with then. As secretary of the church council last year I should like to state that the electoral roll was revised before a full council and was passed at the annual meeting without one objection. Yours truly (signed) F. Harper, Sec. C.C."

On Feb. 12, Mr. Singleton Cooper replied again to Mr. Harper: "Dear Sir,—In reply to your letter of the 10th inst., I cannot see why there is any reason for you to wait for a meeting of your church council. I want to know the reasons for taking off the names of these electors previously mentioned to you from your electoral roll. You do not need to have another meeting of the church council in order to be able to tell me this. The secretary of the council is the officer responsible for keeping the church roll and also for attending to official correspondence. It is not fair to the people in question to keep them waiting for a considerable time, and therefore I must ask you to be good enough to let me have at your early convenience the reasons for the action of your council. At the same time you might let me know whether any notice was sent to the people in question calling their attention to the fact that their names had been removed from the roll. Yours very truly (signed) H. E. Singleton Cooper."

To that letter the following answer was written: "Dear Sir,—In answer to your letter of Feb. 12, I cannot comply with your request until the church parochial council have met. Yours truly (signed) F. Harper, Hon. Sec., Church Council." The next thing that happened was that the lay electoral commission met on Feb. 25, 1932, for the purpose of considering the appeal of the ten persons who had given notice of appeal to the rural dean of Stow, and the minute book of the lay electoral commission records that on that date the commission decided that Mr. Singleton Cooper should write to the secretary of the parochial church council to the effect set out in the following letter, which Mr. Singleton Cooper wrote on the same day, namely: "Dear Sir,—With reference to the appeal of some parishioners in Haughley, the commission met at Ipswich this morning and I am instructed to point out to you that the commission is entitled to be furnished with all the information which it may require—Rules for Representation of the Laity, r. 18 (4) (Diocesan Directory, 1932, p. 198). This being so, I must request you to summon an emergency meeting of your church council which can be convened by your chairman at not less than three days' notice—Parochial Church Councils (Powers) Measure, rules for procedure, r. 7 (Diocesan Directory, 1932, p. 213). The commission further instructs me to say that, unless it hears from you definitely within the course of the next ten days, it will have to insist on the names of the parishioners who have appealed being reinstated on the parochial roll. Yours very truly (signed) H. E. Singleton Cooper, Secretary to the Commission."

To that on March 3, a Mr. Lambert, who, I suppose, was a deputy for Mr. Harper, writes: "Dear Sir,—In reply to yours of Feb. 25, the council will send their statement in a few days. Yours truly (signed) C. Lambert. For P.C.C. Haughley." Mr. Singleton

Cooper answers that on March 4, by saying: "Dear Sir,—I have duly received your letter of March 3, saying that the council will send their statement in a few days in regard to the removal of names of parishioners in Haughley from the electoral roll. You will please note that I shall expect this before very long as you will remember that the commission gave you ten days in which to reply. Yours very truly (signed) H. E. Singleton Cooper, Secretary to the Commission."

There follows that communication a letter from the defendant Harper as secretary of the parochial church council in which he says: "Dear Sir,—As secretary of the parochial church council, I am directed to inform you of the following proposition, that was passed by the council last evening, March 7. That the names of the ten persons removed from the electoral roll at the last revision neither attend worship nor support the parish church, and that any further correspondence will not be entered into by the 'Parochial Church Council.' Yours truly (signed) F. Harper, Secretary, P.C.C."

Thereupon, having, as I think they were entitled to suppose, the grounds upon which the parochial church council had removed the names of the appellants from the electoral roll, the lay electoral commission held a meeting on March 23, 1932. Mr. Singleton Cooper and the two other commissioners were present. Mr. Singleton Cooper read the letters including the letter which had been received from the vicar. Having considered the letters very carefully, the commission decided that it could see no reason for removing the appellants' names from the roll.

Mr. Singleton Cooper was instructed to convey this information to the parochial church council, that the council must obtain the consent of the persons concerned to the removal of their names or produce conclusive evidence showing that either the names were on the roll of another parish or that they were members of a religious body not in communion with the Church of England. Failing this the council was to reinstate the names at once, and on the same day, March 24, Mr. Singleton Cooper wrote to the secretary of the parochial church council, the defendant Harper: "Dear Sir,—Haughley Electoral Roll. We have considered your letters, but we can see no justification for removing the names of the appellants from the electoral roll without having first obtained their consent. If you feel it desirable that these names should be removed from the roll the best course of action is to see the people concerned and get their consent to the removal of their names or else you must produce conclusive evidence that they are members of a religious body not in communion with the Church of England. If you are not prepared to do this please reinstate all the names at once and let me have a certificate to the effect that this has been done. Yours faithfully (signed) H. Singleton Cooper, Secretary to the Commission."

[His Lordship then read letters indicating that, notwithstanding the intervention of the bishop of the diocese, the council declined to give any further reasons in writing for having removed the plaintiff's name from the roll and persisted in their refusal to reinstate the name on the roll, and that the bishop ultimately appointed the rural dean of Stow to put into effect the decisions of the commission, and continued:] Accordingly in pursuance of that authority the rural dean of Stow, on Sept. 20, 1932, posted up on the door of the church of the parish of Haughley a supplementary roll containing the names of those who had appealed from the act of the church council, including the name of the plaintiff. The rural dean having put that up, someone unknown, either on that day or the next, took it down. The name of the plaintiff was not restored to the electoral roll at the revision which took place in January, 1933. The plaintiff attended the parochial meeting in January, 1933, and he was told that he had no right to be there. He waited until the year 1934, when the next parochial church meeting of the parish of Haughley was held. His name was not then on the parochial church roll. He went to the meeting for the purpose of exercising the right of taking part in the meeting, and he was met by a steward or two stewards and a police constable and was informed that he was not on the roll, and no doubt for the presence of the police constable the vicar was responsible.

Henn-Collins, K.C., and *W. T. Elverston* for the plaintiff.
Stable, K.C., and *Michael Hoare* for the defendants.

BENNETT, J. [after stating the facts, continued:] Counsel for the defendants contended that the lay electoral commission acted contrary to natural justice. The foundation of that contention was that the lay electoral commission had not heard the vicar, or the secretary, or some members of the parochial church council, and that it was contrary to natural justice to come to a decision without hearing argument. The lay electoral commission is a statutory body, a body of laymen, and the powers of a court of law to interfere with the decisions of a body of that kind are distinctly limited, and, as MAUGHAM, J., decided in *Maclean* v. *Workers' Union* (1), the court has no jurisdiction to vary or set aside the decision of such a tribunal if in giving the decision the tribunal has acted honestly.

I propose to follow that decision. There is no question, but that the commission acted in good faith. It gave to the defendants, the parochial church council, an opportunity of stating the grounds upon which it removed the plaintiff's name from the electoral roll. The parochial church council stated in writing the grounds upon which it had removed the plaintiff's name from the church roll. I can see nothing contrary to natural justice in the way in which the lay electoral commission decided the appeal against the parochial church council.

Accordingly, the action, in my judgment, succeeds and the plaintiff is entitled to a declaration that he is entitled to have his name reinstated on the electoral roll of the parish of Haughley.

The defendants appealed.

Michael Hoare for the defendants.
Henn-Collins, K.C., and *W. T. Elverston* for the plaintiff.

LORD HANWORTH, M.R. [having reviewed the facts, continued:] It was suggested that the lay electoral commission had not heard and determined the matter, and it is said that some outside body, such as a parochial church council, ought to decide whether or not the commission have properly received and considered the materials which the parochial church council thinks they ought to have considered. Why is that so, when a domestic tribunal of this sort is set up and power is given to them to hear and to decide ? It is for the tribunal to determine what are the relevant circumstances; they are given power to inspect the documents and papers relating to the subject-matter of the appeal, and to be furnished with information. This domestic tribunal must deal with the matter, and are rightly entrusted with the powers of exercising their jurisdiction, and they are not subject to scrutiny or to being overruled by some other body who may wish that they had acted in some way differently. Their decision is to be final, and in the present case there is no ground whatever for charging them with having come to a decision otherwise than bona fide, or on any of the grounds which might justify, if properly pursued, steps being taken to set aside their conclusion. It is sufficient to say that upon the facts before us it is clear that they were entrusted with the decision, that the appeal was rightly brought before them, that it was for them to determine how they would receive and deal with the matter, that they invited information to be given to them which was not forthcoming, and that upon the materials which they had before them, which, of course, would include the electoral roll and the fact that the plaintiff was upon the electoral roll, they came to their determination. A bona fide determination has been come to and is final for all purposes. In these circumstances there is no ground for saying that the action and decision of the lay electoral commission can be questioned. The learned judge has given effect to it; he was right in so doing; and this appeal must be dismissed.

ROMER, L.J.—I agree.

MAUGHAM, L.J.—I also agree.

Appeal dismissed.

Solicitors: *Owen, White & Catlin; Whites & Co.*, for *Greene & Greene*, Bury St. Edmunds.

[*Reported by* J. H. G. BULLER, ESQ., & G. P. LANGWORTHY, ESQ., *Barristers-at-Law.*]

RYE & EYRE *v.* INLAND REVENUE COMMISSIONERS

[HOUSE OF LORDS (Lord Atkin, Lord Tomlin, Lord Russell, Lord Macmillan and Lord Wright), March 1, 1935]

[Reported [1935] A.C. 274; 104 L.J.K.B. 401; 152 L.T. 493; 51 T.L.R. 318; 19 Tax Cas. 164]

Income Tax—Royalties—Payment on account to owner resident abroad—Payment by solicitors at direction of payer—Persons "by or through" whom payment made—Duty of solicitors to deduct tax and account to Crown—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules,* r. 21 (1)—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 25.

A syndicate was formed to produce a play written by M. Guitry, a Frenchman, on the terms that royalties should be paid to M. Guitry with a payment of £300 in advance on account of royalties. The syndicate instructed their solicitors, the appellants, to pay M. Guitry the £300 out of moneys which had been placed in their hands to the account of the syndicate, and a cheque for that amount was accordingly sent by them to M. Guitry's agent in Paris. The play was produced at a loss. It was admitted that M. Guitry's usual place of abode was not within the United Kingdom, and that the sum of £300 was a payment to him on account of royalties in respect of a copyright of which M. Guitry was the owner. The appellants were assessed to income tax in respect of the £300, so paid on the ground that they were the persons by or through whom the payment was made on account of copyright royalties, and were chargeable, therefore, under r. 21 of the All Schedules Rules of the Income Tax Act, 1918, as amended by s. 26 of the Finance Act, 1927, and applied to copyright royalties by s. 25 of that Act.

Held: the appellants were the persons by or through whom the payment for or on account of royalties was made within the meaning of r. 21 (1) of the All Schedules Rules as applied by the Finance Act, 1927, s. 25, and, therefore, they were under an obligation to deduct the proper amount of income tax from the sum payable by them and account for that amount to the Crown.

Notes. The Income Tax Act, 1918, All Schedules Rules, r. 21, was repealed by the Income Tax Act, 1952, s. 527, and is replaced by s. 170 of the latter Act.

As to income tax in respect of copyright royalties where owner abroad, see 21 HALSBURY'S LAWS (3rd Edn.) 377, para. 686; and for cases on the subject, see DIGEST SUPP.

Appeal from the decision of the Court of Appeal (LORD HANWORTH, M.R., SLESSER and ROMER, L.JJ.) on a Case Stated under the Finance Act, 1927, s. 25; the Income Tax Act, 1918; r. 21 of the General Rules applicable to all Schedules as amended by the Finance Act, 1927, s. 26; and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The Case Stated as follows: At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on Nov. 24, 1932, for the purpose of hearing appeals, Messrs. Rye & Eyre, solicitors, of 13, Golden-square, London, hereinafter called the appellants, appealed against an assessment to income tax in the sum of £300 for the year ending April 5, 1931, made upon them under the provisions of s. 26 of the Finance Act, 1927, as extended by s. 25 of the Finance Act, 1927, in respect of a payment made to M. Sacha Guitry on account of copyright royalties.

In June, 1930, a Mr. Lionel Barton was proposing to form a company with the object of producing in London an English version of a play called "Desire," written by M. Guitry. The company was registered on July 3, 1930, under the name of the Long Acre Syndicate, Ltd. Pending its formation, Mr. Barton negotiated with Mr. F. Howell, M. Guitry's agent, an agreement for a licence for the performance of the play on payment of royalties, one of the terms of the agreement being that on its signing the sum of £300 should be paid in advance on account of the royalties thereinafter stipulated.

On June 23, 1930, Mr. Barton called upon the appellants, who acted as solicitors for him and from and after its incorporation for the company which was then about to be formed, and instructed them to forward the agreement in duplicate to Mr. Howell and out of moneys which had been placed in their hands on account of the then proposed company (but of which the said Mr. Barton had the disposition on June 23, 1930) to pay the sum of £300 in accordance with the above-mentioned provision of the agreement.

Accordingly, on the same date the appellants forwarded the agreement in duplicate to Mr. Howell, together with their cheque for £300, accompanied by a covering letter in the following terms:

> "13, Golden-square, W. 1.—June 23, 1930.—Dear Sir,—M. Sacha Guitry and Mr. Lionel H. Barton.—'Desire.'—Long Acre Syndicate.—On the instructions of Mr. Barton, we enclose the two parts of the agreement, one of which has been executed by him, together with our cheque for £300 (the amount of royalties payable in advance under cl. 3), and should be glad if you would kindly return the other part to us signed by M. Guitry as early as possible, as the play is billed for production at the New Theatre on July 2.—Yours faithfully, RYE & EYRE.—F. Howell, Esq., 6, Rue de la Paix, Paris."

The cheque for £300, which was drawn payable to Mr. Howell, was cashed in due course. The production of the play resulted in a loss to the company, and in the events which happened no further sums were paid or payable to M. Guitry on account of royalties in respect of the performance of the play.

When the question of income tax was subsequently raised by the Revenue authorities the appellants endeavoured to persuade Mr. Barton, M. Guitry and Mr. Howell to pay the tax, but their efforts to this end have not been successful.

It was not disputed that M. Guitry's usual place of abode was not within the United Kingdom, and that the sum of £300 paid to him was a payment on account of royalties paid in respect of a copyright of which M. Guitry was the owner.

It was contended on behalf of the appellants:

(*a*) That the appellants were not persons by or through whom any payment giving rise to liability to tax was made;

(*b*) That they were not liable to account to the revenue for income tax on the sum of £300 paid to M. Guitry; and

(*c*) That the assessment should be discharged.

It was contended on behalf of the Crown:

(*a*) That the appellants were persons through whom the sum of £300 had been paid to M. Guitry on account of copyright royalties;

(*b*) That as such they were chargeable to income tax in respect of such payment under r. 21 of the rules applicable to all Schedules of the Income Tax Act, 1918, as amended by s. 26 of the Finance Act, 1927; and applied to copyright royalties by s. 25 of the last-mentioned Act;

(*c*) That the assessment ought to be confirmed.

The commissioners who heard the appeal held that the appellants were chargeable to income tax as persons through whom the payment in question was made, and they confirmed the assessment.

The appellants immediately after the determination of the appeal declared to the commissioners their dissatisfaction therewith as being erroneous in point of law and in due course required them to state a case for the opinion of the High Court pursuant to the Finance Act, 1927, s. 26, and the Income Tax Act, 1918, s. 149.

The Court of Appeal held, affirming the decision of FINLAY, J., that the sum of £300, being a sum paid in advance and on account of royalties, was, within the meaning of sub-s. (1) of s. 25 of the Finance Act, 1927, a sum paid periodically, the royalties being dependent on the weekly receipts of the play. There was no question of any territorial limit, as this was taxable income derived from property, namely, copyright, situated in and derived from the United Kingdom. The alteration of r. 21 was mere machinery, and under r. 19 of the General Rules there was justification given to the person who paid as against his principal to rely upon the deduction as money which had been paid for and on account of the principal. The appellants now appealed to the House of Lords.

Croom-Johnson, K.C., and *P. B. Showan* for the appellants.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *R. P. Hills* for the respondents were not called upon.

LORD ATKIN.—This appeal raises a simple question and one which I venture to think admits of only one answer. It has been answered in the same way by the Commissioners, by FINLAY, J., and by the Court of Appeal, and I am bound to say that I agree with the answer which they have given. It is a case in which there was an agreement between a Mr. Barton in London and M. Sacha Guitry, of Paris, by which Mr. Barton agreed to produce a play of M. Guitry's on terms that he was to pay certain royalties, and one of the terms of the agreement was that on the signing of the agreement he was to pay a sum of £300 "on account of the royalties hereinafter stipulated." Messrs. Rye & Eyre, the appellants, who are solicitors, and who were acting as solicitors for Mr. Barton, having certain funds in their hands which Mr. Barton was in a position to direct them to apply for this particular purpose, were directed by him to pay the £300 on account of royalties to M. Guitry, which they proceeded to do at the time when they enclosed the agreement signed by their client.

It is now sought by the Crown to make them liable for income tax in respect of that sum, and the material paragraphs of the relevant rules which it is contended make the solicitors liable are these. Rule 21 of the rules applicable to all schedules of the Income Tax Act provides in sub-s. (1) as follows:

> "Upon payment of any interest of money, annuity, or other annual payment charged with tax under Sched. D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment."

Then further subsections of the rule go on to provide that he shall then be assessed on the sums which he has deducted or ought to have deducted.

It will be observed that the rule is confined expressly to royalties or other sums paid

> "in respect of the user of a patent, not payable or not wholly payable out of profits or gains brought into charge";

and by s. 25 of the Finance Act, 1927, it was provided:

> "Where the usual place of abode of the owner of a copyright is not within the United Kingdom"—which is this case—"r. 21 of the General Rules"—that is the rule I have read—"shall apply to any payment of or on account of any royalties or sums paid periodically for or in respect of that copyright as it applies to annual payments not payable out of profits or gains brought into charge."

So that in respect of such a payment, you have not to consider the question of the payment being payable out of profits or gains brought into charge; there is an absolute obligation upon "the person by or through whom any such payment is made" to deduct the sum representing income tax from that sum.

Now were the appellants in this case, Messrs. Rye & Eyre, "the person by or through whom any such payment is made"? I imagine that, on the plain meaning of those words, the words would be apt to describe either the principal or the agent—the principal by whom, or the agent through whom, the payment was made. I reserve any question as to whether or not in this particular case the solicitors could be said to be the persons "by whom" the payment was made, but it seems to me obvious that the payment was made either by them or through them. And, indeed, the only other suggestion that was made in the case was that they were not the persons "through whom" the payment was made, because "through whom" means the person in consequence of whose instructions the payment was made, which seems to me to be entirely contrary to the plain meaning of the words, which appear to me to indicate agency.

A It appeared to the learned judges below to be a very plain case, and, indeed, it so presents itself to my mind. I move your Lordships that this appeal be dismissed.

LORD TOMLIN.—I agree, and have nothing to add.

LORD RUSSELL.—I agree.

LORD MACMILLAN.—I also agree.

B **LORD WRIGHT.**—I agree.

Appeal dismissed.

Solicitors: *Rye & Eyre, Solicitors of Inland Revenue.*

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

C

SLATER *v.* SPREAG

D [King's Bench Division (MacKinnon, J.), July 30, 31, 1935]

[Reported [1936] 1 K.B. 83; 105 L.J.K.B. 17; 153 L.T. 297; 51 T.L.R. 577; 79 Sol. Jo. 657]

Negligence—Damages—Survival of action—Claim by administrator for benefit of deceased person's estate—Pain and suffering—Shortening of expectation of life—Deceased unconscious from moment of injury until death—Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1 (1)*—Claim also under Fatal Accidents Acts—Procedure.* E

The plaintiff, the widow of a man who had been killed through the negligent driving of a motor car by the defendant, claimed damages under the Fatal Accidents Act, 1846, on behalf of herself and his other dependants, and also under the Law Reform (Miscellaneous Provisions) Act, 1934, as administratrix of the deceased man's estate, for the physical pain and suffering undergone by him, and for the shortening of his expectation of life. The deceased man had been rendered unconscious when struck by the motor car and died two days later without recovering consciousness. F

Held: (i) there being claims under the two Acts which were essentially different, the correct procedure was first to assess the damages under the Act of 1846 and then to consider the questions arising under the Act of 1934; G

(ii) on the claims under the Act of 1934, in view of the state of unconsciousness in which the deceased man had been from the time of the accident until that of his death, there was proved no pain or suffering and no mental distress due to the deceased's knowledge that his expectation of life was shortened in respect of which damages could be awarded. H

Flint v. *Lovell* (1), [1935] 1 K.B. 354, explained.

Notes. Referred to: *Rose* v. *Ford,* [1937] 3 All E.R. 359.

As to damages for negligence, see 23 Halsbury's Laws (2nd Edn.) 722 et seq., and for cases, see 36 Digest (Repl.) 229 et seq. For Law Reform (Miscellaneous Provisions) Act, 1934, see 9 Halsbury's Statutes (2nd Edn.) 792. I

Case referred to:

(1) *Flint* v. *Lovell,* [1935] 1 K.B. 354; 104 L.J.K.B. 199; 152 L.T. 231; 51 T.L.R. 127; 78 Sol. Jo. 860, C. A.; Digest Supp.

Action claiming damages for negligence.

The plaintiff was the widow of a man who had been killed in a motor accident and sued in two capacities (i) under the Fatal Accidents Act, 1846, on behalf of herself and the other dependants of the deceased; and (ii) as administratrix of her late husband's estate, under the Law Reform (Miscellaneous Provisions) Act, 1934.

The accident occurred on Dec. 22, 1934. The deceased was cycling on the Great North Road when he was struck by the defendant's car and sustained a fractured skull. The medical evidence was that he at once lost consciousness and did not regain it before his death on Dec. 24. One witness of the accident, however, stated that the deceased made an effort to rise after being struck, and that he moaned. The defendant at first denied negligence, but withdrew that defence at the trial and admitted that the plaintiff was entitled to such damages as the court might award under the Fatal Accidents Act. He contended, however, that in the circumstances the plaintiff was not entitled to recover anything under the Law Reform (Miscellaneous Provisions) Act, 1934.

Section 1 of that Act provides as follows:

> "(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate. . . . (2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person . . . (*c*) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included. . . . (5) The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Act, 1846 to 1908."

Edward Terrell (*T. J. O'Connor, K.C.*, with him) for the plaintiff.—The two heads of the plaintiff's claim are separate and distinct. The court must first assess the damages under the Fatal Accidents Act, 1846, without reference to the claim under the Act of 1934. After that has been done, it becomes necessary to consider the measure of damages to the deceased's estate. In doing so *Flint* v. *Lovell* (1) must be applied. In that case the Court of Appeal held that damages at common law awarded to a man still living might include a sum for the shortened expectation of life caused by the injury. During the two days which elapsed after the accident before death ensued, the deceased man could have brought an action claiming damages under three heads, namely (i) pain and suffering, (ii) shortened expectation of life, and (iii) loss of earning capacity. That cause of action survives his death. I admit, however, that if a sum is awarded under the Fatal Accidents Act, the same sum cannot be awarded again under the head of loss of earning capacity under the Act of 1934.

MACKINNON, J.—The evidence is that the deceased was unconscious from the moment of the accident until death. We must hope that he suffered nothing. How, then, can damages for pain and suffering be awarded?

Terrell.—Even if the suffering were only momentary, there must have been an instant in which he suffered great pain and great apprehension.

MACKINNON, J.—I find it difficult to separate damages for the loss of the pleasure of living and damages for loss of earning capacity.

Terrell.—I submit that that can be done and ought to be done, since the latter only are included in the damage under the Fatal Accidents Act. Those, therefore, should not be included in the damages under the Act of 1934, but damages for the loss of the pleasure of living should be included.

The words in s. 1 (2) (*c*) of the Act of 1934, "without reference to any loss or gain to his estate," refer to loss or gain consequent on the death, not consequent on the cause of action. What is contemplated is such a loss as the ending of a pension, or such a gain as the payment of a life policy. It is only matters of that description which are to be excluded from consideration. [He also cited two unreported cases recently heard at assizes, in one of which Humphreys, J., had awarded to an executor damages for pain and suffering sustained by the person injured, and in the other of which Macnaghten, J., had refused to do so.]

Russell Vick, K.C., and *Berryman* for the defendant.—Damages are compensation given to a person who has a cause of action for injuries sustained by him. It is impossible for a court to assess the amount of damages to be awarded to one person for suffering undergone by another. Take, for example, a case where a deceased person had bequeathed his estate to the British Museum. How can it be possible to compensate such an institution for pain suffered by the testator? What passes to an executor is a cause of action, not an accrued claim for damages. Damages can only be assessed as at the date of assessment, and cannot be fixed on the assumption that a dead person is still living. With regard to *Flint* v. *Lovell* (1), it is ludicrous to extend the doctrine that a man while living may recover damages for a shortened expectation of life to a case where the life has been ended by death. Even if we are wrong in this contention, it has not been proved by the plaintiff that the deceased suffered any pain or had any apprehension of a shortened life. On the contrary, he was unconscious from the moment of impact, and experienced nothing.

Edward Terrell replied.

MACKINNON, J. [after stating the facts, continued:] The deceased man died without regaining consciousness. This action is brought by his widow, who claims compensation under the Fatal Accidents Act, 1846, and in addition she makes a further claim as administratrix of the deceased for damages recoverable under the Act of 1934. The claims under those two Acts are essentially different. The former is made on behalf of the dependants and for their benefit. The latter is made as legal personal representative in order to get in the assets of the estate, and if the deceased has made a will any money recovered will be dealt with according to that will. Further, it is provided by s. 1 (5) of the 1934 Act that the rights conferred by that Act shall be in addition to, and not in derogation of, rights conferred by the Fatal Accidents Acts.

Therefore, if a double claim like the one now before me is made, the correct procedure is, in the first place, to disregard the 1934 Act and to assess the damages under the Fatal Accidents Act alone. After that has been done, questions arising under the Act of 1934 must be considered separately. [His Lordship dealt with the earnings of the deceased and the position of his dependants, and assessed the damages under the Fatal Accidents Act at £1,850, and also awarded a sum of £17 for funeral expenses under s. 1 (2) (*c*) of the 1934 Act, and he continued:] Counsel for the plaintiff says that just before the deceased man died there was vested in him a cause of action for damages against the defendant. Those damages fall under two heads, namely, (i) pain and suffering, and (ii) a claim in respect of the shortening of his expectation of life. It might have been said that there was a third ground of claim, namely, the loss of future earnings. With regard to that, I should have been of opinion that it was excluded by s. 1 (2) (*c*) of the Act, but I do not discuss it in detail, as counsel has said that he makes no claim in respect of it.

There remain the two claims for pain and suffering, and for the shortening of the expectation of life. The latter is based on the decision of the Court of Appeal in *Flint* v. *Lovell* (1), which introduces some novel considerations into the law as regards damages. The question which has been debated is whether a claim made under either of those heads can ever be a cause of action which, under the 1934 Act, survives for the benefit of the estate. I think it can. Take the case I suggested during the argument, of a man lingering in hospital for six months, and during that period incurring medical expenses and losing wages and suffering pain. He dies, and at the time of death there is vested in him a claim for damages in respect of each of those three matters. It is vested in him while he is alive, and when he dies it survives for the benefit of his estate. Counsel for the defendant says that the fact that a man has suffered pain cannot be proved after his death. But it might be proved in a proper case by observers equally well as by the man himself, and I think that contention fails.

Therefore, at any rate in theory, the plaintiff in this case would be entitled to damages for the pain and suffering undergone by the deceased before death. But on the facts I am not satisfied that he did experience any pain or suffering. The doctor said that he lost consciousness at once and did not recover it before death. It was suggested by one witness who saw the accident that the deceased tried to raise himself, and that he

A moaned. In those circumstances the degree of pain must be a matter of pure speculation, since the movement may have been convulsive. I am not satisfied that there was any pain for which more than nominal damages could be awarded. In order that the court might act it would have to be proved that he suffered, and that the plaintiff has failed to do.

With regard to the other heads of claim, I am not sure that I appreciate the full B purport of *Flint* v. *Lovell* (1), but as I understand it the damages in that case were awarded for the subjective effect on the plaintiff—that is to say, for the mental effect on the man of knowing that his expectation of life was shortened. If a man does not retain consciousness, I do not think that any damages for the shortening of life can be awarded. Those damages are for the effect on his own mind of his knowledge that instead of being a healthy man he is a crippled wreck. It is the fact that he is so mentally distressed C that is the ground for compensation. Where, therefore, he at once loses consciousness there is not vested in him at the time of death a claim for damages in respect of the shortening of his expectation of life. On different facts the result might be different, for where there is pain and suffering through a period of lingering, that pain and suffering might well be increased by the knowledge that the expectation of life was shortened.

In the result the damages must be confined to those recoverable under the Fatal D Accidents Act, together with the amount of the funeral expenses, and there will be judgment for the plaintiff for £1,867.

Solicitors: *Herbert Z. Deane & Co.*; *Berrymans.*

[*Reported by* V. R. Aronson, Esq., *Barrister-at-Law.*]

E

F

DAGLISH *v.* DAGLISH

[Probate, Divorce and Admiralty Division (Langton, J.), December 16, 1935]

[Reported [1936] P. 49; 105 L.J.P. 19; 154 L.T. 246; 52 T.L.R. 171; 80 Sol. Jo. 129]

G *Divorce—Decree nisi—Substitution of decree of judicial separation—Protection of financial position of children.*

Where a wife who had been granted a decree nisi for the dissolution of her marriage moved the court to rescind the decree and substitute one for judicial separation, the reason for the application being the wife's desire to protect the rights of the children of the marriage under a settlement,

Held: the application should be granted.

H

Notes. Referred to: *Jeffrey* v. *Jeffrey*, [1950] 2 All E.R. 449.

As to changing relief prayed for in a matrimonial suit, see 12 Halsbury's Laws (3rd Edn.) 322.

Cases referred to:

(1) *Parsons* v. *Parsons*, [1907] P. 331; 76 L.J.P. 159; 23 T.L.R. 749; 27 Digest (Repl.) 455, *3892*.

I

(2) *Rutherford* v. *Richardson*, [1923] A.C. 1; 92 L.J.P. 1; 128 L.T. 399; 39 T.L.R. 42; 67 Sol. Jo. 78, H.L.; 27 Digest (Repl.) 592, *5536*.

Motion.

The parties married in March, 1915, and there were two children of the marriage, a son aged eighteen and a daughter aged seventeen years. Under terms of arrangement in proceedings in the Chancery Division in 1931 property was settled on the husband for his life, and thereafter on the issue of his marriage with his wife and his children by any future wife. By a petition dated May 24, 1933, the wife, Helen May Daglish, prayed for a judicial separation on the ground that the husband, William Arnold Daglish, had deserted her without cause for not less than two years. He denied the charge. The petition was amended on Nov. 29, 1934, by charging the respondent with adultery and praying for dissolution of the marriage. The respondent did not defend the petition as amended, and on July 17, 1935, a decree nisi of divorce was granted to the petitioner. The petitioner now moved that the decree nisi should be rescinded and that she should be granted instead a decree of judicial separation, the prayer in the petition being amended accordingly.

Notice of motion had been given to the respondent, who did not appear, and to the King's Proctor, who did not oppose the motion.

F. L. C. Hodson for the petitioner.—The petitioner's object is to prevent the possibility of any children whom the respondent, if he were divorced, might have by an after-taken wife from sharing in the settled property to the detriment of the children of the present marriage. It is well established that the greater remedy of dissolution of marriage includes the lesser one of judicial separation, if the aggrieved party chooses to ask for the latter. In *Parsons* v. *Parsons* (1) the court rescinded the decree nisi on the petitioning wife's application and pronounced a decree of judicial separation as prayed. In *Rutherford* v. *Richardson* (2) the House of Lords affirmed the decision of the Court of Appeal, rescinding a decree nisi of divorce granted on the ground of adultery, and pronouncing a decree of judicial separation on the ground of cruelty by way of substitution.

LANGTON, J., allowed the amendment, rescinded the decree nisi of divorce, and pronounced a decree of judicial separation.

Solicitors: *Wrentmore & Son.*

[*Reported by* WILLIAM LATEY, ESQ., *Barrister-at-Law.*]

SALMON *v.* WEIGHT (INSPECTOR OF TAXES)

[HOUSE OF LORDS (Lord Atkin, Lord Tomlin, Lord Russell, Lord Macmillan, and Lord Wright), March 4, 1935]

[Reported 153 L.T. 55; 51 T.L.R. 333; 19 Tax Cas. 174]

Income Tax—Income—Profits from office or employment of profit—Taxpayer given right to take up shares at par—Shares of greater value than par—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. E.*, *r.* 1.

S., as the managing director of a limited company, was entitled to a yearly salary, but in addition, under resolutions each year, he was given (for services to the company) the right to apply for and take up at par "A" ordinary shares of the company. The shares were at all times of a value considerably in excess of par, and were freely saleable. S. had not sold any of the shares so taken up. Assessments were made on S. in respect of the difference between the par value and the actual value of the allotted shares.

Held: the advantage given to S. of receiving the allotments was "profits" from "having or exercising an office or employment of profit" within the Income Tax Act, 1918, Sched. E, r. 1, and, therefore, was liable to tax as assessed.

Notes. The Income Tax Act, 1952, Sched. 9, r. 1, replaced the Income Tax Act, 1918, Sched. E, r. 1. The words "having or exercising an office or employment of profit mentioned in Sched. E, or" which appeared in r. 1 of Sched. 9 to the Act of 1952 were repealed by the Finance Act, 1956, s. 44 (9) and Sched. 1, Part 1.

Considered: *Lowry* v. *Consolidated African Selection Trust, Ltd.*, [1939] 1 All E.R.

353; [1940] 2 All E.R. 545. Referred to: *Nicoll* v. *Austin* (1935), 19 Tax Cas. 531; *Ede* v. *Wilson & Cornwall*, [1945] 1 All E.R. 367.

As to profits payable in money or in money's worth, see 20 HALSBURY'S LAWS (3rd Edn.) 312, para. 574; and for cases on the subject, see 28 DIGEST 87, 88, *499–507*.

Cases referred to:

(1) *Hilder* v. *Dexter*, [1902] A.C. 474; 71 L.J.Ch. 781; 87 L.T. 311; 51 W.R. 225; 18 T.L.R. 800; 7 Com. Cas. 258; 9 Mans. 378, H.L.; 9 Digest (Repl.) 185, *1194*.

(2) *Tennant* v. *Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 8 T.L.R. 434; 3 Tax Cas. 158, H.L.; 28 Digest 17, *87*.

(3) *A.-G.* v. *Ashton Gas Co.*, [1904] 2 Ch. 621, C.A.; 90 L.T. 204; affirmed, [1906] A.C. 10; 75 L.J.Ch. 1; 93 L.T. 676; 70 J.P. 49; 22 T.L.R. 82; 13 Mans. 35, H.L.; 10 Digest (Repl.) 1253, *8827*.

(4) *Samuel* v. *Inland Revenue Commissioners*, [1918] 2 K.B. 553; 88 L.J.K.B. 588; 119 L.T. 542; 34 T.L.R. 552; 7 Tax Cas. 277; 28 Digest 110, *680*.

Appeal from the decision of the Court of Appeal (LORD HANWORTH, M.R., SLESSER and ROMER, L.JJ.) (reported 151 L.T. 410) on a Case Stated by the Commissioners for the Special Purposes of the Income Tax Acts under the Income Tax Act, 1918, s. 149, for the opinion of the King's Bench Division of the High Court of Justice. The Case stated as follows:

"At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at York House, 23, Kingsway, London, W.C.2, on May 8, 1933, for the purpose of hearing appeals, Harry Salmon, managing director of J. Lyons & Co., Ltd., hereinafter called 'the respondent,' appealed against the undermentioned assessments made upon him under Sched. E of the Income Tax Act, 1918, namely:

	£	s.	d.
For the year ended April 5,			
1927, in the sum of	7,187	10	0
1928, " "	7,968	10	0
1929, " "	7,968	10	0
1930, " "	9,218	10	0
1931, " "	10,312	10	0
1932, " "	9,375	0	0
1933, " "	8,750	0	0

"1. The respondent was a managing director of J. Lyons & Co., Ltd., hereinafter called 'the company,' and was employed under a service agreement at a salary of £6,500 free of income tax, which was increased as from March 31, 1929, to £7,280 free of tax. There were other managing directors employed under similar agreements, and assessments had been made on those directors similar to the present assessments, and were also under appeal to us at the same time.

"2. The authorised capital of the company was £9,925,000.

"The issued share capital of the company at March, 1933, was as follows:

	£
400,000 ordinary shares	400,000
1,241,273 'A' ordinary shares	1,241,273
647,065 five per cent. cumulative preference shares	647,065
5,000,000 seven per cent. cumulative preference shares	5,000,000
1,000,000 eight per cent. cumulative preference shares	1,000,000
466,667 six per cent. preferred ordinary shares	466,667
500,000 proportional profit shares	500,000
450,000 'B' proportional profit shares (10s. each)	225,000
Total	£9,480,005

"3. Article 100 of the articles of association of the company provides as follows: 'The remuneration of a managing director shall from time to time be fixed by the directors, and may be by way of salary, or commission, or participation in profits, or by any or all of those modes.'

"The respondent's service agreement was entered into under this article.

"4. Article 6 of the company's articles is in the following terms: 'The shares shall be under the control of the directors, who may allot or otherwise dispose of the same to such persons on such terms and conditions, either at a premium or otherwise, and at such times as the directors think fit.'

"5. Resolutions have been passed from time to time by the directors of the company giving to the managing directors the opportunity of subscribing for the 'A' ordinary shares of the company at par.

"The following are extracts from the minutes of the directors dealing with the matter in years preceding the years to which the appeal relates:

"'June 9, 1920: Resolved that having regard to the eminent and special services involving an abnormal amount of work rendered by Mr. Alfred Salmon, Mr. Isidore Salmon and Mr. Harry Salmon, the three managing directors of the company, during the financial year of the company which ended on March 31 last, each of them be permitted to make application for and to take up at par one thousand "A" ordinary shares in the capital of the company.'

"'June 14: The assistant secretary pro tem. produced applications for 1,000 "A" ordinary shares from each of the managing directors, Mr. Alfred Salmon, Mr. Isidore Salmon and Mr. Harry Salmon, pursuant to the minute of the 9th instant, and it was resolved that one thousand "A" ordinary shares in the capital of the company numbered 84,911 to 85,910 be and are hereby allotted to Mr. Alfred Salmon. Mr. Alfred Salmon did not vote on this and the two following resolutions.'

"'Similar resolutions for Mr. Isidore Salmon and Mr. Harry Salmon.'

"'June 3, 1921: Messrs. A. Salmon, I. Salmon and H. Salmon having each applied for 1,000 "A" ordinary shares at par, it was resolved that having regard to the eminent and special services rendered by them during the financial year of the company ended March 31, 1921, the shares be and are hereby allotted to them on the terms of such applications and that certificates be issued accordingly.'

"'June 9, 1922: The directors having intimated to the three managing directors that the privilege previously accorded them of applying for an allotment of "A" ordinary shares at par would be repeated, applications by these gentlemen for 2,000 "A" ordinary shares each at par were produced by the secretary, and it was resolved that, having regard to the eminent and special services rendered by them during the financial year ended March 31, 1922, the shares be and are hereby allotted to Messrs. A. Salmon, I. Salmon and H. Salmon respectively on the terms of such applications, and that certificates be issued accordingly.'

"'June 14, 1923: The directors having intimated to the three managing directors that the privilege previously accorded them of applying for an allotment of "A" ordinary shares at par would be repeated, applications by these gentlemen for 2,000 "A" ordinary shares each at par were produced by the secretary, and it was resolved that having regard to the eminent and special services rendered by them during the financial year ended March 31, 1923, the shares be and they are hereby allotted to Messrs. A. Salmon, I. Salmon and H. Salmon respectively on the terms of such applications, and that certificates be issued accordingly.'

"'June 11, 1924: The directors having intimated to the three managing directors that the privilege previously accorded to them of applying for an allotment of "A" ordinary shares at par would be repeated, applications by these gentlemen for 2,000 "A" ordinary shares each at par were produced by the secretary, and it was resolved that having regard to the services rendered by them during the financial year ending March 31, 1924, the shares be and are hereby allotted to Messrs. A. Salmon, I. Salmon, and H. Salmon respectively, on the terms of such applications, and that certificates be issued accordingly.'

"'May 28, 1925: The directors having intimated to the three managing directors that the privilege would again be accorded to them of applying for 2,000 "A" ordinary shares each at par, applications from each of them for that number of shares were produced by the secretary, and it was resolved that the shares be and are hereby allotted to Messrs. A. Salmon, I. Salmon, and H. Salmon on the terms of such applications, and that the certificates be issued accordingly.'

"The following are the entries in the minutes relating to the years in question in this appeal containing the resolutions of the directors and recording the applications of the respondent for 'A' ordinary shares.

"'June 3, 1926: Resolved that the three managing directors be accorded the privilege of applying for 2,500 "A" ordinary shares each at par. Messrs. I. Salmon and H. Salmon did not vote on this resolution.'

"'June 10, 1926: The secretary produced applications from the three managing directors for 2,500 "A" ordinary shares each at par in accordance with the minute of the 3rd inst., and it was resolved that the shares be and are hereby allotted to Messrs. A. Salmon, I. Salmon and H. Salmon on the terms of such applications, and that the certificates be issued accordingly.'

"'May 26, 1927: Resolved that the three managing directors be accorded the privilege of applying for 2,500 "A" ordinary shares each at par. Messrs. A. Salmon, I. Salmon, and H. Salmon did not vote on this resolution.'

"'June 9, 1927: The secretary produced applications from the three managing directors for 2,500 "A" ordinary shares each at par in accordance with the minute of the 26th ult., and it was resolved that the shares be and are hereby allotted to Messrs. A. Salmon, I. Salmon, and H. Salmon on the terms of such applications, and that the certificates be issued accordingly.'

"'June 14, 1928: The directors having intimated to the three managing directors that the privilege would again be accorded to them of applying for 2,500 "A" ordinary shares each at par, applications from each of them for that number of shares were produced by the secretary, and it was resolved that the shares be and are hereby allotted to Messrs. A. Salmon, I. Salmon, and H. Salmon on the terms of such applications, and that the certificates be issued accordingly.'

"'May 28, 1929: Resolved that the three managing directors be accorded the privilege of applying for 2,500 "A" ordinary shares each at par.'

"'June 12, 1929: The secretary produced applications from the three managing directors for 2,500 "A" ordinary shares each at par in accordance with the minute of the 28th ult., and it was resolved that the shares be and are hereby allotted to Messrs. I. Salmon, H. Salmon, and M. Salmon on the terms of such applications and that certificates be issued accordingly.'

"'June 11, 1930: The directors having intimated to the managing directors that the privilege would again be accorded to them of applying for 2,500 "A" ordinary shares each at par, applications from each of them for that number of shares were produced by the secretary, and it was resolved that the shares be and are hereby allotted to Messrs. I. Salmon, H. Salmon, M. Salmon, M. Gluckstein, and J. Salmon on the terms of such applications, and that the certificates be issued accordingly.'

"'June 2, 1931: Resolved that the five managing directors be accorded the privilege of applying for 2,500 "A" ordinary shares each at par.'

"'June 11, 1931: The secretary produced applications from the five managing directors for 2,500 "A" ordinary shares each at par in accordance with the minute of the 2nd inst., and it was resolved that the shares be and are hereby allotted to Messrs. I. Salmon, H. Salmon, M. Salmon, M. Gluckstein, and J. Salmon on the terms of such applications, and that certificates be issued accordingly.'

"'May 31, 1932: The directors having intimated to the managing directors that the privilege would again be accorded to them of applying for 2,500 "A" ordinary shares each at par, applications from each of them for the number of shares were produced by the secretary, and it was resolved that the shares be and are hereby allotted to Messrs. I. Salmon, H. Salmon, M. Salmon, M. Gluckstein, and J. Salmon on the terms of such applications and that the certificates be issued accordingly.'

"The managing directors year by year took advantage of the privilege so accorded to them of applying for shares, and took up and paid for shares accordingly. The assessments appealed against were made upon the basis that the shares so applied for and taken up were worth more than the par price which was actually paid for them.

"It is admitted that the market value of the 'A' ordinary shares of the company which had already been issued was much above par at the time the resolution of the directors according the respondent the privilege of applying for shares was passed in each of the years in question, and it was admitted that the market value of the new 'A' ordinary shares were also much above the par value at that time.

"6. Evidence was given to us as to the value of the 'A' ordinary shares generally and of particular matters affecting the value of the 'A' ordinary shares allotted to the managing directors, and we are satisfied that the new shares allotted to the managing directors year by year were not worth at the time of allotment as much as the market price of previously existing shares. Such new shares did not participate in the yearly dividends payable at or about the time of the allotment, and were not at once quotable on the Stock Exchange. For these and other reasons they were not worth the full market price of quoted 'A' ordinary shares on the day of issue. It has not, however, been necessary for us to fix exactly how much less they were worth than the market price, and it is enough to say here that the reduction in value which could be allowed in this respect was not a very large one. Taking the year 1931 as an instance the value of the shares then allotted was not less than £2 10s. a share more than the price paid for them.

"7. Evidence was also given to us that the company had some 33,000 shareholders; that it was not commercially advisable for the company to make a general issue of 'A' ordinary shares at a premium, and that 'A' ordinary shares had never been so issued; and that the opportunity of applying for 'A' ordinary shares given to the managing directors was not transferable by them. It was the policy of the company to increase the interest of the managing directors in the business by encouraging them to acquire and hold as many 'A' ordinary shares in the company as possible. The respondent had never sold any of his 'A' ordinary shares in the company.

"8. On behalf of the respondent it was contended that the respondent had not received a profit assessable to income tax. The case of *Hilder* v. *Dexter* (1) and a previous decision of the Special Commissioners were referred to.

"9. On behalf of the inspector it was contended that the privilege granted to the respondent was granted for services rendered or to be rendered as managing director of the company; that it was of a valuable nature; that its value was assessable to income tax; and that the assessments should be confirmed.

"10. The Commissioners who heard the appeal felt bound to consider the previous decision of their body to which they had been referred. That case, as also the present one, was very fully argued, and the decision was given in favour of the taxpayer. Although dissatisfaction was expressed with the decision, and a case was demanded and drafted, the case was not proceeded with by the Board of Inland Revenue. They were unable to distinguish that case in any substantial point from the present case, and they accordingly held it to be their duty to follow it, and they discharged all the assessments appealed against.

"Immediately upon their so determining the appeal, the inspector of taxes expressed to the Commissioners his dissatisfaction therewith as being erroneous in point of law and in due course required the Commissioners to state a case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149."

The Court of Appeal held, affirming the decision of FINLAY, J., that though there were passages in the judgment of LORD WATSON in *Tennant* v. *Smith* (2), which possibly might favour the contention of the appellant that this privilege, as it could not be to his advantage unless he first found money to apply for the shares, secured the shares and then sold them, was not a profit assessable to tax, there were cases such as *A.-G.* v. *Ashton Gas Co.* (3) and *Samuel* v. *Inland Revenue Commissioners* (4) in which observations were made which clearly showed that it was not necessary that the privilege should be capable of immediately being turned into money.

Mr. Harry Salmon appealed.

Latter, K.C., *Wilfrid Greene, K.C.*, and *Andrewes-Uthwatt* for the appellant.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *Reginald P. Hills* for the respondent were not called on.

LORD ATKIN.—This is an appeal from a decision of the Court of Appeal affirming an order of FINLAY, J., reversing the Special Commissioners. It is an appeal by the taxpayer, Harry Salmon, who is a managing director of the well-known company of J. Lyons & Co., Ltd., who had been assessed to income tax under Sched. E of the Income Tax Act, 1918, in respect of allotments of shares that had been made to him in the circumstances which are set out in the case.

The material section of the Income Tax Act appears in r. 1 of Sched. E:

> "Tax under this schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this schedule . . . in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment."

The assessments were made in respect of the seven taxing years from the year ended April 5, 1927. The position is that Mr. Salmon, the appellant, had been a managing director of the company for a number of years, and the first of a series of resolutions on which these shares came into the possession of the appellant begins by a resolution of June 9, 1920:

> "Resolved, that having regard to the eminent and special services involving an abnormal amount of work rendered by Mr. Alfred Salmon, Mr. Isidore Salmon and Mr. Harry Salmon, the three managing directors of the company, during the financial year of the company which ended on March 31 last, each of them be permitted to make application for and to take up at par 1,000 'A' ordinary shares in the capital of the company."

Five days afterwards, the assistant-secretary produced applications for 1,000 "A" ordinary shares from each of the managing directors, and it was resolved that 1,000 shares should be allotted to each of them.

There are a whole series of resolutions which follow right through up to 1932, the only difference being that the reference to "eminent and special services" after a time falls to be omitted. No doubt by that time the value of the services was well ingrained in the minds of the directors of the company; and the numbers of shares allotted rose gradually. In 1922 the shares allotted were 2,000 shares, which continued until 1926, when the amount of shares rose to 2,500 shares, which is the figure at which it remains up to the present time.

The "A" shares are shares which rank with the ordinary shares of the company for full dividend, except that apparently they do not give a voting privilege. At all the material times these "A" shares could be sold in the market and were of a value in the market much above the par value at which the directors acquired them. We have not the full particulars of the prices, but apparently in some cases the prices were something like £3 or £4 as compared with the par value of £1. The result was that these managing directors got a very profitable advantage to themselves; and indeed it is very interesting to-day, when people sometimes say there is no gratitude in commerce, to feel that that is refuted by the circumstances of this case, and it is clear that the board of the company have fully recognised the valuable services rendered by these managing directors, for in addition to receiving a salary which is now about, I think £7,000, a year free of income tax, they have in these last years also had the advantage of receiving allotments of shares which they have obtained for £2,500, and which they could sell the next day for something like £7,000, £8,000 or even £10,000.

The question that arises is whether or not that advantage given to the managing directors comes under the words "salaries, fees, wages, perquisites or profits whatsoever therefrom," that is, from "having or exercising an office or employment of profit." That it was in fact remuneration for the office of profit, I think there can be no question at all, on the facts that I have stated. We have not, perhaps fortunately, to consider the precise meaning now of the word "perquisites," because "perquisites" has received a definition in the Act of 1842, it received another statutory definition in the Act of 1918, and now that assistance has been withdrawn from the courts, because the statutory definition has been repealed. It is quite sufficient here, I think, to say that this comes within "or profits whatsoever"; I can have no doubt that here was a profit that was a profit which was in fact given to the managing director and enjoyed by him.

It is to be observed that while the board have expressed their willingness to entertain an application for these shares, nobody was bound and no right was given and no profit was received of any kind by the appellant until the application had been accepted and the shares in question had been allotted to him. At that moment he received from the company 2,500 shares on which there was no clog whatever and he was entitled to go on the market and sell those shares, for which he had paid £1, and he would at once be in a position to receive £3 or £4 or £5, as the case might be.

I think it is really impossible to appreciate the argument which suggests that that was not an immediate profit in the nature of money's worth received by the director as remuneration for his services. It appears to me to correspond very closely in substance to a case where a company might have sold 1,000 tons of its product, if the company were a colliery company, to a director who was in the coal trade, at a price which was one-third of the market price of the day. There no question could arise that the person was receiving a profit in the nature of money's worth and he was receiving that profit in the nature of money's worth to the extent of the difference between the price he could get for it and the price he had actually paid.

For these reasons—I am not quite sure they are precisely the same reasons as those given by the Court of Appeal—this case appears to me to be a very simple case, and I move your Lordships that this case be dismissed with costs.

LORD TOMLIN.—I agree and have nothing to add.

LORD RUSSELL.—I also agree.

LORD MACMILLAN.—I also agree.

LORD WRIGHT.—I agree.

Appeal dismissed.

Solicitors: *Bartlett & Gluckstein*; *Solicitor of Inland Revenue.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

VANN *v.* EATOUGH

[KING'S BENCH DIVISION (Lord Hewart, C.J., Humphreys and Singleton, JJ.), October 9, 1935]

[Reported 154 L.T. 109; 99 J.P. 385; 52 T.L.R. 14; 79 Sol. Jo. 840; 33 L.G.R. 457]

Street Trading—Child—Selling from stall in street market—Children and Young Persons Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 12), *s.* 20 (1).

By s. 20 (1) of the Children and Young Persons Act, 1933: "No person under the age of sixteen years shall engage or be employed in street trading." The respondent, who was teaching his daughter, who was under sixteen years of age, the business of selling from a stall, employed her to sell from a stall in a market held under a royal charter in a street in the borough of Lancaster.

Held: he was guilty of an offence under the above section despite the fact that a market was being held in the street at the time of sale.

Notes. As to the employment of children, see 17 HALSBURY'S LAWS (2nd Edn.) 722 et seq., and for cases, see 28 DIGEST 348 et seq. For Children and Young Persons Act, 1933, see 12 HALSBURY'S STATUTES 974.

Case referred to:

(1) *Stratford Co-operative Society, Ltd.* v. *East Ham Corpn.*, [1915] 2 K.B. 70; 84 L.J.K.B. 645; 112 L.T. 516; 79 J.P. 227; 31 T.L.R. 129; 13 L.G.R. 285; 24 Cox, C.C. 607, D.C.; 28 Digest 348, *2190*.

Case Stated by justices for the borough of Lancaster.

An information was preferred by the appellant, Vann, against the respondent, Eatough, charging him with employing his daughter Violet Eatough, a young person under sixteen years of age, in street trading, contrary to s. 20 of the Children and Young Persons Act, 1933.

On the hearing of the information the following facts were proved or admitted: On Sept. 18, 1934, a market was held on one side of Lower Church-street, Lancaster, under a charter granted by King Edward III to the borough in 1363, by which a market was permitted to be held every Wednesday and Saturday. The charter provided that persons selling from stalls in the market should pay a toll to the corporation. The respondent occupied a stall in the said street on Sept. 8, 1934, and had paid a toll of 3s. to the corporation, as required by the charter. His stall consisted of a collapsible trestle table, extended by boxes, and covering approximately 18 ft. along and 8 ft. across the street. Vegetables and flowers were on sale at the stall. The respondent employed his daughter, Violet, to sell from the stall, and on Sept. 8, 1934, she sold a cauliflower to one Edith Burrows. The respondent was teaching his daughter the business of selling from a stall.

It was contended for the appellant that the respondent employed his daughter in street trading, and that she was none the less selling goods in a street because a market was held there. It was contended for the respondent that Violet Eatough was not trading in a street, but in a market. The justices dismissed the information, and the appellant appealed to the Divisional Court.

Ralph Etherton for the appellant.

Sandlands, K.C., and *J. A. Grieves* for the respondent.

LORD HEWART, C.J.—The present case is the exact converse of *Stratford Co-operative Society, Ltd.* v. *East Ham Corpn.* (1), which has been relied upon by the respondent. In that case ROWLATT, J., said ([1915] 2 K.B. at p. 77):

> "I think 'street trading' means trading with customers found in the street—with customers whose resort is the street—the trader using the street as a market place, and not trading with customers whom he finds at their houses, to arrive at which he necessarily had to pass through the street."

Applying that statement of the law to the present case, I cannot doubt that the facts disclose a mode of street trading. The appeal must be allowed, and the case remitted to the justices with the direction that the offence which was charged was proved.

HUMPHREYS, J.—I agree.

SINGLETON, J.—I agree.

Appeal allowed.

Solicitors: *Norton, Rose, Greenwell & Co.*, agents for *Sir George Etherton*, Preston; *McKenna & Co.*, agents for *W. H. Winder*, Lancaster.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

THE KATE

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.), March 15, April 5, 1935]

[Reported [1935] P. 100; 104 L.J.P. 36; 154 L.T. 432; 51 T.L.R. 410; 18 Asp. M.L.C. 562]

Dock—Damage to ship alongside quay—Foul berth—Negligence by harbour authority and wharfingers—Lease of quay by authority to wharfingers—Covenant by authority to keep berths in good order—Right of wharfingers to indemnity from authority.

By a lease dated Feb. 28, 1932, and made between the first and second defendants, the first defendants the harbour authority, demised to the second defendants who were wharfingers, a length of quay frontage at a port with the right to berth and moor vessels for loading and discharging at the wharfingers' premises on the quay, and they covenanted to keep "the quay, quay walls, mooring posts or river berths in good order and condition." On Sept. 7, 1933, a motor vessel belonging to the plaintiffs sustained damage while lying aground alongside the quay. In an action by the plaintiffs against both defendants the court found that the first defendants had failed to take reasonable care to see that the berth on which the vessel lay was in a proper condition and that the second defendants had taken no reasonable care to see that the first defendants had remedied defects in the berth regarding which the second defendants had complained to them, and judgment was entered for the plaintiffs against both defendants. On a claim by the second defendants against the first defendants for an indemnity in respect of the damages and costs awarded against them,

Held: notwithstanding the negligence of the second defendants towards the plaintiffs, the damage to the vessel flowed from the breach by the first defendants of the covenant in the lease, and, therefore, the second defendants were entitled to the indemnity which they claimed.

Notes. As to liabilities of harbour authorities, see 30 HALSBURY'S LAWS (2nd Edn.) 988–991, and for cases, see 41 DIGEST 975 et seq.

Cases referred to:

(1) *Mowbray* v. *Merryweather*, [1895] 2 Q.B. 640; 65 L.J.Q.B. 50; 73 L.T. 459; 59 J.P. 804; 44 W.R. 49; 40 Sol. Jo. 9; 14 R. 767, C.A.; 3 Digest 88, *215*.

(2) *Burrows* v. *March Gas and Coke Co.* (1870), L.R. 5 Exch. 67; 39 L.J.Ex. 33; 22 L.T. 24; 18 W.R. 348; affd. (1872), L.R. 7 Exch. 96, Ex.Ch.; 36 Digest (Repl.) 34, *156*.

(3) *Scott* v. *Foley* (1899), 16 T.L.R. 55; 5 Com. Cas. 53; 36 Digest 45, *277*.

Third Party Claim for an indemnity in an action brought by the owners of the motor vessel *Kate* claiming damages from the first defendants, the corporation of Barnstaple, A as harbour authority at Barnstaple, and from the second defendants, Stanbury & Son, Ltd., flour millers and lessees of the corporation of part of the quay frontage on the River Yeo, Barnstaple, for damage received by the *Kate* through lying on the uneven bed of the river while discharging grain to the second defendants at the quay.

On March 5, 1935, SIR BOYD MERRIMAN, P., sitting with Trinity Masters, held that the corporation were liable for negligence in that they failed to take reasonable care to see B that the berth in question was kept in a fit condition as they had covenanted to do in the lease between themselves and the company, and that the company were liable because they knew that the berth had been unsafe and they had taken no reasonable care to satisfy themselves that repair work by the corporation had been efficiently done.

The company claimed from the corporation an indemnity in respect of the damages and costs awarded against them in the plaintiffs' action.

C

Cyril Miller for the company.

R. F. Hayward and *Vere Hunt* for the corporation.

April 5. **SIR BOYD MERRIMAN, P.**—I have already delivered judgment in this case as between the plaintiffs and the two defendants, but I have now to decide the third-party claim by the company against the corporation.

D At the conclusion of the arguments in connection with the plaintiffs' claim, an attempt was made to argue the third-party claim, but it soon became apparent that it was impossible to deal with this satisfactorily until I had expressed my reasons for holding that the plaintiffs were entitled to recover against both defendants. The case was, therefore, argued after the parties had had time to consider my first judgment, and upon the basis that that judgment was accepted for the purpose of the argument. E This present judgment, therefore, is to be read in light of my earlier judgment, but I will summarise the effect of it for the purpose of making my present judgment plain.

Both defendants have been found guilty of negligence towards the plaintiffs, but I need scarcely say that the third-party claim is not based on any attempt to obtain contribution as between one tortfeasor and another, but is based upon the covenant in the lease dated Feb. 29, 1932, whereby the corporation covenanted with the company F to keep the quay, quay wall, mooring posts and river berths (including the berth at which the *Kate* was injured) in good order and condition during the said term. The company allege that the award of damages against them results solely from the breach of this covenant. The corporation, on the other hand, deny that they committed any breach of covenant, and they incorporate in their defence the allegation made in their defence to the plaintiffs' claim, that the damage was due to the *Kate* being improperly G placed on the morning of Sept. 7, 1933, without the knowledge and permission of the corporation or their servants, in a position abreast of the water discharge from the flour mills and partly in one berth and partly in another berth. On the question of damage the corporation also argue, as they are entitled to do, although there is no specific pleading with regard to damages, that, even assuming there was a breach of covenant, the damages claimed are too remote.

H In my former judgment I have already disposed, adversely to the corporation, of the issue raised by their defence to the plaintiffs' claim, and have found that the place where the *Kate* was lying was a recognised berth and that it was not in a reasonably safe condition owing to the negligence of the defendants. It follows, therefore, that I have already found that they were guilty of a breach of the covenant in respect of this very berth; and I do not propose to say anything further on that point. The real I substance of the argument of the corporation is that the liability of the company for the damage sustained by the *Kate* is the result of the independent tort of which they have been found guilty, and that, regarded as a consequence of the corporation's breach of covenant, the damages are too remote; and, secondly, that, in any event, the damages ought not to include costs incurred by the company in fighting the action. This argument was put in several ways, but it always came back to the question of remoteness of damage.

I have found that the corporation knew perfectly well that the berth was unsafe and had allowed things to get gradually worse. On the other hand, I have found that in the middle of August the company were uneasy about the state of the berths generally, and had called upon the corporation to put them in order; but as the letter from their Barnstaple office to the head office of Aug. 19 shows, they were re-assured by the fact that the corporation were doing work upon the berths, and, to quote their own words, "when they have finished, the berths will be in good condition." That remained, so far as any written record is concerned, the state of mind of the company's representatives at Barnstaple until the master of the *Kate* complained on Sept. 6. That complaint, however, related to a particular heap of sand under the *Kate's* stern as she lay alongside the elevator, which I have found had nothing whatever to do with the damage.

In other words, though the company did not know of the actual defect which caused the damage to the *Kate*, they knew that there had been grounds for complaint that the berths were defective and unsafe, and they knew that the corporation had been doing some repair work as the result of their own representations to this effect, but I found, nevertheless, that the company took no care to assure themselves that the results were satisfactory, or to inform the plaintiffs, in these circumstances, that they had not done so, and I have held them guilty of negligence in respect of this failure to warn the plaintiffs.

Counsel for the corporation argues that the damage to the *Kate* resulted solely from this negligence on the part of the company. He says that it is impossible that it should have been in the contemplation of the parties that the company would put a ship on the berth opposite the crane without warning the master of the extent of their own knowledge, or lack of knowledge, as the case might be, of the state of the berths. In particular, he argued that this could not be so, since the corporation had promised the company to remove the heap of sand on the morning of Sept. 7, a thing which it was impossible to do if the *Kate* was moved to the crane.

I will deal with this latter argument first. It would be a formidable argument if there were any ground for supposing that such delay in moving the *Kate* as would have enabled the corporation to remove what I have found to be the irrelevant heap of sand, would have prevented the damage which actually occurred, but I am satisfied that this would not have been so. At most it could only have postponed the damage; though, as the *Kate* did not take the ground until well after nine o'clock, this heap could easily have been removed in time to allow her to be moved on the same tide. The actual removal of the heap of sand would have had no effect whatever in minimising the real danger, though it might possibly have aggravated it by giving her even less support forward than she had. I think counsel for the second defendants is right in arguing that the failure to wait for the corporation to clear the heap of sand may have been a causa sine qua non, but was not a causa causans. It amounts to no more than that it enables the corporation to say that the *Kate* might not have been placed upon the point of danger at the exact moment when she was so placed, but otherwise it would have had no effect upon the matter whatever.

But it remains to deal with the main point—that it was the company's negligence in allowing the *Kate* to move to the dangerous berth, without warning, which was the cause of the damage. In my opinion, this argument is disposed of by *Mowbray* v. *Merryweather* (1). In that case the defendant, the owner of a steamship, had undertaken to provide the plaintiffs, a firm of stevedores, with the gear reasonably fit for the purpose of discharging a cargo. Instead, he supplied a chain so defective that it broke while being used in discharging the cargo, whereby a workman of the plaintiffs was seriously injured. That workman recovered damages against the stevedores under the Employers' Liability Act, 1880, by reason of their negligence in failing to discover the defect as it was held they might have done by the exercise of reasonable care. The very argument used in this case, mutatis mutandis, was addressed to the Court of Appeal. In the course of his judgment LORD ESHER said that there was a contract, a breach of it, and, therefore, a cause of action for which, at any rate, nominal damages would be recoverable. He added that the workman could not have recovered unless, as between himself and the stevedores, the stevedores had been guilty of want of care, but that the stevedores argued that they were not bound to examine the chain because the defendant had warranted it sound, and that they had a right to rely on the warranty and did rely

A on it; and that the defendant could not rely on a duty to use due care which was owed not to him but to the plaintiff workman; and LORD ESHER held that this contention was correct, and that the plaintiffs owed no duty to the defendant to examine the chain before allowing it to be used by their workmen, the only duty they owed in that respect being to the workman. He also approved expressly the judgment of MARTIN, B., in *Burrows* v. *March Gas and Coke Co.* (2), which judgment seems to me to be in point in B the present case. One of the reasons given in support of this decision of the Court of Appeal was that, as in this case, the circumstances were such that the original plaintiff could have recovered direct against the then defendant.

In *Scott* v. *Foley* (3) the claim was founded on a breach by the owner of a warranty in a charterparty that the vessel was "in every way fitted for the voyage and service, and to be so maintained by the owners." The breach alleged was the defective con- C dition of an iron ladder leading to the hold, and it was held that the plaintiff charterer's liability to the stevedore was the natural consequence of the defendant's breach of warranty, notwithstanding that his own negligence in failing to inspect the ladder gave rise to the claim of the stevedore. It will be observed that the warranty was a warranty both that the ship was fit for the service and that it would be so maintained.

As regards both these cases, there is, of course, a difference between a covenant to D keep a thing in repair and a warranty that the thing is at a given time in a particular state of fitness or repair, but it seems to me that there is no distinction in principle. The question in either case is whether the damage sustained is the natural consequence of the breach of contract, notwithstanding some independent negligence on the part of the plaintiff.

I ought, however, to add that counsel for the corporation also took the point that, even E assuming that the present case was governed by the cases I have mentioned, the company had nowhere pleaded or proved that they put the *Kate* on the berth in reliance on the covenant. With regard to this, I need only say that the identical argument was used and rejected in *Mowbray* v. *Merryweather* (1), and that in *Scott* v. *Foley* (3) BIGHAM, J., found no difficulty in holding, apart from any specific evidence, that the warranty was obviously relied upon. I so hold in this case. The company had actually called F on the corporation to fulfil their covenant and were obviously re-assured to some extent by the work which they had seen the corporation doing. In my opinion, the fact that the company did not fulfil their duty to the plaintiffs involved no breach of duty to the corporation; and I hold that, notwithstanding their negligence towards the plaintiffs, they are entitled to say as against the corporation that the resulting damage to the *Kate* flowed from the breach of covenant.

G There remains the question of the costs. It seems to me that when the corporation had pleaded, not only as against the plaintiffs, but as against the company, that the *Kate* had been permitted to lie at a place which was wholly unauthorised as a berth, it was practically impossible for the company to submit to judgment. There is abundant authority, including *Scott* v. *Foley* (3) and the cases there cited, that costs reasonably incurred in defending a claim should be included in the damages. I hold that these H costs were reasonably incurred in the circumstances, and if costs are recoverable at all counsel rightly admitted that there was no distinction to be drawn between the party and party costs, and the solicitor and client costs. For these reasons I give judgment for the indemnity claimed, with costs.

Judgment for second defendants.

Solicitors: *W. & W. Stocken*; *Vandercom, Stanton & Co.*, for Town Clerk, Barnstaple; I *Richards, Butler, Stokes, & Woodham Smith.*

[*Reported by* J. A. PETRIE, ESQ., *Barrister-at-Law.*]

FREDMAN *v.* MINISTER OF HEALTH

[KING'S BENCH DIVISION (Swift, J.), December 16, 1935]

[Reported 154 L.T. 240; 100 J.P. 104; 80 Sol. Jo. 56; 34 L.G.R. 153]

Housing—Clearance order—Right of objector to be heard in opposition to resolution before passed by local authority—Housing Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 39), *s.* 1 (1), *s.* 2 (1).

A local authority passed a resolution under s. 1 of the Housing Act, 1930, declaring an area in their district to be a clearance area, and made a clearance order under s. 2 (1) of the Act. An owner of property in that area contended that the clearance order based on the resolution was bad, because he had not been given an opportunity of being heard in opposition to the proposed order before the resolution was passed.

Held: the local authority were not obliged to hear objections by owners of the property affected before passing the resolution, and that the resolution and subsequent order were valid.

Notes. The Housing Act, 1930, was repealed by the Housing Act, 1936, which in turn was repealed by the Housing Act, 1957, ss. 42, 43 (1) and 44 of which reproduce ss. 1 and 2 of the Act of 1930. The powers and duties of the Minister of Health relating to housing have been transferred to the Minister of Housing and Local Government.

As to clearance orders, see 26 HALSBURY'S LAWS (2nd Edn.) 533 et seq., and for cases, see 38 DIGEST 212 et seq.

Cases referred to:

(1) *Cooper* v. *Wandsworth Board of Works* (1863), 14 C.B.N.S. 180; 2 New Rep. 31; 32 L.J.C.P. 185; 8 L.T. 278; 9 Jur. N.S. 1155; 11 W.R. 646; 143 E.R. 414; 26 Digest 518, *2202*.

(2) *Hopkins* v. *Smethwick Local Board of Health* (1890), 24 Q.B.D. 712; 59 L.J.Q.B. 250; 62 L.T. 783; 54 J.P. 693; 38 W.R. 499; 6 T.L.R. 286, C.A.; 26 Digest 564, *2584*.

Application under s. 11 of the Housing Act, 1930, asking the court to quash a clearance order made by Plymouth City Council and confirmed by the Minister of Health.

In March, 1934, the council passed a resolution under s. 1 of the Act, declaring a certain area within their district to be a clearance area. The applicant, who was the owner of some of the houses in the area, himself caused certain improvements to be made to them, and gave notice of objection to the confirmation of the clearance order by the Minister. In April, 1934, a public local inquiry took place, at which evidence was given that the houses in the area were in a dangerous and insanitary condition by reason of lack of repair. The applicant gave evidence to the effect that the improvements carried out by him had removed the alleged defects. The Minister subsequently confirmed the order. The applicant now asked that it should be quashed on the ground that the council ought to have given him an opportunity of being heard in opposition to the resolution before they passed it.

H. A. Hill for the applicant.

The Solicitor-General (*Sir Donald Somervell, K.C.*) and *R. C. Essenhigh* for the Minister.

SWIFT, J.—On March 5, 1934, the corporation of the City of Plymouth, acting under Part I of the Housing Act, 1930, declared an area in their jurisdiction to be a clearance area, and one in which all buildings should be removed. They proceeded in due course to bring the order which they had made before the Minister of Health for his consideration, and after the proper steps had been taken to comply with the Housing Act, 1930, the Minister confirmed the order. The applicant, Israel Fredman, was the owner of the whole of the property which was situated in the area, and he objected to the order being confirmed by the Minister. He now applies under s. 11 (3) of the Act to this court, contending that before the corporation passed the resolution under s. 1 (1) he ought to have been heard in opposition to the step which they were proposing to take. He

A contends that this order, as confirmed by the Minister, is not an order which is within the Act, or that the requirements of the Act have not been complied with, because he was not heard by the corporation before they passed the resolution declaring this to be a clearance area.

It is a well-known principle of our common law that a tribunal which is by law invested with power to affect property of His Majesty's subjects is bound to give the particular
B subject an opportunity of being heard before it proceeds to deal with the property, and that rule, as was said by WILLES, J., in *Cooper* v. *Wandsworth Board of Works* (1) (14 C.B.N.S. at p. 190) "is of universal application, and founded upon the plainest principles of justice." As counsel for the applicant has pointed out to me, there have been numerous cases arising under all sorts of conditions in which it has been said by the courts that that principle must be regarded by persons who are empowered to deal with
C the property and the liberty of others. No man, by the common law of England, is to be condemned unheard.

That being a broad principle of our law, how far is it applicable in the administration of the provisions of the Housing Act, 1930? I do not think there can be any doubt that that broad principle is incorporated in the Act, and has to be regarded when one is considering the administration of the Housing Acts so far as the conduct of any person
D is concerned who has anything to do which affects the property of a private citizen. The Minister clearly, in confirming an order, has to have regard to the rights of citizens, and has to act in accordance with the dictates of natural justice, and so has the person, in my view, who holds the public local inquiry which the Act imposes. Nobody can suggest for one moment that the principle of the common law that the King's subjects are to be dealt with fairly by those who administer his Acts of Parliaments is not recog-
E nised, and is not implied, in the Housing Act, 1930. Counsel for the applicant has suggested to me that that principle must be applied by the corporation before they pass their resolution and make their clearance order, and there I am bound to say I cannot follow him. Before they pass their resolution the Act of Parliament says what they are to do. They are to consider an official representation or any other information in their possession, which, I suppose, is the information furnished by their own eyes and
F nostrils, if by nothing else, and on considering these, if they are satisfied that an area is dangerous or injurious to the health of the inhabitants of the area, they are to proceed to pass a resolution to that effect. They do not themselves thereby order the property to be pulled down, or to be made sanitary; they do not affect the property in any way, except that by passing their resolution they may bring it one step towards ultimate demolition, and they may thereby depreciate its value, or on the other hand, it is con-
G ceivable that they might enhance its value. It certainly does not affect the property in the way in which the property was affected in *Cooper* v. *Wandsworth District Board of Works* (1) or in the way in which the property was affected in *Hopkins* v. *Smethwick Local Board of Health* (2) which have been cited to me.

There is no obligation on the part of the corporation, and as far as I can see no power on the part of the corporation, to hold an inquiry of any sort before they pass their
H resolution and make their clearance order. What they have to do is to give notice of it when they have made it, and, having given such notice, the owner of the property in the area is informed that he may make his objection to the Minister. I do not think in the scheme of this Act there is any intention on the part of the legislature that the corporation shall hold any inquiry or give anybody any hearing at all. I, therefore, think that this application must be dismissed with costs.

I *Application dismissed.*

Solicitors: *Barnes & Butler*; *Solicitor to the Ministry of Health.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

Re HARWOOD. COLEMAN *v.* INNES

[CHANCERY DIVISION (Farwell, J.), November 12, 1935]

[Reported [1936] Ch. 285; 105 L.J.Ch. 142; 154 L.T. 624]

Charity—Cy-près doctrine—General charitable intent—Gift to named institution accurately described—Institution ceasing to exist before death of testatrix—Further gift, too vaguely described, to non-existent institutions.

A testatrix, by her will, gave £200 to the W. Peace Society, Cambridge, £300 to the Peace Society of Belfast, and £300 to the Peace Society of Dublin. The W. Peace Society had ceased to exist before the death of the testatrix. There was no evidence that there ever had been a Peace Society of Belfast. The Peace Society of Dublin had never existed, but there had been in existence the Dublin Peace Society, which, however, had ceased to exist before the death of the testatrix.

Held: (i) where a testator shows in the will itself some care to identify the particular charitable society he wishes to benefit, the difficulty of showing any general charitable intent if the society once existed, but has ceased to exist before the death of the testator, is very great; (ii) the testatrix had so identified the W. Peace Society, and, therefore, it was not open to the court to hold that there was any such general charitable intent as to allow the application of the cy-près doctrine, and the gift to the W. Peace Society accordingly failed; (iii) as there was a clear intention to benefit by the legacy to the Peace Society of Belfast any society whose object was the promotion of peace and which was connected with Belfast, there was a general charitable intent, and the cy-près doctrine applied; (iv) the testatrix's ideas as to the particular society she wished to benefit by the gift to the non-existent Peace Society of Dublin were extremely vague, but there was an intention to benefit any society whose object was the promotion of peace and which was connected with Dublin, the cy-près doctrine therefore applied.

Notes. As to legacies to unidentifiable or non-existent charitable institutions, and as to indications that the testator thereby intended a general charitable purpose, see 4 HALSBURY'S LAWS (3rd Edn.) 279, 327, and for cases on the subject, see 8 DIGEST (Repl.) 461–464, *1624–1641.*

Case referred to:

(1) *Re Davis,* [1902] 1 Ch. 876; 71 L.J.Ch. 459; 86 L.T. 292; 50 W.R. 378; 46 Sol. Jo. 317; 8 Digest (Repl.) 417, *1086.*

Adjourned Summons taken out by the executors and trustees of a testatrix for the determination of the questions how each of three legacies left by her will should be dealt with. K. E. Jones, on behalf of the Peace Committee of the Society of Friends, claimed a legacy of £200 left to the Wisbech Peace Society, Cambridge; M. F. Greeves, on behalf of the Belfast Branch of the League of Nations Union, claimed a legacy of £300 left to the Peace Society of Belfast; and W. O'C. Brady, on behalf of the League of Nations Society of Ireland, claimed a legacy of £300 left to the Peace Society of Dublin. The facts appear in the judgment.

J. V. Nesbitt for the plaintiffs, the executors.
Winterbotham for K. E. Jones.
Andrew Clark for M. F. Greeves.
G. W. Knowles (*G. E. Timins* with him) for W. O'C. Brady.
Wilfrid Hunt for the residuary legatee.
Andrewes-Uthwatt for the Attorney-General.

FARWELL, J.—The first question that I have to determine is whether a gift of £200 "to the Wisbech Peace Society, Cambridge," fails. The evidence is that this particular society ceased to exist in the testatrix's lifetime. It is said that it is being still carried on as part of the work of the Peace Committee of the Society of Friends. The onus is upon them to show that they are the persons entitled to take. The evidence in this case is so unsatisfactory that I cannot say that that onus has been discharged.

That leaves the question whether there is any general charitable intent, so as to admit of the application of the cy-près doctrine. In the will there is a long list of various charitable societies, including charities whose work is devoted to peace. It is said that as this is one of a long list of charitable legacies there is a general charitable intent. On the other hand, it is said that where there is a gift to a particular society, which once existed but ceased to exist before the death of the testator or testatrix, the gift lapses and there is no room for the cy-près doctrine. I have been referred to *Re Davis* (1). In that case the learned judge was able to come to the conclusion that as to one particular gift there was a general charitable intent; but in that case no such society as that named in the will had ever existed. It was not a case of a society which had been in existence and had ceased to exist. I do not decide that it can never be possible for the court to hold that there is a general charitable intent in a case where the charity named in the will once existed but ceased to exist before the death. Without deciding that, it is enough for me to say that, where the testator selects as the object of his bounty a particular charity and shows in the will itself some care to identify the particular society which he desires to benefit, the difficulty of finding any general charitable intent in such case if the named society once existed, but ceased to exist before the death of the testator, is very great. Here the testatrix has gone out of her way to identify the object of her bounty. In this particular case she has identified it as being "the Wisbech Peace Society, Cambridge (which is a branch of the London Peace Society)." Under those circumstances, I do not think it is open to me to hold that there is in this case any such general charitable intent as to allow the application of the cy-près doctrine.

Accordingly, in my judgment, the legacy of £200 fails and is undisposed of.

Then there is the gift to the "Peace Society of Belfast."

The claimant for this legacy is the Belfast Branch of the League of Nations Union. I am quite unable on the evidence to say that that was the society which this lady intended to benefit, and I doubt whether the lady herself knew exactly what society she did mean to benefit. I think she had a desire to benefit any society which was formed for the purpose of promoting peace and was connected with Belfast. Beyond that, I do not think that she had any very clear idea in her mind. That is rather indicated by the pencil note which was found after her death. At any rate, I cannot say that by the description, "the Peace Society of Belfast," the lady meant the Belfast Branch of the League of Nations Union; but there is enough in this case to enable me to say that, although there is no gift to any existing society, the gift does not fail. It is a good charitable gift and must be applied cy-près. The evidence suggests that at some time or other, possibly before the late war, there may have been a society called the Peace Society of Belfast. It is all hearsay evidence; there is nothing in the least definite about it, and it does not satisfy me that there ever was any society in existence which exactly fits the description in this case, and, there being a clear intention on the part of the lady, as expressed in her will, to benefit societies whose object was the promotion of peace and there being no such society as that named in her will, in this case there is a general charitable intent, and, accordingly, the doctrine of cy-près applies.

The next legacy is "to the Peace Society of Dublin the sum of £300." The claimant to that legacy is a society known as the League of Nations Society of Ireland. The way in which the claim is put is not the same as in the case of the Belfast Society. It is said that there was a society known as the Dublin Peace Society, the name of which was afterwards changed to the Irish Peace Society; that it ceased to exist many years ago, and that what was left of its funds was handed over to this new society, when it came into existence, and the old society is now being carried on by the existing society. The evidence does not satisfy me that that is so, and I am unable to say that the League of Nations Society of Ireland is entitled to the legacy. Then it is said that since there was at one time a society which answers the description in the will, and has now ceased to exist, there is a lapse and the legacy fails. I think that it is very probable that, if there was now a society in existence known as the Dublin Peace Society, having regard to the evidence here, such a society would have had little difficulty in establishing that

A it was the society which the lady intended to benefit; but the evidence shows that there never was a society which answered the exact description in the will, "the Peace Society of Dublin." It is also clear from the memorandum which the lady left, which was found after her death, that her ideas as to any particular society which she desired to benefit by this gift were extremely vague; her one idea seems to have been to benefit any society whose object was the promotion of peace which was connected with Dublin. B Under those circumstances, there never having been any society which exactly answers the description in the will, this again is a case where the doctrine of cy-près applies.

Declaration accordingly.

Solicitors: *Barlow, Lyde & Gilbert,* for *Wilmshurst & Kaye,* Huddersfield; *Waterhouse & Co.*; *Peake & Co.*; *G. H. Mennell*; *Treasury Solicitor.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*] C

D

Re SHENTON

[CHANCERY DIVISION (Clauson and Farwell, JJ.), May 27, 1935]

E [Reported [1935] Ch. 651; 153 L.T. 343; 104 L.J.Ch. 311; [1934–35] B. & C.R. 201]

Bankruptcy—Deed of Arrangement—No trust for payment of preferential debts—Creditor who would have been preferential creditor in a bankruptcy—Agreement to prefer creditor—Enforceability of agreement—Deeds of Arrangement Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 47), *s.* 17—*Trustee Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 19), *s.* 15 (*f*)—*Law of Property* (*Amendment*) *Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 11), *s.* 3 (1). F

On April 2, 1933, the debtor executed a deed of arrangement in favour of a trustee and his creditors, but such deed did not contain a trust for preferential payment of those persons who would have been preferential creditors if the debtor had been made a bankrupt. On May 22, 1933, the trustee's solicitors informed the solicitors for an employee who would have been a preferential creditor in a bankruptcy that the trustee would treat the employee's claim as a preferential claim. G Subsequently the trustee refused to treat the employee's claim as a preferential claim.

Held: the trustee was bound to treat the employee's claim as a preferential claim because (i) the letter of May 22, 1933, and the employee's consequent acquiescence in the deed constituted an agreement for good consideration that the trustee H would treat the employee as a preferential creditor; (ii) this agreement to treat the employee as a preferential creditor was within the power to "compromise, compound . . . or otherwise settle any debt . . . claim or thing whatever relating to the . . . estate or to the trust" conferred on the trustee by s. 15 (f) of the Trustee Act, 1925, as applied to a trustee under a deed of arrangement by s. 3 (1) of the Law of Property (Amendment) Act, 1926, and was, therefore, binding on I the trustee.

Per CURIAM: It is not by virtue of s. 17 of the Deeds of Arrangement Act, 1914, that the workman must be treated as a preferential creditor: s. 17 merely protects the trustee from criminal liability and has no effect on the civil rights of the parties.

Notes. The Workmen's Compensation Act, 1925, has been repealed: Workmen's Compensation is now replaced by National Insurance benefits.

Referred to: *Re Moss, Westminster Corpn.* v. *Reubens,* [1935] W.N. 171; *Re Risdel, Risdel* v. *Rawlinson,* [1947] 2 All E.R. 160.

A As to the powers of a trustee under a valid and operative deed of arrangement, see 2 HALSBURY'S LAWS (3rd Edn.) 620, para. 1237.

For the Deeds of Arrangement Act, 1914, s. 17, see 2 HALSBURY'S STATUTES (2nd Edn.) 316, for the Law of Property (Amendment) Act, 1926, s. 3 (1), see 20 HALSBURY'S STATUTES (2nd Edn.) 900, and for the Trustee Act, 1925, s. 15 (f), see 26 HALSBURY'S STATUTES (2nd Edn.) 73.

B **Appeal** by the trustee under a deed of arrangement from the Staffordshire County Court, made on a summons under the Deeds of Arrangement Act, 1914, that a creditor whom he had agreed to treat as a preferential creditor should be so treated.

On April 21, 1933, the debtor executed a deed of arrangement in favour of a trustee and his creditors, but such deed did not contain a trust for preferential payment of those persons who would be preferential creditors.

C By an award made in January, 1931, Samuel Harris, the creditor, an employee of the debtor, was certified to be suffering from silicosis, an industrial disease within the meaning of the Workmen's Compensation Act, 1925, and by reason of such award the creditor at the date of the execution of the deed of arrangement was in receipt of £1 3s. 10d. from the debtor as compensation under the Act.

On May 22, 1933, the trustee's solicitors wrote to the creditor's solicitors as follows:

D

> "Adverting to our conversation with you some little time ago. We have now heard from the trustee of the deed of assignment executed by Mr. Shenton and he instructs us that Harris's claim to compensation is being treated by him as a preferential claim, and that in accordance with the suggestion made at our interview with you Harris will be paid his present weekly compensation until some further arrangement is made between us."

E However, on June 7, 1934, the trustee's solicitors wrote to the creditor's solicitors that on the advice of their counsel they were not prepared to admit his claim to preferential treatment.

Eventually the creditor issued this summons, which asked (inter alia) whether he was entitled to preferential payment.

F The county court judge held in favour of the creditor, and ordered that the trustee should admit him as creditor under the deed and treat him as preferential creditor under the provisions of s. 17 of the Deeds of Arrangement Act, 1914, as if the estate of the debtor was being administered in bankruptcy.

Section 17 provides that:

G

> "if a trustee under a deed of arrangement pays to any creditor out of the debtor's property a larger sum in proportion to the creditor's claim than that paid to other creditors entitled to the benefit of the deed, then, unless the deed authorises him to do so, or unless such payments . . . are such as would be lawful in a bankruptcy, he shall be guilty of a misdemeanour."

Section 3 (1) of the Law of Property (Amendment) Act, 1926, provides that:

H

> "for the purposes of the . . . Trustee Act, 1925, . . . the expression 'trust corporation' includes . . . in relation to . . . property subject to a deed of arrangement . . . the trustee under the deed."

The trustee appealed.

Allan Walmsley for the trustee.

J. Leonard Stone for the creditor.

I **CLAUSON, J.**—Under the deed of arrangement the trustee primâ facie would be committing a breach of trust if he recognised a preferential creditor as being preferential and paid him in priority over other creditors; he would be committing a breach of trust so far as the deed was concerned, because there is no provision in the deed which enables him to do that. I mention, though I do not think it is strictly relevant to this matter, that there is a provision in s. 17 of the Deeds of Arrangement Act, 1914, which provides that a trustee who makes a payment which would be justified in bankruptcy is not committing a misdemeanour, whereas trustees who make certain other payments not authorised by the deed may be guilty of a misdemeanour. That does not throw light in itself upon what would or would not be a breach of trust, and it must be taken that, on the terms of this deed, and it is on this footing that I give this judgment, to pay a preferential creditor by way of preference would be a breach of trust. [His Lordship dealt with facts, and continued:] On the construction of the letter of May 22, 1933, in the circumstances which have arisen, I am of opinion that there was an agreement between the trustee and the workman that, on the terms that the workman assented to the deed, he was to be treated as a preferential creditor in respect of his claim under the award, on precisely the same footing as if the affairs of the debtor were in bankruptcy. If I am right in treating that as the true construction of the letter, then, in my view, that arrangement is an arrangement which is binding upon the trustee and upon the creditors, because, although it is not expressly justified by the terms of the deed, it is justified by the addition to the deed which is in effect made by s. 15 of the Trustee Act, 1925. For the purposes of that section the trustee of a deed of arrangement is by virtue of s. 3 (1) of the Law of Property (Amendment) Act, 1926, to be treated as a trust corporation: and accordingly the effect of s. 15 of the Act of 1925 is that he may, if and as he thinks fit

> (*f*) "compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the . . . trust; and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith."

On the construction which I give to that letter the arrangement which was made between the trustee and the workman amounted, in my opinion, to an arrangement which was justified by sub-cl. (*f*). If that be so, to carry out that arrangement is no breach of trust and the trustee is now bound to carry it out, and, accordingly, to treat the workman as a preferential creditor.

The way in which the matter comes before us is this: that arrangement having been made, at some later date the trustee was advised, or it may be that some of the creditors took the view, that it was an arrangement which ought not to be carried out, and that the workman ought to be relegated to the position of an ordinary creditor without any preference. With a view to bringing the matter to an issue, which was quite a proper and reasonable thing to do, the trustee took out a summons under the Deeds of Arrangement Act before the proper court asking for the determination of the following question, namely, whether the workman

> "is a creditor entitled to the benefit of the trusts and provisions of the said deed of assignment and if so whether he is entitled to any preferential payment."

The county court judge ordered:

> "that the trustee do admit the said Samuel Harris as a creditor under the deed and treat him as a preferential creditor pursuant to s. 17 of the Deeds of Arrangement Act, 1914."

We have not the advantage of having the reasons of the county court judge in detail; but, as that order stands, it appears to me not to be correct in form, because it is not by virtue of s. 17 that this workman must be treated as a preferential creditor. Section 17 merely protects the trustee from criminal liability if he deals with the matter in such a way as it might be dealt with in bankruptcy. That has no effect on the civil rights of the parties. In my view the right order is to declare that, in the events which have happened, the trustee is bound to treat the workman as a preferential creditor as though the estate were being administered in bankruptcy. Accordingly, in my view, the learned county court judge's judgment ought to be varied in form to that extent, but the result is in substance the same.

FARWELL, J.—I agree. If the arrangement which was made between the trustee and the creditor be a binding arrangement, it is not one which can be justified under the deed itself. However, it appears that by virtue of the Law of Property (Amendment) Act, 1926, s. 3, s. 15 of the Trustee Act, 1925, applies to a trustee under a deed of this

A kind. That being so, such a trustee has the powers which are given by s. 15 including a power to:

> (*f*) "compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust."

B In this case there was a claim by a creditor who had not assented to the deed that he was entitled to be paid by the debtor, and it may be that, failing payment or agreement, he had remedies against the debtor which he could have enforced. Under those circumstances the creditor's solicitor approached the trustee, and, as a result of conversations, the trustee's solicitor wrote to the creditor's solicitor the letter of May 22, 1932. In my judgment that letter clearly indicates that an arrangement had been come to between
C the trustee and the creditor as to the creditor's position. It is plain on that letter that the creditor assented to the deed. It would have been impossible after the creditor had received that letter and had been paid the weekly sums thereby agreed, for him to have attacked the deed in any shape or form; he would have been bound by it. If that be so, if he be bound by it, equally, in my judgment, the trustee has bound himself, as he was entitled to do under s. 15 of the Trustee Act, to treat the creditor as a pre-
D ferential creditor. That agreement was one for which there was ample consideration on both sides. It is an agreement which is binding on the trustee, and one which the trustee could properly enter into having regard to the provisions of s. 15. Under those circumstances the trustee is bound to give effect to the agreement which he has made.

Appeal dismissed; order varied.

Solicitors: *Hancock & Willis*, for *Hugh W. Adams & Ellis*, Tunstall, Staffs.; *Preston,*
E *Lane-Claypon & O'Kelly*, for *Hollinshead & Moody*, Tunstall, Staffs.

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

F

MATANIA *v.* THE NATIONAL PROVINCIAL BANK, LTD., AND OTHERS

G

[KING'S BENCH DIVISION (Charles, J.), December 10, 1935]

[Reported 154 L.T. 103]

Landlord and Tenant—Covenant—Covenant for quiet enjoyment—Building operations on adjoining part of premises—Derogation from grant—Nuisance—Building operations—Dust and noise—Trespass—Second floor of building let for music
H *lessons—Structural alterations to first floor causing noise and lessening of support.*

The tenant under a lease of the second floor of a building had entered into the lease, as the landlords knew, for the purpose of carrying on on the demised premises his profession of a teacher of singing. The lease contained a covenant for quiet enjoyment.

After the tenant had gone into possession of the premises and had begun to carry
I on his profession there, the landlords granted a lease of the first floor of the building to E. That lease contained a term authorising E. to execute structural alterations to the first floor by cutting away walls so as to convert several small rooms into one large one.

Shortly after taking possession, E. began to execute the alterations, employing builders to do the work. The work was properly, carefully and considerately executed by the builders, but it continued for three months, during which period the noise caused by it was so great that the tenant was unable to carry on his professional work. Moreover, his premises were physically interfered with, since a wall supporting his floor was cut away, together with the ceiling and plaster above it, so that there was no support for the floor boards, and gaps appeared between them, whereby the noise caused by the building operations was rendered more audible.

Held: (i) temporary disturbance caused by reasonably carrying out the work of re-construction did not amount to a trespass or a nuisance, and the tenant therefore had no cause of action against E. or against the builders (reversed on appeal, [1936] 2 All E.R. 633). *Harrison* v. *Southwark and Vauxhall Water Co.* (1), [1891] 2 Ch. 409, followed; (ii) the noise created by the building operations, combined with the physical interference with the premises, was a breach of the covenant for quiet enjoyment (*Sanderson* v. *Mayor of Berwick-on-Tweed* (2) (1884), 13 Q.B.D. 547, applied), and was also a derogation by the lessors from their grant, (*Lyttelton Times Co., Ltd.* v. *Warner's, Ltd.* (3), [1907] A.C. 476, and *O'Cedar, Ltd.* v. *The Slough Trading Co., Ltd.* (4), [1927] 2 K.B. 123, applied) for both of which the tenant was entitled to recover damages from the landlords.

Notes. This decision was reversed by the Court of Appeal, [1936] 2 All E.R. 633, as regards the judgment against the landlords on the ground that their consent to the alterations was expressly conditional on the first floor tenants obtaining the tenant's consent, and that, as the first floor tenants did not obtain this consent, the alterations were made unlawfully and without the landlords' consent and so were neither a breach of the covenant of quiet enjoyment nor a derogation from grant. The Court of Appeal refrained from affirming or disapproving the view of Charles, J., that the alterations could amount to such a breach and such derogation. The Court of Appeal also reversed the decision in favour of the first floor tenants on the ground that the work done by its very nature involved a risk of damage to the tenant, and that the first floor tenants were, therefore, liable to the tenant in nuisance.

As to the effect of the covenant for quiet enjoyment, see 20 Halsbury's Laws (2nd Edn.) 239, para. 266, and for cases on the subject, see 31 Digest (Repl.) 139–144, *2767–2822.*

Cases referred to:

(1) *Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409; 60 L.J.Ch. 630; 64 L.T. 864; 36 Digest (Repl.) 253, *46.*

(2) *Sanderson* v. *Mayor of Berwick-on-Tweed* (1884), 13 Q.B.D. 547; 53 L.J.Q.B. 559; 51 L.T. 495; 49 J.P. 6; 33 W.R. 67, C.A.; 31 Digest (Repl.) 141, *2801.*

(3) *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.*, [1907] A.C. 476; 76 L.J.P.C. 100; 97 L.T. 496; 23 T.L.R. 751, P.C.; 31 Digest (Repl.) 145, *2846.*

(4) *O'Cedar, Ltd.* v. *The Slough Trading Co., Ltd.*, [1927] 2 K.B. 123; 96 L.J.K.B. 709; 137 L.T. 208; 43 T.L.R. 382; Digest Supp.

(5) *Bamford* v. *Turnley* (1862), 3 B. & S. 66; 31 L.J.Q.B. 286; 6 L.T. 721; 9 Jur. N.S. 377; 10 W.R. 803; 122 E.R. 27, Ex.Ch.; 36 Digest (Repl.) 262, *123.*

(6) *Dennett* v. *Atherton* (1872), L.R. 7 Q.B. 316; 41 L.J.Q.B. 165; 20 W.R. 442, Ex.Ch.; 31 Digest (Repl.) 130, *2679.*

(7) *Jenkins* v. *Jackson* (1888), 40 Ch.D. 71; 58 L.J.Ch. 124; 60 L.T. 105; 37 W.R. 253; 4 T.L.R. 747; 31 Digest (Repl.) 141, *2804.*

(8) *Shaw* v. *Stenton* (1858), 2 H. & N. 858; 27 L.J.Ex. 253; 30 L.T.O.S. 352; 6 W.R. 327; 157 E.R. 353; 31 Digest (Repl.) 143, *2815.*

(9) *Robinson* v. *Kilvert* (1889), 41 Ch.D. 88; 58 L.J.Ch. 392; 61 L.T. 60; 37 W.R. 545, C.A.; 31 Digest (Repl.) 130, *2676.*

(10) *Browne* v. *Flower*, [1911] 1 Ch. 219; 80 L.J.Ch. 181; 103 L.T. 557; 55 Sol. Jo. 108; 31 Digest (Repl.) 142, *2807.*

(11) *Aldin* v. *Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437; 63 L.J.Ch. 601; 71 L.T. 119; 42 W.R. 553; 10 T.L.R. 452; 38 Sol. Jo. 458; 8 R. 352; 30 Digest (Repl.) 541, *1755.*

(12) *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ltd.*, [1921] 1 Ch. 200; 90 L.J.Ch. 140; 124 L.T. 418; 37 T.L.R. 91; 65 Sol. Jo. 93, C.A.; 31 Digest (Repl.) 138, *2766.*

Action for damages for trespass and nuisance, and for breach of a covenant for quiet enjoyment, and for loss sustained through derogation by lessors from their grant. The facts are summarised in the headnote and are fully set out in the judgment.

Trevor Hunter, K.C., and *Clement Edwards* for the tenant.

P. B. Morle and *R. Knight* for the landlords.

L. W. Morris, K.C., and *S. K. de Ferrars* for the first floor tenants.

Stable, K.C., and *Melford Stevenson* for the builders.

CHARLES, J.—In this case the tenant, Francesco Matania, brings an action against the landlords, the National Provincial Bank, Ltd., the first floor tenants, the Elevenist Syndicate, Ltd., and the builders, T. H. Adamson & Sons, for damages which he sets out under three heads. He says firstly that there has been by the landlords a breach of covenant for quiet enjoyment, and, further, that the landlords derogated from the lease which they granted to him of certain premises to which I will hereafter refer. Against all the defendants he asks for damages for trespass and damages for nuisance. The case has some rather exceptional points in it, which makes it all the more insistent for me to follow out the direction, which has been given in more than one case, that the surrounding circumstances of each case should be closely examined in order that the tribunal may attain, in a legal way, to the best justice that can be given to the litigant.

The facts are that the tenant is a professor of singing, and that at places other than the present premises he had given lessons to various pupils in the art of singing. He desired in 1933 to obtain premises which would be more commodious for the purposes, not only of singing, but of holding concerts and carrying on, if he could, an operatic society, the members of which would have the advantage of his teaching and coaching. So it was that he came into touch with the landlords, who had premises, the ground floor of which they themselves occupied, at 25, Nutford-place. He saw the second floor of those premises, which then, as I gather, consisted of three or four rooms with partitions between them, which the landlords, on his behalf for the specific purpose of his carrying on the musical arts that I have indicated, expressed themselves as willing to remove, so that the whole of the second floor, saving only a piece reserved as a bedroom for the tenant, should be thrown into one large room in which he could teach his pupils, hold his concerts with an audience of something like a hundred and above, and there also hold, if he desired, his operatic society. All these matters were well known to the landlords, and they, with that knowledge, did on May 25, 1933, enter into a lease with the tenant whereby those premises were leased to him under certain terms.

That lease contained two matters which are of importance for me to observe. One is that in cl. 1 (*e*) the tenant enters into the following covenant, that he will

> "permit the lessors or their surveyors agents workmen and others authorised by them respectively at all times and upon due notice during the said term to enter into and upon the hereby demised premises for the purpose of executing and carrying out structural and other works and repairs to the said demised premises or any adjoining premises."

In the same document there is in cl. 4, sub-para. (*b*), a somewhat wide covenant for quiet enjoyment, and that is in these terms:

> "That the lessee paying the rent hereby reserved and performing and observing the several covenants conditions and agreements herein contained and on his part to be performed and observed may (subject to the reservations covenants and provisions herein contained) quietly enjoy the said premises during the said term without any lawful interruption or disturbance from or by the lessors their heirs executors administrators or assigns or any person or persons claiming under or in trust for them."

The alterations to which I have already referred were carried out upon that second floor, which was then turned into one large room and a bedroom, and the tenant entered into possession of those premises on Aug. 25, 1933, and there he began to carry on his work. He obtained a certain number of pupils, some of whom had come on with him from his last studio, and others who had joined with those already there and were desirous of taking singing lessons from him. The premises were much more commodious than his last premises, and seem to have attracted certainly one or two pupils who might not have cared to be taught, all things being equal, in a more restricted space.

All went well—the tenant had got some pupils—until the early part of 1934, and then the Elevenist Syndicate, Ltd., now the first floor tenants, who, I gather, are a limited company carrying out the business arrangements of the Elevenist Branch of the Christian Science Church, came along and said that they wanted a reading room and were minded to take the first floor under the tenant for that purpose. That floor was split up into a great many small rooms, and it is material that, when granting a lease to the first floor tenants, as the landlords did upon March 23, 1934, the landlords were well aware of what was going to happen—well aware, if they were people of sense at all, what would be the effect upon the tenant on the floor above. They were also aware that it was their duty, and not the duty of the first floor tenants, before they could establish that as a firm and sound lease, to get the consent of the head landlords, the proprietors of the Portman Estate. In the lease which the landlords granted upon March 23, 1934, to the first floor tenants, there is this clause, para. (*c*), in cl. 1:

> "At their own expense and during the said term to execute in a proper and workmanlike manner and"

and these words seem to me, having regard to the authorities, to be of great importance

> "to the satisfaction of the lessors or their surveyor the alterations and works set out in and in accordance with plans and specifications"—again these words are important—"approved in writing by the lessors with such modifications as may be approved by the lessors."

The landlords had, during the negotiations, communicated with the first floor tenant, and said upon July 13, 1933—the negotiations went on for some time—as to the alterations:

> "Any alterations proposed by the tenants must be submitted to us for approval by [our] architect, and we would mention"—that is all—"that such alterations will require the approval of our head lessor,"

which it was their duty to obtain. On Sept. 25, 1933, the landlords again communicated with the first floor tenants, and, after some criticisms, which were the result of further advices by their own, the landlords' architect, they say: "Apart from the above matters, subject to the consent of the Portman Estate, the proposed alterations appear to be in order."

So there we have this position: the landlords have let to the tenant for a special purpose, of which they were fully apprised, and which had caused them to alter their premises, in order to satisfy it. As between the tenant and the first floor tenants the fact that no consent to the alterations was ever obtained from the tenant, as was required by a term of the Portman Estate licence, is really not of importance. I had evidence given to me by an officer of the first floor tenants, who said that it never occurred to him that he should get the consent of the tenant. Whether it occurred to him or whether it did not, the landlords never did, and nobody did. That being the position, on March 26, three days after the signing of that agreement between the landlords and the first floor tenants, work commenced and work went on until July 4, when it was completed. The tenant, whose consent had not been asked, very quickly found that that result of these alterations, to which I will refer hereafter, was that it made it absolutely impossible for him to carry on his music lessons, or, indeed, to carry on sensible conversation in that room at all, because of the extravagant, though perhaps unavoidable, noise that these operations at once began to show would appear during the continuance of those alterations. On March 30, that is only four days after, he writes a very clear letter, an extremely reasonable letter, saying he will do all he can when they get into the reading room to avoid the sound of his music school coming down to the reading room to their disturbance, and saying he will put insulators under his piano and carpets down if they thought it desirable. His action seems to have been very reasonable in the matter. But he says this:

> "The builders started on Monday, the 26th inst., and although I appreciate the care on the part of the foreman in conducting the work downstairs, I am compelled to tell you that since Monday it has been quite impossible for me to carry on my work. The unavoidable hammering for the demolition, and especially for the preparation and installation of the girders, which are directly underneath my studio, and the consequent shaking and noise, make it utterly impossible for me to give lessons, although I have made every effort to do so. The work starts at 8 a.m. and finishes at 5 p.m., and from 5–6.30 (when I must leave for evening school) leaves me, as you will appreciate, far too short a space of time within which to give all my lessons. I understand that this state of affairs is necessarily to continue for some time, and I can only, therefore, leave it to your committee, with whom I would like an interview on the matter, to see that some friendly arrangement be reached in order to reduce my loss."

It was a very great pity, inasmuch as the loss to the tenant was so plain and so undoubted, that these parties did not do that which, at that stage, they might have done for a comparatively few pounds, as I will indicate, namely, get rid of the trouble that endured until July 4.

Evidence has been given *in extenso* as to what happened in that room below the tenant. I am only going to refer to some matters because upon the evidence I find as a fact, that there was physical interference with the tenant's tenement. There was a thickish wall which formed partly the support upon which the tenant's room rested. That was knocked down, with all the inevitable noise, dirt, dust, and confusion that such an operation must entail, and in its place a girder was put up. That was in order to free the room of the hampering presence of the wall. In order to put the girder up, the ceiling which was below the tenant's room was, to a large extent, cut away, and the plaster taken off and the floorboards of the tenant's room exposed from the lower side, with the result that from the upper side—this is where physical interference comes in—where heretofore he had a floor supported by a wall with the covering of the cement that was removed, now, as he put it somewhat dramatically, and as is confirmed by the workmen, he was standing on a grid instead of a floor. The workmen who gave evidence on behalf of the builders said that the spaces between the boards—for it was an old house—were something like ⅜ in. wide, so that the tenant's description is not altogether inapt. The alterations were extensive, and not only inevitably produced noise, alteration of the support, and exposure of the floorboards so that the spaces were open from the tenant's room down into the room below, but the results were inevitable, as the landlords knew, because their architect had gone into the plans, approved them and criticised them. The landlords knew that that which happened in fact would happen. The extent of the noise and the dust, in my judgment, have been in no way exaggerated. The condition of the stairs has been exaggerated, for it is said that the mortar, which had to be employed during the carrying out of these alterations, was mixed at the side of the entrance hall, and that a heap of sand, which was designed for the mixing of the mortar, was put down just outside the entrance door, and so a good deal of inconvenience and dirt was inevitably, I find, caused in that hall, and also upon the stairway. That hall was the only entrance that the tenant had for his second floor, which had been let to him by the landlords. I say that the matter has been exaggerated because some people have said that the mess made the hall practically impassable; others have said that they trod freely through the entrance hall without getting their shoes dirty. Witnesses, both male and female, asserted that really the mixing of the mortar was more to the side, and that if you took a little reasonable care you could get past without disaster and so up the stairs into the tenant's room. Some point was made about getting to the top of the stairs, because as the stairs were being altered a temporary stairway or passover had to be made. I think there is nothing in that at all because the stairs were altered for the tenant's benefit, and he knew it, and the stairs, as altered, made a greatly improved manner of access to his room on the second floor.

Although the noise and the dirt and the dust resulting from these alterations was very great, so great I am quite satisfied as to make the second floor uninhabitable because you could not carry on a conversation with comfort there, much less give

A music lessons—I am unable to see that anything in the carrying out of these operations was carried out by the builders, on behalf of the first floor tenants, other than in a proper and reasonable way, avoiding unnecessary noise, unnecessary dirt, and unnecessary dust. Having said that, however, I am left with the conclusion of fact that the noise was intolerable, that the dust was intolerable, and that to a certain extent, the dirt was an inconvenience, but not intolerable.

B What, then, is the legal position upon those facts? I am satisfied that no nuisance has been committed. I consider myself to be bound by a case so often approved (*Harrison* v. *Southwark and Vauxhall Water Co.* (1)). In the judgment of VAUGHAN WILLIAMS, J., I find this ([1891] 2 Ch. at p. 413):

> C "It frequently happens that the owners or occupiers of land cause, in the execution of lawful works in the ordinary user of land, a considerable amount of temporary annoyance to their neighbours; but they are not necessarily on that account held to be guilty of causing an unlawful nuisance. The business of life could not be carried on if it were so. For instance, a man who pulls down his house for the purpose of building a new one no doubt causes considerable inconvenience to his next door neighbours during the process of demolition; but he is not responsible as for a D nuisance if he uses all reasonable skill and care to avoid annoyance to his neighbour by the works of demolition. Nor is he liable to an action, even though the noise and dust and the consequent annoyance be such as would constitute a nuisance if the same, instead of being created for the purpose of the demolition of the house, had been created in sheer wantonness, or in the execution of works for a purpose involving a permanent continuance of the noise and dust. For the law, in judging E what constitutes a nuisance, does take into consideration both the object and duration of that which is said to constitute the nuisance."

That case has been quoted and approved many times, and it is only a reiteration of the old cases such as *Bamford* v. *Turnley* (5), where BRAMWELL, B., says (3 B. & S. at p. 83):

> "It seems to me that that principle may be deduced from the character of these cases, and is this, namely, that those acts necessary for the common and ordinary F use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action."

So far as one can judge upon the evidence, these troublesome matters were conveniently done; I think that really means done with reasonable care. I come to that conclusion with some hesitation for this reason: one has to judge when something that is temporary passes from a proper connotation of the word "temporary" into G something more. Although, in the cases quoted to me, generally I find the temporary character to be something like a month, I find here that the trouble went on from March 26 to July 4, and therefore, having regard to the facts of this case, I come to that conclusion with some hesitancy because of the very length of time for which this intolerable inconvenience was imposed upon the tenant and because of the damage which it caused him. However, I think, having re-read the cases which govern the matter, H that I should not be justified in finding that the execution of these works, properly, carefully, and considerately executed, amounted to a nuisance.

Does that mean that the tenant must fail against all the defendants? He fails against all defendants in matters of trespass and nuisance, but, for reasons which I will now shortly develop, I do not consider that he fails against the landlords, either on the head of a breach of covenant for quiet enjoyment or upon the head of derogation from I the rights conferred by them upon him in the lease of May 25, 1933. There must be an interference in order that there may be a breach of covenant for quiet enjoyment; there must be an interference; some judges have used the words "physical enjoyment," and others the words "physical interference"—there must be something that is tangible. Noise, it has been held, is not tangible, but once you get the breach of covenant for quiet enjoyment involving something that is physical, the plaintiff can recover against persons who so commit such a breach, either for the breach of the covenant if there be some physical interference, or for derogation from the grant given by the lease if the facts justify the court in finding such derogation. I have indicated that the operation of these works not only produced intolerable noise and dust, but actually interfered with the floor of the tenant's room—I repeat his words, for I cannot improve upon them—causing him to stand, not on a sound floor, but on a grid. The effect of that physical interference was twofold; the noise, of course, was greater, and the dust found more or less free access into his room. The noise that came from the hammering and putting up of the girder, the knocking down of the wall, and the dust that resulted from those operations, were all the more evident to the tenant in that room than they would have been if he had not had the protection taken away from his floor by those operations, so as to expose the floor with its three-eighths of an inch, and sometimes more, spaces between the floorboards. The landlords' architect passed all the plans, having criticised them—and indeed his approval was necessary—so the landlords knew exactly what was going to be done in that room. I come to the conclusion, therefore, that there was in this case a breach of the covenant for quiet enjoyment which I have read, and which is not a very narrow one.

Sanderson v. *Mayor of Berwick-on-Tweed* (2), where the court consisted of Brett, M.R., Bowen, L.J., and Fry, L.J. I find this passage (13 Q.B.D. at p. 551) in the course of the judgment of the court, which was delivered by Fry, L.J.:

> "But it appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected."

It had been contended on *Dennett* v. *Atherton* (6) that there was previously an idea, which this very distinguished court found to be a much too narrow idea, that a covenant for quiet enjoyment only affects title and possession. That case has been considered, and there is nothing in any succeeding case that I can find, certainly not in any case of superior authority—that was the Court of Appeal—which limits or alters the true effect of those words. Indeed, it is a matter to a certain extent, of the amount of interference. That is why there is that insistence in the cases that a judge ought to regard closely the facts and circumstances of each case. The comment which is made by Kekewich, J., in *Jenkins* v. *Jackson* (7) (40 Ch.D. at p. 74), upon *Sanderson's Case*, is this:

> "In that case there was water and drainage actually coming into the field demised, and making it, to use the words of the Lord Chief Baron, uninhabitable, that is to say, interrupting the actual physical enjoyment."

That is the words of the Lord Chief Baron referring to the case of *Shaw* v. *Stenton* (8), the doctrine of which is the doctrine which, in the later case of *Sanderson* v. *Mayor of Berwick-on-Tweed* (2), is enunciated by Fry, L.J. It does not seem to me that you can distinguish between water being drained on to land which may be drained off somewhere else and the present case; the drainage of the land may be diverted and the water taken away, leaving the land as it was, and the water as it was, and so introducing a temporary aspect into the matter.

The alterations in the present case continued from March to July, and during that time, or closely towards the end of that time—because, of course, the noise lessened as the work became more completed—the premises were rendered uninhabitable and the physical enjoyment of those premises was completely destroyed. I find that under these circumstances the landlords have been guilty of a breach of the covenant for quiet enjoyment.

Now, what am I to say about derogation? Counsel for the landlords prays in aid strongly that clause to which I earlier referred, which says that the lessor shall have the right to enter upon the premises to do structural repairs. It is to be remembered, however, that the landlords, who entered into that agreement with the tenant, were people who knew for what purpose that room was to be used, and I cannot help thinking that what the parties envisaged, if they envisaged anything structural, was something less than the structural alterations which took place here, and which lasted for months.

It was quite impossible to make that agree with the covenant for quiet enjoyment; it was quite impossible to my mind to execute those alterations in the circumstances without a derogation from the grant that was made to the tenant.

The cases which deal with this matter are very numerous, and I have been referred to a considerable number. The first to which I wish to refer is *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.* (3).

LORD LOREBURN, the Lord Chancellor, says ([1907] A.C. at p. 481):

> "At the root of the difficulties in the case as presented to their Lordships in argument lies this question: ought the fact that one of the parties was the grantor, and the other the grantee of a lease to dominate the decision of the case? The maxim that a grantor cannot derogate from his grant expresses the duty ordinarily laid on a man who sells or leases land. But it does not touch a similar and equally binding duty that may in certain cases be laid on a man who buys or hires land. If A. lets a plot to B., he may not act so as to frustrate the purpose for which in the contemplation of both parties the land was hired. So also if B. takes a plot from A. he may not act so as to frustrate the purpose for which, in the contemplation of both parties, the adjoining plot remaining in A.'s hands was destined. The fact that one lets and the other hires does not create any presumption in favour of either in construing an expressed contract. Nor ought it to create a presumption in construing the implied obligations arising out of a contract. When it is a question of what shall be implied from the contract, it is proper to ascertain what in fact was the purpose, or what were the purposes, to which both intended the land to be put, and, having found that, both should be held to all that was implied in this common intention. . . . One cannot bisect the intention and enforce one half of it when the effect of so doing would be to frustrate the other half."

I have already commented on the view which the parties took as to structural alteration. It is inconceivable to me that the landlords should have deliberately made all these alterations to that second floor for the specific purpose of the somewhat delicate operation of teaching music, and at the same time intended, and believed, that their lessee intended that structural alterations such as I find in this case—extensive demolishing and re-building—should take place in such a way, to his prejudice, that it would for some months be absolutely and utterly impossible for him to use those premises for the purpose required, or even for the ordinary purposes of habitation. Whether it is necessary to refer to many other cases I doubt, for the principles are well established, but a case was quoted to me this morning of *O'Cedar, Ltd.* v. *The Slough Trading Co., Ltd.* (4). That is a decision of BRANSON, J., and he says this ([1927] 2 K.B. at p. 127):

> "It, therefore, becomes material to consider whether the principle that a lessor may not derogate from his grant extends beyond cases in which the purpose of the grant is frustrated to cases in which the purpose can still be achieved albeit at a greater expense or with less convenience. That it does not extend to prevent any interference at all with the enjoyment of the property demised is beyond doubt. This appears from *Robinson* v. *Kilvert* (9), and *Browne* v. *Flower* (10). There must be a substantial interference with the use of the premises for the purposes for which they were demised. I was invited by Mr. Archer to hold that mere interference, although it may be substantial, is not enough, but that the principle applies only in cases in which what has been done frustrates the purpose for which the premises were demised to the lessee. This appears to me to be contrary to the decision of STIRLING, J., in *Aldin* v. *Latimer Clark, Muirhead & Co.* (11), where a substantial interference with the purpose for which the premises had been demised was held to entitle the lessee to damages, although it was not suggested that that purpose had been frustrated. *Aldin* v. *Latimer Clark, Muirhead & Co.* (11) and *Browne* v. *Flower* (10) were treated by the Court of Appeal in *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ltd.* (12) as stating the principle correctly. I see no reason in logic or fairness for limiting the application of the principle to cases in which there has been a complete frustration of the purpose for which the premises were demised."

In the case now before me there was for a period which, as I have indicated, it is difficult to regard fairly as temporary under the circumstances, a complete frustration for at least three months, and I come to the conclusion that upon that head the tenant is entitled to damages.

Now, I consider the question of damages. I have to say at once and without hesitation that the damages are grossly exaggerated. When they came to be tested in court it was made perfectly clear not only that the number of Mr. Matania's pupils were limited, but that some, at any rate, would have been willing to follow him to the Wigmore Hall. On April 6, 1934, that is to say, one week after he wrote that letter saying that it was quite impossible for him to do anything at all in the way of teaching, he ascertained from the Wigmore Hall that for £30 he could get a studio with light and heating, the occupancy of which for that sum he could enjoy from April 16 till July 21, a period which would cover the essential period here. Indeed, the tenant, with great freedom and great clarity, said: if only the landlords would have paid the £30. I would have taken it at once without any hesitation and gone to the Wigmore Studios and carried on my business, but so well as I could. There is March 26 until April 16 when he has no pupils. During that time people go away. I think there is evidence that people get tired of acquiring the arts of singing from the tenant and do not come back. Some people who had gone to the tenant apparently have gone into the provinces and so possibly would not, and probably could not, come back to him. It is displayed to me by his general account that when he makes a move there is a temporary, but inevitable, reduction of his earnings. That was seen when he moved from his last studio to the present studio, concerning which this present litigation is being carried on. However, his claim that he should have £400 odd is, to my mind, out of all reason. I have to do justice between all the parties as well as I can, and I give judgment for the tenant against the landlords for £150.

I give judgment in favour of the first floor tenants and of the builders. Without any sort of application I have no hesitation in saying that both those parties were properly joined, and I must make an order that such costs as the tenant has to pay to the first floor tenants and to the builders must be added to the costs which will be paid by the landlords to the tenant in the matter. There will be judgment for £150, and costs accordingly, accompanied by that which is commonly called a Bullock order.

Solicitors: *Cohen & Cohen, Wilde, Sapte, & Co.*; *Ashurst, Morris, Crisp, & Co.*; *Leighton & Savory.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

Re RISSIK

[CHANCERY DIVISION (Farwell, J.), July 15, 1935]

[Reported [1936] Ch. 68; 105 L.J.Ch. 40; 154 L.T. 100; [1934–5] B. & C.R. 208]

Bankruptcy—Deed of arrangement—Payment of interest on debts—Surplus after discharge of debts—No express or implied provision in deed for payment of interest on debts—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 33 (8), *s.* 69.

Where the trustee under a deed of arrangement has discharged all the debts, and has a surplus in his hands, the creditors are not entitled, without an express or implied provision in the deed to that effect, to interest on their debts.

Notes. As to entitlement of creditors to interest under a deed of arrangement, see 2 HALSBURY'S LAWS (3rd Edn.) 625, para. 1247. For the Bankruptcy Act, 1914, ss. 33 (8), 69, see 2 HALSBURY'S STATUTES (2nd Edn.) 369, 400.

Bankruptcy Motion, by a trustee under a deed of arrangement for the direction of the court.

The motion which raised the question whether creditors are entitled to interest on their debts when a surplus remains in the hands of a trustee under a deed of arrangement after he has discharged all the debts of a deceased debtor, came before the registrar and was adjourned to the judge with the consent of all parties.

The facts appear from the judgment.

Oscar Kean for the trustee.

Gavin Simonds, K.C., and *P. J. Sykes* for the legal personal representatives of the debtor.

C. Duveen for the creditors.

FARWELL, J.—This is a motion by a trustee under a deed of arrangement, dated July 18, 1910, for the direction of the court whether he is entitled to pay to the creditors interest on their debts, and if so at what rate, out of the money in his hands before paying the surplus to the legal personal representatives of the debtor.

The motion in the first instance came before MR. REGISTRAR MELLOR, but with the consent of all parties has been adjourned to me. The debtor by the deed in question assigned to the trustee the whole, or practically the whole, of his property upon the trusts therein contained. He died on Jan. 4, 1928. All the debts have been paid in full, and there is, or will be, a substantial surplus in the hands of the trustee. The representatives of the debtor claim that, subject to the payment of any costs, charges and expenses of the trustee still unpaid, they are entitled to such surplus, while the creditors claim that they are entitled to interest on their debts before there is any surplus for the debtor's representatives. Which of those contentions should prevail depends, in my judgment, wholly upon the true construction of the deed. Unless there is either express or implied some provision in the deed for payment of interest, no interest is payable.

By the deed the property is assigned to the trustee

> "upon trust to pay all rates, taxes, wages, and similar claims, if any, which would be payable in full or in priority in bankruptcy, and subject as aforesaid upon trust thereout to pay and discharge rateably according to the laws of bankruptcy and in such preference or priority and by such dividends as the trustee shall think fit the debts due to the creditors, and to pay the surplus if any to the debtor his executors administrators and assigns."

It is said on behalf of the creditors that under that provision interest is payable by virtue of s. 33 (8) of the Bankruptcy Act, 1914. That subsection provides that:

> "If there is any surplus after payment of the foregoing debts, it shall be applied in

A payment of interest from the date of the receiving order at the rate of four pounds per centum per annum on all debts proved in the bankruptcy."

Section 69 provides for the payment of any surplus to the bankrupt.

It is said that some meaning must be given to the words in the deed "according to the laws of bankruptcy," and that unless these words have the effect of importing that subsection into the deed, they are mere surplusage. I cannot accept that contention. B In my judgment, as a matter of construction, it is reasonably plain that these words relate and relate only to the preceding word "rateably" and do not import any provision as to payment of interest. In my view, the words referred to were inserted in the deed to emphasise the direction that the payment of debts was to be made rateably, and are not apt to provide for payment of interest or to import into the deed any provisions other than those necessary to ensure a rateable distribution. If it had been intended C to provide for payment of interest it would have been easy to so provide in express terms, and in the absence of any such provision there is no justification for reading into the deed an agreement by the debtor to pay interest on the debts. In my judgment, therefore, after payment in full of the debts and costs, the debtor's legal personal representatives are entitled to the balance of the moneys in the hands of the trustee, and I will declare accordingly.

D The costs of all parties of this motion must be taxed as between solicitor and client and retained and paid by the trustee out of the moneys in his hands.

Solicitors: *Wild, Collins, & Crosse*; *Elkin, Henriques & Harford.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

E

F

Re BOWDEN. HULBERT *v.* BOWDEN

[KING'S BENCH DIVISION (Bennett, J.), July 19, 1935]

[Reported [1936] Ch. 71; 105 L.J.Ch. 23; 154 L.T. 157; 79 Sol. Jo. 625]

G *Settlement—Voluntary settlement—Settlement of expected share under father's will—Trustees empowered to receive share from father's executors—Receipt accordingly—Right of settlor to call for transfer of share.*

In 1868 a settlor made a voluntary settlement of any property to which she might become entitled on the death of her father, and she gave the trustees power to give receipts for the same or any part thereof in her name. Her father died in 1869 H and his executors transferred the settlor's share under her father's will to the trustees of the settlement. In 1935 the settlor requested the trustees to transfer to her as her absolute property the funds which her father's executors had transferred to them.

Held: the settlor was not entitled to call for the transfer because (i) the trustees had received the settlor's share under a valid and effective authority from the I settlor; (ii) immediately after such receipt by the trustees the settlor's share became impressed with the trusts declared in the voluntary settlement, and was now held by the trustees on those trusts.

Meek v. *Kettlewell* (1) (1842), 1 Hare 464 and *Re Ellenborough* (2), [1903] 1 Ch. 697 distinguished.

Notes. Applied: *Re Adlard's Settlement Trust, Re Campbell's Settlement Trust, Re Fulton's Settlement Trust, Taylor* v. *Adlard*, [1953] 2 All E.R. 1437.

As to the enforcement of voluntary settlements, see 33 HALSBURY'S LAWS (2nd Edn.) 135–136, para. 229.

Cases referred to:

(1) *Meek* v. *Kettlewell* (1842), 1 Hare, 464; 11 L.J.Ch. 293; 6 Jur. 550; 66 E.R. 1114; on appeal (1843), 1 Ph. 342, L.C.; 25 Digest 225, *543*.

(2) *Re Ellenborough*, [1903] 1 Ch. 697; 72 L.J.Ch. 218; 87 L.T. 714; 51 W.R. 315; 47 Sol. Jo. 255; 40 Digest 537, *800*.

Adjourned Summons by trustees for the directions of the court. The following statement of facts is taken from the judgment of BENNETT, J.: This is a summons in the matter of a settlement dated July 9, 1868, made by the defendant, Miss Catherine Henrietta Bowden, and the plaintiffs ask the court whether they, being the trustees of this settlement, ought to transfer to the settlor as her absolute property investments and cash now held by them representing the funds subject to the settlement.

The settlement was made at the time when the settlor was proposing to become a member of a religious order or community of nuns of the Roman Catholic Church established at Stone in the county of Stafford.

By the settlement she assigned to the trustees the interest in remainder vested in her under her parents' marriage settlement and also an expectation or expectations which so far as material are described in the settlement as all the share and interest "to which upon the decease of the said Henry Bowden [the settlor's father] in her lifetime she may become entitled under and by virtue of his will or any codicil thereto or as one of his next of kin or otherwise from or under the said Henry Bowden."

As regards the second subject which the settlor purported to assign she had only a spes successionis and no property capable of assignment by law; but in addition to purporting to assign her expectation under her father's will or intestacy she appointed the trustees of the settlement her agents to receive her share of whatever might come to her under her father's will. She appointed them her attorneys to receive any property which might become hers. To such an appointment no objection can be taken or is taken. It is plain, I think, that it operated to appoint the two trustees the settlor's agents, to receive anything to which she might become entitled under her father's will or under his intestacy. Then the settlement proceeds to declare the trusts of anything which the agents might receive from the settlor's father as her agents and to provide that it is to be held on trusts not material for the decision of the present question.

The settlor's father died on Nov. 18, 1869, the settlor not having revoked the power of attorney or authority given to the trustees of the settlement to receive the interest to which she might become entitled under her father's will or on his intestacy; and in due course of time these trustees as the settlor's agents received from the executors of the will substantial sums, and from the time when they were received those sums have been held by the original and subsequent trustees on the trusts of the voluntary settlement.

In the year 1935 it seems to have occurred to the settlor that she might not have settled what came to her, so on Jan. 23, 1935, she addressed a communication in writing to the trustees requesting them to transfer to her as her absolute property the cash representing the fund. She states that to the best of her knowledge she never authorised the transfer of any such property to the trustees of that settlement. Those are the facts which give rise to the question raised by the summons.

A. G. N. Cross (*H. F. F. Greenland* with him) for the trustees.

R. W. Goff for the settlor.

J. H. Stamp for the Attorney-General.

P. M. Walters and *R. C. H. Horne* (*Roger Turnbull* with them) for other parties interested.

BENNETT, J.—[His Lordship stated the facts and continued:] Counsel for the settlor submitted that the question should be answered in the affirmative and that the property the subject of the trusts of the settlement should be transferred to her. He based his argument on the authority of *Meek* v. *Kettlewell* (1) and *Re Ellenborough* (2), and contended that the settlement, being a voluntary settlement, was void and altogether unenforceable. Neither of these authorities supports either of his propositions. All that was decided in *Meek* v. *Kettlewell* (1) was that where the assistance of the court of equity is needed to enable the trustees of a voluntary settlement to obtain possession

A of property subjected to the trusts of the voluntary settlement, the property not having been vested in the trustees, a court of equity will render no assistance to the plaintiff.

But here nobody is seeking the assistance of the court of equity to enforce the voluntary settlement. Under a valid authority, unrevoked, the persons appointed trustees under the settlement received the settlor's interest under her father's will, and, immediately after it had been received by them, as a result of her own act and her own B declaration, contained in the voluntary settlement, it became impressed with the trusts contained in the settlement.

No assistance is required from a court of equity to put the property into the hands of the trustees.

I can find no ground which enables me to decide that the trustees of this settlement must, after sixty years, hand over the property to the settlor. I therefore answer the C question in the negative.

Solicitors: *Metcalfe, Hussey, & Hulbert*; *The Treasury Solicitor.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

D

ROBINSON *v.* GRAVES

E [COURT OF APPEAL (Greer, Slesser, and Roche, L.JJ.), February 28, March 1, 1935]

[Reported [1935] 1 K.B. 579; 104 L.J.K.B. 441; 153 L.T. 26; 51 T.L.R. 334; 79 Sol. Jo. 180; 40 Com. Cas. 217]

Work and Labour—Contract—Commission to paint portrait—Not contract for sale of goods.

F The defendant commissioned an artist to paint a three-quarter length portrait of a lady for the sum of 250 guineas, and the artist accepted the commission. The defendant repudiated the contract, and, on the artist suing him for its breach, pleaded s. 4 of the Sale of Goods Act, 1893.

Held: the plaintiff was entitled to succeed because as the contract in substance was for the exercise of skill, and as materials would have passed from the G plaintiff to the defendant only as incidental to that skill, the contract was not a contract for the sale of goods, but one for work and labour and materials supplied, and, therefore, s. 4 did not apply.

Clay v. *Yates* (1) (1856), 1 H. & N. 73, and *Lee* v. *Griffin* (2) (1861), 1 B. & S. 272, considered and applied. Dictum of BAYLEY, J., in *Atkinson* v. *Bell* (3) (1828), 8 B. & C. 277, disapproved. *Isaacs* v. *Hardy* (4) Cab. & El. 287, distinguished.

H Per SLESSER, L.J.: If BLACKBURN, J., in *Lee* v. *Griffin* (2) (1861), 1 B. & S. 272, meant to state that whenever there was an agreement whereby a chattel ultimately would have to be delivered, the contract was, of necessity, for the sale of goods, so wide a proposition could not be supported.

Notes. Section 4 of the Sale of Goods Act was repealed by the Law Reform (Enforcement of Contracts) Act, 1954, s. 2, but the distinction between a sale of goods and a I contract for work labour and materials supplied remains of importance in determining such questions as, for example, the time when the property passes.

Referred to: *Marcel* (*Furriers*), *Ltd.* v. *Tapper*, [1953] 1 All E.R. 15.

As to the distinction between a contract of sale and a contract for work and labour, see 29 HALSBURY'S LAWS (2nd Edn.) 14, para. 12, and for cases on the subject, see 39 DIGEST 359–360, *3–10*.

Cases referred to:

(1) *Clay* v. *Yates* (1856), 1 H. & N. 73; 25 L.J.Ex. 237; 27 L.T.O.S. 126; 2 Jur. N.S. 908; 4 W.R. 557; 156 E.R. 1123; 12 Digest (Repl.) 268, *2068*.

A (2) *Lee* v. *Griffin* (1861), 1 B. & S. 272; 30 L.J.Q.B. 252; 4 L.T. 546; 7 Jur. N.S. 1302; 9 W.R. 702; 121 E.R. 716; 12 Digest (Repl.) 167, *1079*.

(3) *Atkinson* v. *Bell* (1828), 8 B. & C. 277; Dan & Ll. 93; 2 Man. & Ry. K.B. 292; 6 L.J.O.S.K.B. 258; 108 E.R. 1046; 39 Digest 497, *1146*.

(4) *Isaacs* v. *Hardy* (1884), Cab. & El. 287; 39 Digest 360, *10*.

B (5) *Grafton* v. *Armitage* (1845), 2 C.B. 336; 15 L.J.P.C. 20; 6 L.T.O.S. 152; 9 Jur. 1039; 135 E.R. 975; 44 Digest 1293, *1*.

Appeal by the plaintiff from a decision of ACTON, J., in favour of the defendant on the ground that the contract relied on was unenforceable by virtue of s. 4 of the Sale of Goods Act, 1893.

C The plaintiff was a painter of portraits; the defendant was a film producer. On July 27, 1932, the plaintiff was introduced to the defendant at a party given by a friend. The defendant asked the plaintiff his fee for painting a three-quarter length portrait of Miss Finnegan, his fiancée, whom the defendant subsequently married, and the plaintiff said 300 guineas. The defendant said that this was more than he was willing to pay, and after some conversation the parties agreed orally that the plaintiff should paint such a portrait of Miss Finnegan for 250 guineas, one half of the fee to be paid in advance, the work to commence forthwith as the defendant was getting married in September. D Miss Finnegan came to the studio on the next day, when the plaintiff made rough crayon studies for the portrait, and he purchased the canvas and other materials for painting the portrait. On July 30 the plaintiff, the defendant not having communicated with him or sent the 125 guineas, rang up the defendant and asked him if he was really in a position to pay for the portrait. The defendant replied that he was, but that it would be more convenient if he were to pay only 100 guineas down. E The plaintiff agreed to this, and the defendant promised to send on that amount without fail. On Aug. 2 the plaintiff wrote asking the defendant to call and see the studies he had made for the portrait, and asked him to let him have the cheque for 100 guineas on account: "I shall be grateful as you promised to let me have it last week, only I suppose it must have slipped your memory." There was no reply to this letter, but on Aug. 5, the plaintiff having spoken to the defendant on the telephone, the defendant wrote to him F a letter: "We are not entertaining any thought of having a portrait painted." On Aug. 8, 1932, the plaintiff wrote the defendant a letter setting out the facts as stated above and concluded by inviting the defendant to reiterate his instructions to proceed with the portrait: if he did not want the portrait painted the defendant was asked to forward the cheque for 250 guineas. To this letter there was no reply.

G The plaintiff sued for the agreed fee, £262 10s. or damages for breach of contract. By his defence the defendant denied the agreement alleged to have been made with the plaintiff, and pleaded:

> "if and in so far as may be necessary the defendant will rely upon the provisions of s. 4 of the Sale of Goods Act, 1893."

H At the trial, ACTON, J., found the facts as stated above, but held that this was a contract for the sale of goods of the value of £10 and more, and that, as there was no note or memorandum of the contract in writing, it could not be enforced. ACTON, J., said that the rule had been laid down by BLACKBURN, J., in *Lee* v. *Griffin* (2) (4 L.T. at p. 547),

> I "if the contract be such that when carried out it would result in the sale of a chattel, the party cannot sue for work and labour; but if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered,"

and gave judgment for the defendant.

The plaintiff appealed.

The Sale of Goods Act, 1893, s. 4, provides:

> "(1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the

> contract, or in part payment or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf. (2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some other act may be requisite for the making or completing thereof, or rendering the same fit for delivery. (3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not. (4) The provisions of this section do not apply to Scotland."

Sylvain Mayer, K.C., and *John Fennell* for the plaintiff, the artist.
Sylvester Gates for the defendant, the buyer.

GREER, L.J.—This appeal raises an interesting question, which has been well argued and is not free from difficulty. There has not yet been any actual decision on the point involved, though there have been judicial dicta expressing opinions that vary. The question is this: whether, when a client (to use, for the moment, a neutral term) goes to an artist to have a portrait painted, whether it be his own portrait or that of another, and when the commission is accepted by the artist, they have made a bargain for the manufacture of future goods to be delivered when those goods come into existence under circumstances which make it a sale of goods within the meaning of the Sale of Goods Act, 1893, and so within the terms of s. 4 of that Act which has now taken the place of s. 17 of the Statute of Frauds.

I propose to look at the question first apart from authority, because after all we are dealing with the meaning of the English language in this statute and its application to the particular facts of this case. I can imagine nothing which would more surprise a client who goes to a portrait-painter to have his portrait painted, or an eminent artist who accepts such a commission, than to be told that he, either the client or the artist, was making a bargain about the sale of goods. It is, of course, possible that a picture may be ordered under such circumstances as will make it an order for goods to be supplied in the future; but it does not follow that this is the inference to be drawn under all the circumstances as between the client or customer and the artist. Looking at the propositions involved from the point of view of interpreting the words in the English language, it seems to me that the painting of a portrait in these circumstances would not be deemed to be the purchase and sale of that which is produced by the artist. It would, on the contrary, be held to be an undertaking by the artist to exercise such skill as he possessed, in order to produce for reward a thing which would ultimately have to be accepted by the client. If that is so, the contract in this case was not a contract for the sale of goods within the meaning of s. 4 of the Sale of Goods Act, 1893.

There are only two cases to which, I think, it is necessary to refer. The first is *Clay* v. *Yates* (1), which was concerned with the question whether a contract with a printer to print and deliver printed paper to the customer who desired to have it printed was or was not one for the sale of goods; and in the course of the argument MARTIN, B., said (1 H. & N. at p. 76):

> "Suppose an artist paints a portrait for 300 guineas, and supplies the canvas for it, which is worth 10s., surely he might recover under a count for work and labour."

I regard that as an expression of opinion, by a high authority on all questions of the common law, that under those circumstances there would not be any sale of goods but there would be a contract for work and labour. In the other judgments in that case the learned judges seem to me to agree with that view, because POLLOCK, C.B., uses these words (1 H. & N. at p. 78):

> "My impression is, that in the case of a work of art, whether in gold, silver, marble, or plaster, where the application of skill and labour is of the highest description, and the material is of no importance as compared with the labour, the price may be recovered as work, labour, and materials."

Alderson, B., agreed with that judgment and did not find it necessary to add anything, and then Martin, B., said (1 H. & N. at p. 79):

> "I am of the same opinion. There are three matters of charge well known to the law, namely, for labour simply, for labour and materials, and for goods sold and delivered. Now every case must be judged of by itself, and what is the present case?"

Then he deals with the present case and agrees with the judgment that has been delivered by the learned Chief Baron. Bramwell, B., said (1 H. & N. at p. 80):

> "I did not hear the whole of the argument, and will not, therefore, give a decided opinion, but I am inclined to think that the plaintiff is entitled to recover, even assuming Mr. Quain's argument to be right. The contract is to print a treatise and a dedication, the latter to be thereafter furnished. That imposed on the defendant the obligation of furnishing a dedication, such as the plaintiff could by law print."

A contract to make a portrait or produce a portrait involves the fact that the person whose portrait is to be painted should contribute something, that is to say, he should contribute the sittings which are necessary for the purpose of enabling the portrait to be painted.

It is said that the decision in *Clay* v. *Yates* (1) is inconsistent with that in *Lee* v. *Griffin* (2). So far as the facts in *Lee* v. *Griffin* (2) are concerned, it affords no help to the decision of the present case because it was concerned with the question whether, when a dentist undertakes to make a plate of false teeth—more frequently called a denture—that is or is not a sale of goods. In that case a principal part of that which the parties are dealing with is the chattel which will come into existence when such skill as may be necessary to produce it has been applied by the dentist and those who work for him; but in the course of delivering the judgments in that case, Crompton, J., and Hill, J., said nothing whatever which would throw any doubt upon the views expressed in the earlier case of *Clay* v. *Yates* (1). Crompton, J., said (4 L.T. at p. 547):

> "However, on the point which was made at the trial, whether the plaintiff could not succeed on the count for work, labour, and materials, I am also clearly of opinion against the plaintiff. Whether the cause of action be work and labour or goods sold and delivered, depends on the particular nature of each individual contract";

and then he refers to *Clay* v. *Yates* (1) as turning upon the peculiar circumstances of the case, and concludes with these words:

> "I do not agree with the proposition that whenever skill is to be exercised in carrying out the contract, that fact makes it a contract for work and labour, and not for the sale of a chattel; it may be the cause of action is for work and labour, when the materials supplied are merely ancillary, as in the case put of an attorney or printer. But in the present case the goods to be furnished, namely, the teeth, are the principal subject-matter; and the case is nearer that of a tailor, who measures for a garment and afterwards supplies the article fitted."

In giving judgment Hill, J., said (4 L.T. at p. 547):

> "The proposition of Bayley, J. (in *Atkinson* v. *Bell* (1828), 8 B. & C. 277), that where a person has bestowed work and labour on his own materials he cannot maintain an action for work and labour, is certainly not universally true; and Tindal, C.J., as well as the other members of the court, in *Grafton* v. *Armitage* (5), repudiated that doctrine, and explained that Bayley, J., must be regarded as speaking with reference to the particular circumstances of the case then before this Court; and the same view was taken by the Court of Exchequer in *Clay* v. *Yates* (1),"

the case to which I have already referred. It is quite true that in giving judgment Blackburn, J., to whose views on any question of contract or of the common law the greatest weight is to be attached, uses these words (4 L.T. at p. 547):

> "The other question is, whether the present was a contract for the sale of goods, or for work and labour. In order to ascertain this you must, of course, in each case,

> A look at the contract itself. If the contract be such that it will result in the sale of a chattel, the proper form of action, if the employer refuses to accept the article when made, would be for not accepting";

and later in his judgment he said:

> "An attorney employed to draw a deed is a familiar instance of the latter proposi- B tion"—that is to say, where the action is for work and labour—"and it would be an abuse of language to say that the paper or parchment of the deed were goods sold and delivered."

Then he quoted TINDAL, C.J., in *Grafton* v. *Armitage* (5), observing of that case:

> "The substance of the contract was goods to be sold and delivered by the one party to the other."

C I treat that judgment as indicating that in the view of BLACKBURN, J., one has to look to the substance of the contract. If you find, as the court did in *Lee* v. *Griffin* (2), that the substance of the contract was a contract to produce something to be sold by the dentist to the dentist's customer, then that is a sale of goods. But if, on the other hand, the substance of the contract is that skill and labour have to be exercised for the production of the article, and that it is only as ancillary to that that there will pass D from the artist to his client or customer some materials in addition to the skill involved in the production of the article, that does not affect the conclusion that the contract is one for work and labour and materials, because the substance of the contract is for the skill and experience of the artist in producing the article.

I am of opinion that in this case the substance of the matter was an agreement for the exercise of skill, and that it was only as incidental to this that some materials would E have passed from the artist to the gentleman who commissioned the portrait. For these reasons I think that within the meaning of s. 4 of the Sale of Goods Act, 1893, this was not a contract for the sale of goods, but one for work and labour and materials.

That disposes of the subject-matter of this appeal with this exception, that it does not follow that the plaintiff is entitled, as damages, to the full amount that he would have recovered if he had been allowed to complete the contract, because there would F have to be some expenditure by the plaintiff upon the cost of the canvas and the coats of paint to be put upon the canvas, and that ought to be deducted. As no such question was raised or discussed at the trial we think that under the circumstances it is open to this court to say that something ought to be deducted, and the damages therefore should be, not the 250 guineas claimed, but, say, £200. We have to make a guess, and this is rather on the generous side towards the plaintiff, but the only alternative would G be to send the case back for trial, a course which, as I understand the argument, neither party is desirous should be taken. For these reasons I think there ought to be judgment for the plaintiff for £200 damages.

SLESSER, L.J.—I am of the same opinion. In this case the plaintiff is unable to produce any document in writing sufficient evidentially to maintain his contract which has been found to have been made, orally, with the defendant. If this is a contract for H work and labour done, that does not prejudice him. If it is a contract for sale of goods or an agreement to deliver goods under a sale, then the objection has been held to be fatal to him. In my opinion this is a contract for work and labour.

This question, whether such a contract is for sale of goods or for work and labour done which ultimately may produce a chattel which is delivered to the purchaser, has vexed jurists from the earliest stages. According to the Civil Law as finally settled by I JUSTINIAN, the test whether a contract was conductio-operis or emptio-venditio depended upon whether the material was supplied by the employer or by the workman. That view appears to have been accepted by BAYLEY, J., in *Atkinson* v. *Bell* (3), but since that time the dictum of BAYLEY, J., has been repudiated by all the authorities. It was repudiated in *Grafton* v. *Armitage* (5) (2 C.B. at p. 339) by MAULE, J., and ERLE, J. The English doctrine is far more elastic in this matter than that contained in the INSTITUTES OF JUSTINIAN or in most of the foreign civil codes. The question of the ownership of the material on which the work is done is not conclusive of the matter.

Another test which has been suggested is that which appears particularly prominently in the judgment of Blackburn, J., in the case of *Lee* v. *Griffin* (2). There Blackburn, J., said (4 L.T. at p. 547):

> "I do not think that the relative value of the labour and of the materials on which it is bestowed can in any case be the test of what is the cause of action; and that if Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been the less for the sale of a chattel."

It is that observation of that very learned judge which has given me considerable doubt and difficulty in this case, but I have come to the conclusion, looking at the authorities as a whole, and considering the matter as a matter of principle myself, that if Blackburn, J., there meant to state that whenever there was an agreement whereby a chattel would ultimately have to be delivered, that was of necessity for the sale of goods, so wide a proposition cannot be supported. As is indicated by the old plea in Bullen and Leake's Pleadings (2nd Edn.), for a common indebitatus account for work done, what is claimed is

> "money payable by the defendant to the plaintiff for work done and materials provided by the plaintiff for the defendant at his request."

Normally, in the class of case which we have here to consider, when the work has to be done in order to make the chattel fit for ultimate delivery to the purchaser, there will always be, or nearly always be, some material which, at some stage or another, will have to be delivered, and if that be the only test, that delivery of some ultimate material decides that the contract is for the sale of goods, I should find it difficult to understand how cases in which it has always been agreed that the contracts are for work and labour and not for the sale of goods, such as the delivery of written documents of parchment by a solicitor, would not fall within the category of contracts for the sale of goods. But I think that the authorities are clear to the contrary, notwithstanding the weighty observation of Blackburn, J.

In the first of the two cases to which my Lord drew attention, to which, therefore, I need not refer in any detail, that of *Clay* v. *Yates* (1), Pollock, C.B., said (1 H. & N. at p. 78):

> "The true rule is this, whether the work and labour is of the essence of the contract, or whether it is the materials that are found."

Then he gives the illustration of a work of art:

> "Whether it be silver or gold, or marble or common plaster, that is a case of the application of labour of the highest description, and the material is of no sort of importance as compared with the labour; and therefore that all this would be recoverable as work and labour and materials found."

Martin, B., spoke to the same effect, and he said (1 H. & N. at p. 80):

> "I do not think it is profitable to go into an inquiry of the other cases, for in the common sense and understanding of mankind this is clearly a case of work, and labour, and materials."

In *Lee* v. *Griffin* (2), the later case, Crompton, J., seems to me to support that view He said (4 L.T. at p. 547):

> "I do not agree with the proposition that whenever skill is to be exercised in carrying out the contract, that fact makes it a contract for work and labour, and not for the sale of a chattel; it may be the cause of action is for work and labour, when the materials supplied are merely ancillary, as in the case put of an attorney or printer"

—to which I may add, that of a painter of portraits. Hill, J., spoke of there being a sale of goods when the substance of the contract was goods to be sold and delivered, and therefore inferentially suggested that where goods to be sold and delivered were not the substance of the contract but merely ancillary to it, the contract might be one for work and labour; so that all those authorities seem to me to be consistent.

There is one other matter upon which I will comment. It has been pointed out in this case that under s. 5 (1) (*a*) of the Copyright Act, 1911:

> "The author of a work shall be the first owner of the copyright therein: Provided that (*a*) where, in the case of . . . a portrait the . . . original was ordered by some other person and was made for valuable consideration in pursuance of that order then, in the absence of any agreement to the contrary, the person by whom such . . . original was ordered shall be the first owner of the copyright."

There would therefore be in a case such as this a restriction upon the proprietary rights of the painter to dispose of these goods, which one would not have expected to find if the property in the goods was still in an unrestricted state in his disposition before he delivered them, under the contract of sale of goods, to the purchaser. One of the learned judges in an earlier case points out that, in that particular case, where it was held that the contract was one for work and labour, there was a restriction on the power of the printer to dispose of the goods.

I am of opinion that on the facts of this case it is here shown that the material, the paint and the canvas, were merely ancillary to the actual technical work of producing the work of art, and that, therefore, this is a contract for work and labour. I will only guard myself finally by saying that I only decide this case upon its own particular facts. There may be cases where portraits are ordered in circumstances which would constitute the contract one for the sale of a picture as a chattel. In the circumstances of this case, however, where the defendant gave a commission to an artist to paint the portrait of a lady impliedly contracting, as I think, that the lady should attend at the artist's studio that the work might be executed, it is impossible to say that the mere fact that there would result an ultimate delivery of the picture constituted the contract one for the sale of goods. Consequently, s. 4 of the Sale of Goods Act, 1893, is no protection to the defendant in this case, and this appeal must be allowed.

ROCHE, L.J.—The defendant in this action desired that a portrait should be painted of a lady who subsequently became his wife. He, as the learned judge found, entered into a contract with the plaintiff, an artist, for the painting of the lady's picture. The picture was not painted because the defendant refused to go on with the contract. The artist, the plaintiff, sued for the price or for damages. At the trial the defendant disputed the making of a contract. The learned judge at the trial found the facts on this issue entirely in favour of the plaintiff, and held that the contract alleged was established. But the learned judge felt himself bound by the decision in *Lee* v. *Griffin* (2), to hold that the contract between the parties was a contract for the sale of goods and not one for work and labour. In so doing the learned judge was, I think, too much influenced by an expression in the judgment of BLACKBURN, J. (4 L.T. at p. 547), in reference to a well-known goldsmith artist of mediaeval Italy; but, however that may be, the learned judge's conclusion that he was so bound by the decision in *Lee* v. *Griffin* (2) to decide in favour of the defendant was based, I think, on a mistaken view. On the contrary, in my opinion, *Lee* v. *Griffin* (2) is an authority for a decision in favour of the plaintiff. In *Lee* v. *Griffin* (2) the authority of the decision of *Clay* v. *Yates* (1), which clearly is an authority in favour of the plaintiff, was recognised, and in *Lee* v. *Griffin* (2) BLACKBURN, J., whose judgment has been principally relied on as an authority for the defendant, said (4 L.T. at p. 547):

> "If the work and labour be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of sale, then an action for work and labour is the proper remedy. An attorney employed to draw a deed is a familiar instance of the latter proposition; and it would be an abuse of language to say that the paper or parchment of the deed were goods sold and delivered."

Equally, in my judgment, if the history and reality of the transaction involved in the painting of a portrait of this kind is considered, it would be an abuse of language to say that the portrait is sold. In former days the phrase used would have been: What painter are you going to employ to paint the portrait? In these more polite days the phrase is, Who is commissioned to paint the portrait? Both phrases alike represent a transaction which is a mandate or authority given to another for reward to execute a certain thing desired, namely, the production of a portrait or representation of the person giving the commission or of someone whom he wishes to be so represented. That was the language, I think, employed in this case. The evidence was that the defendant asked the plaintiff his fee for a portrait of Miss Finnegan, and then later the plaintiff was commissioned to carry out the work.

In those circumstances, adopting the test put by BLACKBURN, J., in *Lee* v. *Griffin* (2), I have no doubt that the proper conclusion to be drawn is that this was a transaction not for the sale of goods but of the employment of an artist to do work which the defendant desired that he should do. The terms of s. 5 (1) (*a*) of the Copyright Act, 1911, referred to by SLESSER, L.J., tend, I think, towards the same conclusion, because it is plain by reason of that subsection, and I think, also, by reason of the nature of the contract between the parties, that it would be quite impossible, and would amount to a breach of contract, if the plaintiff, when he had begun to paint this portrait on the commission of the defendant, had sold it to someone else. In no respect was this, in my opinion, a transaction of which the end was the delivery of goods. For these reasons I agree that the appeal should be allowed and that judgment should be entered for the plaintiff for the sum of £200.

GREER, L.J.—I had intended to say, and would like to add, that in deciding as we have done we are not deciding anything which is necessarily contrary to the decision of MATHEW, J., in the shortly reported case of *Isaacs* v. *Hardy* (4), which dealt with a contract of a very different kind, where a picture dealer whose sole object was to acquire something that he might sell in his business, engaged an artist to paint and deliver to him a picture of a given subject at an agreed price. It must not be taken that we are in any way overruling that case or deciding in any way as to whether that decision was right or wrong.

Appeal allowed.

Solicitors: *Halliday, Clarke, & Co.*; *Whitelock & Storr.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

BUTTERWORTH (INSPECTOR OF TAXES) *v.* PAGE

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser, and Romer, L.JJ.), November 28, 29, 30, 1933].

[HOUSE OF LORDS (Lord Atkin, Lord Tomlin, Lord Russell, Lord Macmillan and Lord Wright), March 8, 11, 12, April 8, 1935]

[Reported 153 L.T. 34; 19 Tax. Cas. 328]

Income Tax—Award of Royal Commission on awards to inventors—Award made to company—Agreement between company and inventor that moneys received in respect of user of inventions up to certain date should be paid to inventor—Right of inventor to share of award—Liability of inventor to tax in year of award—Whether capital or income in the hands of inventor—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. D.*

In 1909 the respondent sold his engineering business to a private limited company incorporated for the purpose, the price being satisfied by shares in the company. The respondent was appointed whole-time manager of the company for life. In 1917 the government required the company to impart the knowledge necessary to enable contractors to construct aeroplanes of the types designed and built by the company. When the United States of America entered the war of 1914–1918 the British Government required the company to hand to the Government of the United States the designs of their aeroplanes and to instruct American engineers how to build the machines. In 1918 the company and the respondent entered into an agreement for the payment by the company to the respondent of royalties in respect of a licence previously granted orally to the company to use certain inventions and designs, in respect of which the respondent had obtained letters patent. In 1919 the company and the respondent entered into a new agreement which recited that the company owed a large sum to the respondent for royalties payable up to Dec. 31, 1918, and it was agreed that the company would pay to the respondent all royalties and remuneration received by the company for the use of the inventions and designs by the British Government or the United States Government up to that date. The agreement also provided for the assignment to the company of specified inventions, drawings, and letters patent, and for the assignment to contain a covenant by the respondent to communicate to the company all such further inventions in connection with aircraft as he might make during the period of seven years from Jan. 1, 1919. The consideration for the assignment was a considerable number of shares in the company, and the appointment of the respondent as managing director for seven years from Jan. 1, 1919. The sale was made accordingly, and soon afterwards the company became a public company. In December, 1919, the company presented two claims to the Royal Commission on Awards to Inventors relating to the services of the company to the British Government in supplying aircraft designs and imparting knowledge as to the methods of construction of the machines. On the same date two claims were lodged by the company in respect of the user by the United States Government. On May 15, 1922, the Royal Commission made one award of £30,000, under head 3 of the powers conferred by the Royal Warrant of March 19, 1919, in respect of the two claims of the company in relation to the user of their services by the British Government including the user of all parts or appliances covered by the patents referred to in the agreement of 1919. The claims arising out of the American user were dealt with by a special Anglo-American body to which a fresh claim in the names both of the company and the respondent was submitted, based in part on an alleged contract made by the British Government with the respondent to be responsible for compensation in respect of user by the American Government. On March 21, 1923, the joint body awarded £9,000 as compensation to the claimants. The £30,000 was paid to the company in October, 1923, and the £9,000 was paid to the company in the course of the year ending April 5, 1924. On Feb. 14, 1927, the board of directors of the company considered proposals made by the respondent for the settlement of his claims against the company in respect of the two awards, and it was resolved that his claim for approximately £30,400 should be admitted. The respondent was assessed to income tax in respect of that sum under the Income Tax Act, 1918, Sched. D, for the year ending April 5, 1924.

Held (by the Court of Appeal): the sum received by the respondent was not received in the course of the carrying on of his business, but was a capital sum paid to him for the surrender of a capital asset, and, therefore, was not taxable.

Held (by the House of Lords): on the facts, the respondent had no right to any part of the compensation as such received by the company, who did not claim on his behalf or as his agent; the respondent's rights in respect of the compensation were contractual only, arising out of his agreements with the company, and the £30,483 was only received by him when it was paid to him in 1927; and, therefore, the assessment must be discharged.

Decision of the Court of Appeal (infra) affirmed on different grounds.

Notes. The Income Tax Act, 1918, Sched. D, was repealed by the Income Tax Act, 1952, s. 527, and is replaced by Part 5 of the latter Act.

Referred to: *British Salmson Aero Engines, Ltd.* v. *Inland Revenue Commissioners*, [1937] 3 All E.R. 464.

For the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 1.

Cases referred to:

(1) *Constaninesco* v. *R.* (1926) 11 T.C. 730, 740, C.A.; 42 T.L.R. 685; affirmed (1927), 11 T.C. 745, H.L.; 43 T.L.R. 727; 28 Digest 19, *97*.

(2) *Mills* v. *Jones* (1928), 14 T.C. 769; 44 T.L.R. 351; affirmed, 14 T.C. 778, C.A.; 140 L.T. 183; 45 T.L.R. 31; (1929), 14 T.C. 785, H.L.; 142 L.T. 337; 46 T.L.R. 118; Digest Supp.

(3) *Martin* v. *Lowry*; *Martin* v. *Inland Revenue Commissioners*, [1927] A.C. 312, H.L.; 11 T.C. 320; 96 L.J.K.B. 379; 136 L.T. 580; 43 T.L.R. 116; 71 Sol. Jo. 18; 28 Digest 22, *114*.

(4) *Stedeford* v. *Beloe*, [1932] A.C. 388; 101 L.J.K.B. 268; 146 L.T. 456; 48 T.L.R. 291; 76 Sol. Jo. 217; 16 Tax. Cas. 505, H.L.; Digest Supp.

Appeal. This was an appeal by the taxpayer from an order of FINLAY, J., dated July 28, 1933, on a Case Stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the general purposes of the Income Tax Acts for the Division of the Hundred of Gore for the opinion of the King's Bench Division of the High Court of Justice.

The Case Stated (so far as relevant to this report) as follows:

At a meeting of the said commissioners for the general purposes of the Income Tax Acts for the Division of the Hundred of Gore, held at the Court House, Hendon, on Oct. 29, 1930, Frederick Handley Page (hereinafter called "the respondent") appealed against two assessments to income tax made upon him under the provisions of Sched. D of the Income Tax Acts for the years ended April 5, 1923, and April 5, 1924, respectively in the sums of £39,000 each expressed in column 4 of the assessment under the heading of "Description of Trade Profession Vocation Concern or other profit chargeable under Sched. D" as "Royal Commission award in respect of the user of certain patents and designs." The said assessments were made alternatively to protect the position of the revenue in case any question should arise as to the year of receipt of the subject-matters of the assessments. At the hearing of the appeal the assessment for the year ended April 5, 1923, was abandoned, and the commissioners accordingly discharged it. It was agreed that if there was liability the assessment of £39,000 for the year ended April 5, 1924, should be reduced to £30,483.

The following facts were admitted or proved:

A company called Handley Page, Ltd. (hereinafter called "the company") was registered under the Companies (Consolidation) Act, 1908, as a private company on June 17, 1909, for the purposes, inter alia, of acquiring from the respondent the business of an engineer carried on by him at Woolwich together with the goodwill, plant, machinery, &c., and also an invention and a design of which the respondent was the author and registered proprietor. The terms on which the company acquired the said business and other assets are set out in an agreement between the respondent and the company dated July 27, 1909. This agreement provides, inter alia, as follows:

> "Clause 1: The purchase price to be £500 for the invention and design and the business and goodwill thereof; benefit of contracts plant machinery and effects; the respondent to indemnify the company against all debts existing at date of said agreement.
>
> Clause 3: The purchase price of £500 to be satisfied by allotment to respondent or as he should direct of 25 fully paid up shares of £20 each in the company.
>
> Clauses 10 to 15: Company to employ respondent at a salary and percentage of profits.
>
> Clause 20: The respondent for a period of five years to disclose to company any improvements on existing inventions or designs; and also any further inventions or designs he might make.
>
> Clause 21: The consideration for the undertaking in cl. 20 to be a payment by the company to the respondent of £1,000."

On the outbreak of war the company, which then owned and was carrying on the business and was entitled to the goodwill thereof, to the services of a skilled staff and in particular to the services of the respondent, worked out designs for large bombing aeroplanes which, when made in accordance with those designs, were known as the "O" and "V" types of aeroplane. These designs were not capable of being registered and were not in fact registered designs nor could they be made, nor were they in fact made the subject of letters patent, though certain minor features were patented from time to time. In the evolution of these designs many questions of great technical difficulty were solved by the company's technical staff.

In 1917 H.M. Government resolved that machines should be made from the company's designs, and accordingly required the company to impart the knowledge necessary to enable government contractors in various parts of the country to construct machines in accordance with the designs. The company, in complying with this requirement, distributed blue prints and drawings of the machines and imparted the necessary knowledge to such contractors (including the company's competitors in trade), by whom large numbers of "O" and "V" machines were constructed.

By an agreement, expressed to be supplemental to the above-mentioned agreement of July 27, 1909, entered into between the respondent and the company on May 28, 1918, it was recited that no improvements or further inventions had been made by the respondent during the said period of five years, and that since the expiration of the said term of five years the respondent had made certain improvements on existing inventions and designs, and had also made certain further inventions and designs for which protection had been obtained, all of which further inventions and designs were recited in the agreement to be the sole property of the respondent, and to have been used by the company pursuant to a verbal licence granted to the company by the respondent upon the terms that the respondent should be paid a sum to be agreed upon, and it was agreed (cl. 1) that the company should pay to the respondent: (*a*) 10 per cent. on prices charged by the company in respect of aeroplanes, &c., and (*b*) 15 per cent. on prices charged by the company in respect of bomb gear at any time theretofore manufactured and sold by the company under the letters patent inventions or designs in the schedule to the agreement.

Clause 2 of the agreement provided for the like percentages to be paid to the respondent on the same items manufactured and sold by the company after the date of the agreement.

Just before the entry of the United States of America into the war the company had an opportunity of selling in America all its rights in the before-mentioned designs for a very large sum of money.

Before, however, the company could take advantage of this opportunity the United States of America became a belligerent power, with the result that by agreement between His Majesty's Government and the Government of the United States the company was required by His Majesty's Government to hand over all its blue prints and designs relating to the said types of aeroplane to the American Government, and was required to instruct that government how to build the said machines from the said designs.

The company accordingly handed over all its blue prints and designs as aforesaid, and sent its draughtsmen and six foremen to America. By reason of the foregoing the company parted with its trade secrets and lost its goodwill in relation to the said designs. In fact the disclosure of the said designs enabled several American companies to make large twin engine machines which previously had never been made in America.

A further agreement was entered into between the respondent and the company on April 11, 1919, by which time large numbers of aeroplanes had been manufactured by the company in accordance with the said designs.

This agreement referred to the two previous agreements and further recited as follows:

> "And whereas there is due from the company to the [respondent] the sum of £108,800 for royalties payable up to and including the 31st day of December, 1918, in respect of the inventions designs provisional protection letters patent and registered designs mentioned in the second and third parts of the schedule hereto. And whereas the said inventions and designs have been used by His Majesty's Government and with such government's consent by the Government of the United States of America during the present war and the company has at the request of the [respondent] claimed from His Majesty's Government royalties or remuneration for such use and it has been agreed that all such royalties or remuneration as may be received by the company for such use up to the 31st day of December, 1918, shall be paid and shall belong to the [respondent], but that all such royalties or remuneration for such use after the 31st day of December, 1918, belong to the company."

By this agreement it was provided:

Clause 1, that the before-mentioned agreements of July 27, 1909, and May 28, 1918, were cancelled as from Dec. 31, 1918, save as thereinafter mentioned.

Clause 2 of this agreement provided for the payment of £108,800 in satisfaction of the royalties due to the respondent for user by the company and remuneration up to Dec. 31, 1918. The said clause also provided as follows:

> "And (the company) shall also pay to the [respondent] all such royalties or remuneration as the company shall receive for the use of the said inventions and designs by His Majesty's Government or the Government of the United States of America up to Dec. 31, 1918. Should any question arise between the parties hereto as to what proportion of any sum which may be received from the government the [respondent] is entitled to, the same shall be submitted to the auditors of the company for the time being whose certificate thereon shall be final and binding on both parties."

Clause 3 provided for the sale by the respondent of his rights in the inventions, drawings, letters patent, designs, &c., specified in the schedules to the agreements.

Clause 4 provided that the respondent would at request and cost of the company apply for and assign to the company letters patent for the said inventions.

Clause 5 provided that the assignment to the company should contain covenants by the respondent to communicate all improvements and inventions connected with aircraft that he might make or discover or become entitled to during the seven years from Jan. 1, 1919.

Clause 6 provided that the consideration for the sale should be 140,000 fully paid £1 ordinary shares in the company to be issued and allotted to the respondent or his nominees.

Clause 8 provided that the respondent should serve the company as managing director for seven years from Jan. 1, 1919, with power in the respondent to extend that period for a further three years.

This agreement was entered into because it was intended to turn the company into a public company (this was done shortly afterwards, the company's capital being then increased by £150,000), and it was considered necessary that the respondent should have sold to the company everything which might be his in relation to aircraft and to have it clear that as from the date of the agreement he had no other interest in the company than the share consideration plus the amount of royalties up to Dec. 31, 1918, and in addition all such royalties or remuneration as the company should receive for the use of the inventions and designs by H.M. Government or the Government of the United States of America up to Dec. 31, 1918. The patents which the company became entitled to under this agreement included the respondent's slotted wing patents and this, together with the right to the benefit of all patents taken out in the said seven years, was of immense value to the company.

By an indenture dated Oct. 21, 1919, the respondent assigned to the company the various inventions, &c., specified in the schedules to this document in consideration of the allotment to him or his nominees of 140,000 shares in the company and in pursuance of the agreement dated April 11, 1919.

A Royal Commission on awards to inventors was appointed by His Majesty's Royal Warrant on March 19, 1919.

The warrant having recited s. 29 of the Patents and Designs Act, 1907, further recited as follows:

> "And whereas there may also have been the like exceptional user of inventions, designs, drawings, or processes which, though not protected against the Crown under the said Act or otherwise, may have been of such merit or utility as to render it proper that the inventor, author, or owner thereof should receive some remuneration from the Treasury in respect of such user."

The warrant then sets out the powers conferred upon the commission under three heads as follows:

> "(1) In any case of user or alleged user of any patented invention for the services of the Crown by any government department and of default of agreement as to the terms of user, the commissioners upon the application of the patentee and agreement to accept their determination may proceed to settle and may settle the terms of user in lieu and place of the Treasury. . . .
>
> "(2) In any case where the terms of user of any patented inventions . . . or any terms as to assignment of an invention under s. 30 of the Act have been agreed or are in course of agreement between the patentee and any government department, the commissioners may, on the application of the Treasury, make any recommendations as to the giving or withholding by the Treasury of approval of such agreement or proposed agreement and may assist in adjusting or determining any term or terms of any proposed agreement as to which the parties may not be fully agreed.
>
> "(3) In any case of user or alleged user for the services of the Crown by any government department of any inventions, designs, drawings, or processes which, though not conferring any monopoly against the Crown or any statutory right to payment or compensation, may nevertheless appear from their exceptional utility or otherwise to entitle the inventor, author, or owner thereof to some remuneration for such user (including user by way of selling for use, licensing, or otherwise dealing with any articles made in accordance therewith) the commissioners may, on the request of the Treasury, inquire into the circumstances of the case and make a recommendation to the Treasury as to the remuneration (if any) that is proper to be allowed therefor."

A claim dated Dec. 3, 1919, was made by the company under heads (1) and (3) of the Royal Warrant for compensation in respect of the user by the British Government of the "O" Type twin engine aeroplane. [A copy of the claim was annexed to the Case.] The respondent was included in the claim as a party interested in the letters patent.

Clause 1 of the counter-statement states that no admission was made as to the validity of the patents or designs specified in the said claim; that the same were in respect of minor features of design and that the department was willing that compensation should be assessed under head 3 of the Royal Warrant. An identical claim was made in respect of the user by the British Government of the "V" type four-engine aeroplane.

The said claims were duly heard before the Royal Commission, and dealt with as falling under head 3 of the Royal Warrant. Accordingly the claim for compensation for user of the said letters patent was abandoned at the hearing. On May 15, 1922, the Royal Commission issued their recommendation. The said recommendation was in the following terms:

> "The commission having inquired into the circumstances of the case recommend to the Lords Commissioners of His Majesty's Treasury that the sum of £30,000 is proper to be paid by way of remuneration to the applicants, Messrs. Handley Page, Ltd., in respect of user by the Crown of all 'O' type twin engine aeroplanes and 'V' type four-engine aeroplanes, which down to May 1, 1922, had been or were being manufactured for the services of the Crown by companies, firms, or persons other than the applicants, and of all parts or appliances of or in connection with the said aeroplanes, including those protected by the letters patent or applications therefor set out in the schedule hereto.
>
> "In arriving at the sum hereinbefore recommended the commission have not taken into consideration any contractual claim which the applicants may have in respect of services alleged by them to have been rendered at the request of His Majesty's Government in providing a separate 'drawing office and blue print department' and an 'outside contracts department,' and supplying therefrom to contractors blue prints, drawings, and other articles, and in furnishing instruction and assistance and the services of trained staff."

In addition to the claim for compensation for user by the British Government of the subject-matters of those claims a further claim was made on Dec. 3, 1919, in respect of the user of the "O" type twin engine aeroplane by the Government of the United States of America. The claim is substantially in the same form as the British user claims.

By an agreement dated Jan. 11, 1923, and made between the company and the respondent of the first part, the President of the Air Council (for and on behalf of His Majesty) of the second part, and the Assistant Secretary of War, War Department, U.S.A., of the third part, after reciting that the company and the respondent (therein referred to as the claimants) claimed compensation for the communication, information, and assistance made and given by them as hereinbefore stated (including any question of patent rights and use of inventions and designs by the U.S. Government), it was agreed that the claims of the claimants should be considered and the amount (if any) proper to be paid to the claimants determined by the Royal Commission aforesaid sitting conjointly with the commission appointed by the War Department of the U.S.A. (thereinafter called the Joint Commission), and provisions were made under which the claim was to be brought before the Joint Commission.

The claimants duly lodged their claim pursuant to the agreement of reference, and the U.S. Government lodged a counter-statement. The principles on which the Joint Commission proceeded were precisely the same as the Royal Commission.

The claim in respect of American user of the "O" type of aeroplane was duly heard before the Joint Commission, who made their award on March 21, 1923, that the amount proper to be paid to the claimants was £9,000. The said award reads as follows:

> "The Royal Commission on Awards to Inventors and the American Commission for the Adjustment of Foreign Claims.—The Royal Commission on Awards to Inventors and the Commission for the Adjustment of Foreign Claims appointed by the War Department, United States of America (hereinafter called the Joint Commission), having taken into consideration the matters referred to them by the memorandum of agreement dated Jan. 11, 1923, and made between Handley Page, Ltd., and Frederick Handley Page (hereinafter called the claimants) of the first part, the President of the Air Council of the second part, and the Assistant Secretary of War of the United States of America of the third part, and having heard the respective parties thereon, award and determine that the amount proper to be paid by His Majesty's Government to the claimants in respect of the communication to and (or) user by or on behalf of the Government of the United States of the

invention or inventions, design or designs in the said memorandum of agreement mentioned is the sum of nine thousand pounds (£9,000)."

The said sum of £9,000 was paid in cash to the company.

In an agreement dated Oct. 17, 1923, made between the Treasury Solicitor, the Disposals and Liquidation Commission, and Handley Page, Ltd., it was recited that the company was indebted in the sum of £86,554 10s. 10d. to the Crown in respect of accounts between the parties and in the sum of £67,000 in respect of the purchase by the company of certain lands at Hendon. The agreement further recited that the government had agreed to accept £35,000 in settlement of the claim for £86,554 10s. 10d. and £67,000 in respect of the claims under the agreement for purchase of the land. The agreement provided that the company thereby assigned to the Treasury Solicitor the benefit of the award dated May 15, 1922, and the benefit of the sum of £30,000 payable to the company thereunder. The company thereby requested the Treasury to pay the £30,000 to the Treasury Solicitor in lieu of the company towards satisfaction of the sums owing by the company to the Treasury, and this was done.

At the date of the said agreement the respondent was the managing director of the company, and there was no evidence before us to suggest that the respondent objected to the agreement being carried out.

In the balance sheet of the company as at Dec. 31, 1924, the amount of the two awards, namely £39,000, was shown as in "suspense account." The company made substantial losses for all relevant years.

At a meeting of the directors of the company held on Feb. 14, 1927, the following resolution was passed:

> "Extract from minutes of a board meeting of the directors of Handley Page, Ltd., held on Feb. 14, 1927: Mr. Handley Page's proposals for a settlement of his claims against the company in regard to the 'O' and 'V' and 'American User' awards were discussed and subject to his undertaking to meet any claim against the company for income tax payable in respect of the value of the awards now agreed to be due to him it was resolved that his claim for approximately £30,400 in respect of compensation for sale of assets by disclosure of plans be admitted in full in consideration of which he would release to the company the sum of approximately £2,400—the company in turn agreeing to bear tax on the latter amount should it be assessed against them. It was further resolved that the net amount of approximately £28,000 due to be paid to him over a period of five years, bearing in the meantime interest at the rate of 6 per cent. per annum; such interest to commence from the date of this arrangement subject to the scheme for reorganisation going through."

The respondent admitted in evidence before the commissioners that he had in fact received the said sum of £30,483 in cash from the company in accordance with this minute.

The following cases were referred to in the course of the hearing of the appeal before the commissioners: *Constantinesco* v. *R.* (1) and *Mills* v. *Jones* (2).

On behalf of the respondent it was contended:

(i) That the sums awarded by the Royal Commission and by the Joint Commission, being in respect of user of the designs of the "O" and "V" type aeroplanes which were at all times the absolute property of the company, were not sums awarded to the respondent.

(ii) That the respondent, not being entitled to any sums that might be awarded, could not, and did not, reserve to himself the right to receive any part of the sums awarded to the company, and did not in fact receive the sums awarded or any part thereof.

(iii) That the sum of £30,483 was part of the purchase price paid by the company for the assets sold to it and for the benefit of the services of the respondent acquired by it by the agreement of April 11, 1919.

(iv) That the said sum was capital in the respondent's hands.

(v) That the sums awarded by the Royal Commission and by the Joint Commission were ex gratia payments in the nature of bounty and were not taxable.

(vi) Alternatively, if, contrary to the respondent's contentions, any taxable profit arose to the respondent, such profit did not arise and (in this alternative) is not chargeable in the year of assessment.

(vii) That the assessment should be discharged.

On behalf of the Crown it was contended:

(*a*) That under the agreement of April 11, 1919, the respondent had specifically reserved to himself the right to receive the whole of any award which might be made in respect of the use of the inventions and designs up to Dec. 31, 1918.

(*b*) That this was no part of the consideration for the assignment of the patents and designs, but that such consideration was specifically stated in the agreement and did not include any part of any award which might be made.

(*c*) That the fact that the respondent, who was the managing director of the company, allowed the money to be used by the company in paying the company's debts for a time was immaterial.

(*d*) That the respondent did in fact receive £30,483 as his share of the awards and that the said sum represented income properly included in the assessment made upon him.

(*e*) That the terms of the awards clearly stated that the payments were made for "user" and that although the payments were made under head 3 such payments could not, so far as concerning their nature as payments for user, be distinguished in principle from payments made under the other subheadings of the Royal Warrant.

The commissioners having considered the evidence and arguments adduced before them decided to confirm the assessment for 1923–24 in the figures agreed, namely, £30,483, and they discharged the assessment for 1922–23. The respondent immediately on the determination of the appeal declared his dissatisfaction therewith as being erroneous in point of law, and in due course required the commissioners to state and sign a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149.

FINLAY, J., held that consequent on the awards, the company received money on behalf of the respondent, in respect of which he was correctly assessed to tax.

Latter, K.C., and *Cyril King* for Frederick Handley Page, the taxpayer.
The Attorney-General (*Sir Thomas Inskip, K.C.*) and *R. P. Hills* for the Crown.

LORD HANWORTH, M.R.—It is necessary to state the facts on which the point comes before this court. It is a claim by Mr. Frederick Handley Page that, in the assessment made on him in the year 1924, was wrongly included a sum of £39,000* which he had received from the government. The £39,000 was paid to him in two sums of £30,000 and £9,000. The sum in the first case, the £30,000, was in respect of matters with which I must deal in fuller detail vis-à-vis His Majesty's Government, and the £9,000 was in reference to the matters dealt with vis-à-vis the American Government. Mr. Handley Page was a person who was interested in, and a leader in, the making of aeroplanes, and after the war a claim was made in respect of the user and appropriation which had been made by the government of certain matters and things which belonged to Mr. Handley Page. The form of the claim is this:

> "Particulars of claim under cls. 1 and 3 of the Royal Warrant dated March 19, 1919, that is, claims in respect of the user of designs and patented inventions where no terms of user have been agreed between the patentee and the government department concerned."

As we all know, there was a Royal Commission set up for the purpose of making awards to inventors. That was its primary purpose, but the constitution and the duties which it had to perform are found in the case and are set out in three separate heads. [His Lordship referred to the three heads specified in the Royal Warrant, and continued:] It is plain, therefore, that those three duties were imposed on the commission—one, settling the terms of the user of a patented article; two, assisting in reaching the ascertainment of an amount where terms of user had been agreed; and, three, the ascertainment of a sum where the commission thought that it was appropriate that a sum should be recommended to be given by the Treasury; but it is quite plain that under the third head what was ascertained was not ascertained in pursuance of a right but in pursuance of compensation which might, nevertheless, appear to be appropriate to the facts which had taken place.

---

* See the statement of facts taken from the Case Stated. It was later agreed that this assessment should be reduced to £30,483.

It is to be remembered that in the case of patented articles, there was, under the Patents and Designs Act, 1907, a right to be paid a sum by the Crown. Section 29 of the Act of 1907 gave the inventor in respect of his patent the same right against His Majesty the King, as the inventor had against the subject, and the sum which was to be paid was, in default of agreement, to be settled by the Treasury, and such cases have been known. That was repealed by s. 8 of the Patents and Designs Act, 1919, and then there was given a right to the Crown to use patented inventions, but, in case of a dispute arising as to what should be paid therefor, that was to be referred to the court for decision, the court being the High Court, and then there was to be a sum ascertained.

In lieu of following that procedure, it will be seen that, under the warrant, the commissioners were entrusted with a duty in respect of the cases (1) where there was a good patented article used, and (2) where there was an agreement, but (3) was added in respect of cases which lay on the borderline, where it was not possible to say there was an agreement, and yet it should seem right to the commissioners that some remuneration should be granted.

It is not in dispute that certain patents, certain designs, certain knowledge, which belonged to Mr. Handley Page were made use of by the government, but, in many cases, what was made use of was not the subject-matter of patents, because for many reasons the relevant designs, &c., could not be patented.

The claim that is made deserves to be looked at. It says this:

> "The subject of this claim is the design of the Handley Page 'O' type twin engine aeroplane—the only really successful large bomb-carrying machine produced either in Great Britain or by any of the Allied and Associated Powers. The only really successful large bomb-carrying machine produced by the opposing belligerents was the German Gotha, the design of which was copied from an 'O' type aeroplane which accidentally landed in German territory. Minor features of the 'O' type design are protected by" certain patents, and the particulars with full names of the persons who were interested in the patents are "Frederick Handley Page pursuant to an assignment by him"

made to the company; and then it says:

> "The claimant elects to accept the decision or recommendation of the Royal Commission under the terms of the Royal Warrant in lieu of the settlement by the Treasury under s. 29 of the Patents and Designs Act, 1907."

Then particulars are given of the alleged user. First, they say they are designers of certain aeroplanes, and then (*b*):

> "In the middle of the year 1917 the aircraft production department of the Ministry of Munitions received demands from the Forces for a large number of bombing machines, and orders were placed with other contractors for the supply of large quantities of Handley Page aeroplanes. The claimants, at the request of the department of aircraft production, and in order to increase the output of these machines, imparted the special knowledge they had acquired in the construction of bombing machines to other government contractors, handed over to them all the necessary drawings, &c., and dispatched trained staffs of engineers and others to all parts of the country to instruct fully the other contractors in the art of constructing Handley Page aeroplanes. For these services the claimants have received no payment whatsoever";

and in (*c*) they say: "The aeroplanes so produced proved of great value." Paragraph 9 is as follows:

> "The claimants have made no terms with such users [His Majesty's Government] but owing to the action of the latter the American Government have used this

> design and probably others. The user by the American Government is the subject of a separate claim." A

To that there was a counter-statement put in on behalf of His Majesty's Government, and they said this:

> "No admission is made as to the validity of any of the letters patent or registered designs mentioned in para. 3 of the particulars of claim herein. The same are in B respect of minor features of design, and the department is willing that compensation therefor should be assessed under cl. 3 of the Royal Warrant of March 19, 1919, in connection with the general design of 'O' type aeroplanes."

Then they mention the extent of the user by the government, and they say, with regard to their objections and remarks on para. 8 of the particulars of claim:

> "The design of both the said aeroplanes was worked out by the air department of C the Admiralty in collaboration with the applicants . . . [and they say that] the design was the subject of modifications in detail which were the result of discussion and collaboration between the applicants and the air department of the Admiralty, and numerous tests were made from time to time during the said period by the advisory committee of aeronautics for the purpose of elucidating points of difficulty in connection with the said design." D

Then they say:

> "By reason of the premises the applicants have been enabled to secure contracts for very large sums of money all the experimental and extra costs of the said machine due to modifications of design"

were paid by the government; they say that the design now reached E

> "is of considerable value . . . the applicants have been adequately remunerated for the part taken by them in the said design."

There was a further claim in respect of the "V" type which followed the same lines. When we come to see what happened we are told in the case at para. 15:

> "The said claims were duly heard before the Royal Commission, and dealt with as F falling under head 3 of the Royal Warrant" [that is, under the ex gratia clause]. "Accordingly the claim for compensation for user of the said letters patent was abandoned at the hearing. On May 15, 1922, the Royal Commission issued their recommendation, of which a copy marked 'I' is annexed hereto and forms part of this case."

That is, as plain as can be, a statement that all questions of right which might arise to G the applicants under s. 29 or the revised s. 8 of the Act of 1919 were set aside and the whole matter was dealt with under cl. 3 of the warrant. Hearing it in that way, the commissioners arrived at the sum to be paid as £30,000, and they say that, in arriving at that sum they have not taken into consideration any contractual claim which the applicants could have in respect of a drawing office, in respect of supplying prints of the drawings, and in furnishing instruction and assistance and the services of trained H staff. To my mind that makes it quite plain, on these facts, that there was nothing in respect of which a petition of right would lie that was taken into account in this determination of this £30,000. Such matters are set aside, and £30,000 is arrived at as the sum to be taken in virtue of the collaboration and assistance which had, in that sense, been rendered to the common pool of knowledge out of which the aeroplanes ultimately emerged. It is common ground that these ex gratia payments were merely recom- I mended to the Treasury. There was no means whereby, such as under the Petitions of Right Act, a claim could be made which would ultimately have a legal sanction and could be brought effectively against the Treasury; it was that the Treasury were going to honour the recommendation of the Royal Commission. And in respect of what? Something that they had come to the conclusion ought to be recommended under head 3. I do not want to be misunderstood, or that this judgment should go too far. It is quite true that if this sum could be treated as a sum which was received by the applicants in the course of carrying on their business, if it was a sum which was due

A to a possibly unusual system of carrying on their business, but yet was a part of the business which they undertook and did carry on, and in respect of which they provided services or plant or materials, I should hesitate long before I said that it was not a taxable item under Sched. D. But it appears to me that the circumstances under which the decision of the commissioners was reached are such as to differentiate this claim from anything which could be called the result of the carrying on of the business B of the applicants. You may have a case in which a single payment is made but yet is made in the course of business; that is illustrated by *Martin* v. *Lowry*; *Martin* v. *Inland Revenue Commissioners* (3). You may have a case in which the work that is done, although it is the making of individual out-and-out contracts, yet is a part of the business which is carried on by the trader. But in the present case it seems to me that when one looks at the counter-statement put in by the Crown to the claim it is a negation of C there being any right, a negation of there being services rendered, a negation of the user of the property of the applicants; it is merely a statement that there was some collaboration for which the applicants had been adequately remunerated. That paragraph which I have read, para. 15 of the Case, seems to me of great importance, because it shows that any claim except that which fell under head 3 of the Royal Warrant was abandoned.

D Let me go back to the most recent case of what may be called the "voluntary payments." In *Stedeford* v. *Beloe* (4) LORD DUNEDIN reads the words of Sched. D and says ([1932] A.C. at p. 390):

> "Now it must be a real profit under Sched. D, and it has been held again and again that a mere voluntary gift is not such a profit because it is not, in the true sense of the word, income. It is merely a casual payment which depends upon E somebody else's goodwill."

I apply those words to the facts of the present case. Can I in any way say that this sum, which has been reached in the confused circumstances set out in the counter-statement, and which took place during the war, is a sum which has been reached in the course of the carrying on of their business? I do not find myself able to bring this payment F within those words of LORD DUNEDIN, and, therefore, it seems to me that the appeal must succeed on that ground. Equally, I find myself unable to accept the view which commended itself to the learned judge. He says:

> "In each case the sum is handed over by the government to the inventor, and in each case it is in respect of the user of something valuable which he has invented."

G I cannot so find the facts in the Case; but he goes on:

> "The real difference is this, and my attention was properly called to it. Differences between head 1 and head 3, I think, do not affect the matter once the payment has been made. It was a voluntary payment [and there the learned judge and I are in agreement] it need not have been made; but when it is made it seems to me that it is assessable to income tax."

H Somehow or another, although it was a voluntary payment, yet, when it had reached the hands of a business concern, it was to be treated as a sum, a profit and gain, reached and received in the course of business. It is upon that point that I find myself unable to agree with the learned judge.

There is another point on which I think the case also succeeds. What is this sum—a large sum, a considerable sum. What is it paid for? There was here a dissipation of I the knowledge and experience of the applicants. It was placed at the disposal of all and sundry who were engaged in making these aeroplanes and supplying them to the government. They were required to place their experience, their knowledge and such inventive faculties as they employed in their business, at the benefit of the other contractors. It seems to me that that was the very negation of carrying on the business of the Handley Page concern. No one in business, in their wisdom or prudence, would have so dealt with their faculties; I do not want to use the word "property," because I am by no means sure whether or not what was done was the handing over of property; it seems to me rather that they were contributing to a common pool their experience, A their knowledge and the drawings and the like, most of them, if I understand, incapable of being either registered, and not capable of being patented. But they brought all that into the common pool, and what was the result? They had enabled their competitors to enjoy the fruit of their research and labours during a number of years, and, to call that a sum which is received in the course of carrying on the business seems to me to neglect the very first meaning of the terms. From this point of view it appears to me that the two sums of £30,000 and £9,000 can be treated as a capital payment and not B as income at all. Whichever view commends itself to those who may have to consider this question at all, it seems to me it was in the nature of a capital payment. In the case of their claim against the United States it is said in their claim in para. 8:

> "Relying on the assurance as aforesaid, the claimants did not attempt to enter into any legal arrangement with the United States, and, so far as they have been able to determine their position, it would appear that they have no legal rights against C the United States Government."

Would they, apart from any contract, apart from any agreement, have made all this research and experience available to those who were, if not competitors, at least their rivals in business? That seems to me to be a view which is in strong contrast with the facts, and it appears to me, therefore, that these two payments may be considered D equally as a matter of capital payments; they had made their contribution and, for that contribution, it was held that they were entitled to be remunerated ex gratia.

For these reasons it appears to me that these two sums do not come within the ambit of profits and gains in the course of their business, and once they have been paid and reached the hands of the applicants they do not lose the character or characteristics under which they were paid; they remain the same, and they cannot be altered after E their receipt into the hands of the applicants. For those reasons it appears to me that the appeal must be allowed with costs here and below and the assessment discharged.

SLESSER, L.J.—I agree that this appeal should be allowed. I can state my reasons very shortly. I am of opinion that this sum of money which was awarded to the company by the Royal Commission was in the nature of capital in their hands. I think that the learned judge has laid too much emphasis on the word "user" which is given F as the ground of the compensation in the finding of the Royal Commission, where they say that having inquired into the circumstances the sum of £30,000 is proper to be paid by way of remuneration "in respect of user" by the Crown of the twin engine aeroplanes. On that the learned judge says this:

> "It was also argued that this was capital. That argument I may deal with at once. I do not think it can succeed. That was not, I think, a payment in respect of G capital. It is no doubt true that probably a communication of the design to other people would depreciate, and greatly depreciate, its value. It is in respect of that largely that the sum was awarded; but none the less, I think that the sum was truly awarded in respect of the user of a secret process, and I cannot see that that can be regarded as a capital payment."

When the facts of this case, as stated in the Case, are examined, it is found that, so H far from being a user in the sense that there was a user in *Mills* v. *Jones* (2) and in the case of *Constantinesco* v. *R.* (1), where the patents remained in the hands of the patentees, here what was done, either by request or by compulsion, was that Mr. Handley Page parted with the whole of his property in the subject-matter. For what was his property? His property was the knowledge which he had acquired of the methods for constructing these machines, and in para. 4 it is stated that he was required to impart the knowledge I necessary to enable government contractors in various parts of the world to construct the machines, and that he complied with that requirement, so that he did not give them a mere user of a patent or a mere user of his property, but he handed over the whole, the substratum of his property. He had in substance nothing of his business left. His property was his secret process and his knowledge, and that property was, at the request or by compulsion of the government, dissipated among all his competitors. To speak of "user" as if there was some tree producing fruit seems to me an entire misconception of the facts. The whole tree, root and branch, was lost to him, and the

A award was given in compensation for the total loss of the substratum of his business. Once those facts are realised I think it must necessarily follow that this was in the nature of a capital payment and not income.

ROMER, L.J.—I, too, agree that this appeal must be allowed on the ground that these payments were capital payments and were not in the nature of profits or gains within B the meaning of those words as used in Sched. D.

I can state my reasons for arriving at that conclusion, I think, quite shortly. A patentee has, of course, a monopoly, and that monopoly, which is a right of preventing other people utilising his invention, is a capital asset in his hands. He may exploit that capital asset in either or both of the following ways: He can himself exercise his invention for profit or he can grant licences to others to do so on payment of royalty. C The profit he derives by exercising the invention himself or the profit he derives from the royalty are profits and gains within the meaning of Sched. D, notwithstanding the fact that every year his capital asset is diminishing in value. If, on the other hand, he sells the monopoly, or if—I cannot remember that such a case has ever happened—he surrenders his monopoly in consideration of a payment, the payment he received for the sale of the patent or the payment he received for surrendering his monopoly would D be a capital asset in his hands, and none the less so because, after surrendering the monopoly, he himself was in a position which enabled him, in competition with the rest of the world, still to exercise his own invention. The owner of a secret process such as was possessed by Mr. Handley Page stands in a very analogous position; he has not a monopoly at law, but he has a monopoly in fact—a monopoly in fact arising from the possession by him of the secret knowledge of the process that he is carrying on. That E secret knowledge is as much his capital asset as is the patent monopoly the capital asset of the patentee, and, like the patentee, he can use that capital asset in either or both of the following ways: he can himself carry on the secret process, or he may—it is very seldom done owing to the obvious danger involved—grant a licence to a third person to carry on the secret process, securing himself against his secret process being divulged by that third party to others. In both these cases the profits he derives from carrying F on the secret process himself and the royalty he might derive from the licensee would be annual profits or gains within the meaning of Sched. D. But supposing he sells his secret process or supposing, as here, he surrenders his quasi monopoly by making it public to the world, then I say that, if he gets paid for doing either one or the other of those things, the money he receives in payment is a capital asset. Here, at the invitation of the government, he surrendered to the world his secret knowledge, and his G capital asset thereupon ceased to exist. The payment in question in my opinion was made to him for the surrender of his capital asset, and, in his hands, is capital money not taxable under Sched. D or any other schedule.

The Crown appealed to the House of Lords.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *Reginald Hills* for the Crown.

H *Latter, K.C.*, and *Cyril L. King* for the taxpayer.

The House took time for consideration.

April 8.—**LORD ATKIN.**—I have had the opportunity of reading the opinion which is about to be delivered by my noble and learned friend LORD TOMLIN, and I entirely concur in it and have nothing to add.

I

LORD TOMLIN.—Two assessments to income tax were made upon the respondent under the provisions of Sched. D of the Income Tax Acts for the years ending respectively April 5, 1923, and April 5, 1924, each for the sum of £39,000 described in column 4 of the assessment under the heading of "Description of Trade Profession Vocation concern or other profit chargeable under Sched. D" as "Royal Commission award in respect of the user of certain patents and designs."

On an appeal to the general commissioners for the purposes of the Income Tax Acts the appellant (who is the Inspector of Taxes) abandoned the assessment for the year ending April 5, 1923, and agreed to the reduction of the figure of £39,000 in the other assessment to £30,483.

The commissioners affirmed the assessment of £30,483 for the year ending April 5, 1924. On appeal Finlay, J., affirmed the commissioners' decision, but the Court of Appeal have set the assessment aside.

To understand the nature of the case a story of some length and complexity has to be unfolded.

In and prior to 1909 the respondent carried on business as an engineer in Woolwich and owned an invention in relation to aeroplanes for which provisional protection had been obtained and also a registered design for a propeller. Neither the invention nor design formed any part of the design for either of the types of aeroplane which will be presently mentioned.

On June 17, 1909, a limited company called Handley Page, Ltd., with a nominal capital of £10,000 in 500 shares of £20 each, was registered as a private company to take over the respondent's business.

On July 27, 1909, the respondent and the company entered into an agreement by which the respondent sold and the company purchased for £500 (to be satisfied by the allotment of twenty-five fully-paid shares of £20 each in the company) the invention and design to which I have referred and the respondent's business and the goodwill thereof and the benefit of all contracts and agreements of the respondent in relation to the business and certain plant, machinery and effects.

By the agreement the respondent was appointed whole-time manager of the business for life at a salary which included a sum equal to 20 per cent. on the net annual profits earned by the company when not less than 10 per cent. for the year had been divided by way of dividend on shares.

Any improvement on the existing invention or design, and any further invention or design made by the respondent within five years from the registration of the company were under the terms of the agreement to belong to the company, and as consideration for this provision the respondent was allotted a further fifty fully-paid shares of the company of £20 each.

In fact no improvement, invention or design was made during the five years in question.

Paragraphs 3, 4 and 6 of the Case Stated contain findings to the following effect:

> "3. On the outbreak of war the company which then owned and was carrying on the business and was entitled to the goodwill thereof to the services of a skilled staff and in particular to the services of the appellant, worked out designs for large bombing aeroplanes which when made in accordance with those designs were known as the 'O' and 'V' types of aeroplane. These designs were not capable of being registered and were not in fact registered designs nor could they be made, nor were they in fact made, the subject of letters patent, though certain minor features were patented from time to time. In the evolution of these designs many questions of great technical difficulty were solved by the company's technical staff.
>
> "4. In 1917 H.M. Government resolved that machines should be made from the company's designs and accordingly required the company to impart the knowledge necessary to enable government contractors in various parts of the country to construct machines in accordance with the designs. The company in complying with this requirement distributed blue prints and drawings of the machines and imparted the necessary knowledge to such contractors (including the company's competitors in trade) by whom large numbers of 'O' and 'V' machines were constructed.
>
> "6. Just before the entry of the United States of America into the war the company had an opportunity of selling in America all its rights in the before-mentioned designs for a very large sum of money.
>
> "Before, however, the company could take advantage of this opportunity the United States of America became a belligerent power, with the result that by agreement between His Majesty's Government and the Government of the United States the company was required by His Majesty's Government to hand over all

> its blue prints and designs relating to the said types of aeroplane to the American Government, and was required to instruct that Government how to build the said machines from the said designs.
>
> "The company accordingly handed over all its blue prints and designs as aforesaid and sent its draughtsmen and six foremen to America. By reason of the foregoing and by reason of the matters referred to in paras. 3 and 4 hereof the company parted with its trade secrets and lost its goodwill in relation to the said designs. In fact the disclosure of the said designs enabled several American companies to make large twin engine machines which previously had never been made in America."

Up to this point the position on these findings seems reasonably plain. The designs for the "O" and "V" types of aeroplane and the minor patented features were worked out by and belonged to the company, and any compensation which might become payable by reason of the action of the government in regard to these designs and patents would apparently be payable and belong wholly to the company. Compensation was later on paid in respect of these matters and the question is whether, having regard to what was subsequently done and to the circumstances of the case generally, the respondent has been properly charged to tax in respect of the year ending April 5, 1924, with a sum of £30,483, as though it were part of such compensation.

In 1918, after the government had compelled disclosure of the designs of the "O" and "V" types of aeroplane, and after these designs and the minor patented features had first come to be used in the United Kingdom by or on behalf of H.M. Government and in America by or on behalf of the Government of the United States of America, the respondent and the company entered into a further agreement dated May 28, 1918. This agreement was expressed to be made between the respondent (therein called the vendor) of the one part and the company of the other part, and to be supplemental to the agreement of July 27, 1909, and after a recital that no improvement, invention or design had been made during the five years mentioned in the principal agreement, the following recitals and provisions appeared, namely:

> "And whereas since the expiration of the said term of five years the vendor has made improvements upon the said invention and design (that is the invention and design mentioned in the principal agreement) and has made further inventions and designs and has applied for and obtained provisional protections and letters patent and registered designs in respect of such improvements and further inventions and designs which provisional protection letters patent and registered designs are more particularly specified in the schedule hereto and whereas the improvements and further inventions and designs and the provisional protection letters patent and registered designs in respect thereof are the sole property of the vendor as the company hereby admit and acknowledge which improvements further inventions and designs have pursuant to a verbal licence granted to the company by the vendor been hitherto used and exercised by the company in their business upon terms that the vendor should be paid by the company in consideration of such licence such sum as should be thereafter agreed now it is hereby agreed as follows:
>
> "1. As consideration for the said licence the company shall pay to the vendor (*a*) 10 per cent. on the prices charged by the company in respect of all such aeroplanes hydroplanes airships aeronautical apparatus machines engines and accessories (except bomb gear) and (*b*) 15 per cent. on the prices charged by the company in respect of all bomb gear at any time heretofore manufactured and sold by the company under any of the said letters patent inventions or designs set forth in the said schedule.
>
> "2. The company shall so long as the said licence continues pay to the vendor the like percentages in respect of all such aeroplanes hydroplanes airships aeronautical apparatus machines engines and accessories including bomb gear as the company shall manufacture and sell after the date of this agreement.
>
> "3. The said licence shall continue on the terms aforesaid until revoked by

> notice in writing addressed by the vendor to the company which he may give at any time." A

The schedule to this agreement contained particulars of two British letters patent and of three applications for other British letters patent and of particulars of a registered design. One of these letters patent and the three applications for letters patent were concerned with some of the minor features of the design of the "O" type of aeroplane for the user of which compensation was afterwards paid. B Except to this extent the agreement seemed to have had no reference to the design either of the "O" or "V" type of aeroplane, though the effect of cl. 1 (*a*) may be that the 10 per cent. therein mentioned became payable on the price charged for any type of aeroplane which embodied any of the features covered by the particulars in the schedule.

The only things referred to in the recitals are: (1) Improvements on the original invention and design which have nothing to do with this case; C and (2) further inventions and designs particularised in the schedule. Of the particulars in the schedule only the four items to which I have referred are material to this case. With regard to those four items the statement in the recitals that they were the sole property of the respondent seems on the face of it to be at variance with the findings of the Case Stated, but the four items relate only to minor features.

D On March 19, 1919, the Royal Commission on Awards to Inventors was erected by Royal Warrant of His Majesty. By the warrant the powers of the commissioners were set out under three heads. The first and third of these heads so far as material to the present appeal were as follows:

> "(1) In any case of user or alleged user of any patented invention for the services of the Crown by any government department and of default of agreement as to the E terms of user the commissioners upon the application of the patentee and agreement to accept their determination may proceed to settle and may settle the terms of user in lieu and place of the Treasury . . ."
>
> "(3) In any case of user or alleged user for the services of the Crown by any government department of any inventions designs drawings or processes which though not conferring any monopoly against the Crown or any statutory right to F payment or compensation may nevertheless appear from their exceptional utility or otherwise to entitle the inventor author or owner thereof to some remuneration for such user (including user by way of selling for use, licensing or otherwise dealing with any articles made in accordance therewith) the commissioners may on the request of the Treasury inquire into the circumstances of the case and make a recommendation to the Treasury as to the remuneration (if any) that is proper to be G allowed therefor."

It is to be noted that under head 1 the commissioners' duty was in certain circumstances to settle and award the amount which a patentee was legally entitled to for the use of his patent for the service of the Crown, while under head 3 the cases dealt with were cases in which there was no patent or other source of legal monopoly relied on and therefore no claim of right, and in which the commission only recommended to the H Treasury a payment by way of bounty. It is also to be observed that the commission had no power to determine the validity of a patent, accordingly if the validity of the patent of a claimant under head 1 was not admitted by the Crown, the claimant had either before coming to the commission to go to the ordinary courts of law to establish the validity of his patent or else to waive his claim under his patent and seek some compensation by way of bounty under head 3 of the Royal Warrant. I There was a subsequent Royal Warrant of Oct. 3, 1920, which further regulated the commissioners' powers, but it did not affect the position as I have stated it under the original Warrant.

On April 11, 1919, a new agreement was entered into between the respondent and the company in which the respondent is referred to as the vendor. This new agreement referred to the two previous agreements and recited as follows:

> "And whereas there is due from the company to the vendor the sum of £108,000 for royalties payable up to and including the 31st day of December, 1918, in respect of the inventions designs provisional protection letters patent and registered design

> mentioned in the 2nd and 3rd parts of the schedule hereto and whereas the said inventions and designs have been used by His Majesty's Government and with such government's consent by the Government of the United States of America during the present war and the company has at the request of the vendor claimed from His Majesty's Government royalties or remuneration for such use and it has been agreed that all such royalties or remuneration as may be received by the company for such use up to the 31st day of December, 1918, shall be paid and shall belong to the vendor, but that all such royalties or remuneration for such use after the 31st day of December, 1918, shall belong to the company and whereas it was provided by the said agreement of May 28, 1918, that the licence therein mentioned should continue on the terms therein provided until revoked by notice in writing addressed by the vendor to the company."

The operative part of the new agreement provided (cl. 1) that the two earlier agreements and the licence with regard to the applications and inventions set forth in the third part of the schedule to the new agreement should be cancelled as from Dec. 31, 1918, save as was thereafter mentioned and (cl. 2) that the respondent should be paid by the company £108,800 in satisfaction of the royalties due to him for user by the company and remuneration up to Dec. 31, 1918. The same clause also provided as follows:

> "And (the company) shall also pay to the vendor all such royalties or remuneration as the company shall receive for the use of the said inventions and designs by His Majesty's Government or the Government of the United States of America up to Dec. 31, 1918. Should any question arise between the parties hereto as to what proportion of any sum which may be received from the government the vendor is entitled to the same shall be submitted to the auditors of the company for the time being whose certificate thereon shall be final and binding on both parties hereto."

Clause 3 provided for the sale by the respondent of all his rights and interests to and in the inventions, drawings, letters patent, applications for letters patent and design specified in the first, second, and third parts of the schedule to the agreement, and all rights of the respondent to obtain protection in foreign countries or the Dominions. The agreement also contained provisions for an assignment to the company of the letters patent or other rights sold and that such assignment should contain inter alia a covenant by the respondent to communicate to the company all such further inventions in connection with aircraft as he might make or discover or to which he might become entitled during the period of seven years from Jan. 1, 1919. The consideration for the sale and covenants was to be the issue by the company to the respondent of 140,000 fully-paid ordinary shares of £1 each, and the respondent was to hold office as managing director for a term of seven years from Jan. 1, 1919, upon the terms mentioned in the agreement.

The schedule to the agreement was divided into three parts. The first part was as follows: "Drawings showing the design of the Handley Page 'O' type aeroplane, the like Handley Page 'V' type aeroplane." The second part was the same as the schedule to the agreement of May 28, 1918, with the omission of a patent for bomb-releasing gear which has nothing to do with the appeal. The third part contained particulars of applications for four British letters patent relating to other minor features of the design of the "O" type of aeroplane.

Subsequently a deed of assignment was executed by which the respondent assigned to the company a large number of patents, including seventeen letters patent covering minor features of the designs of the "O" and "V" types mentioned in the award of the Royal Commission to which I shall presently refer; these seventeen letters patent or applications for letters patent included (*a*) the four letters patent and applications for letters patent already mentioned by me, of which particulars were set out both in the schedule to the agreement of May 28, 1918, and in the second part of the schedule to the agreement of April 11, 1919, and (*b*) the four applications for letters patent set out in the third part of the schedule to the agreement of April 11, 1919.

According to the findings of the Case Stated, (1) at the time when the agreement of April 11, 1919, was entered into large numbers of aeroplanes had been manufactured by the company in accordance with the designs of the "O" and "V" type (see para. 7); and (2) the agreement of April 11, 1919, was entered into because it was intended to turn the company into a public company (as was shortly afterwards done), the capital being increased by £150,000, and it was considered necessary that the appellant should have sold to the company everything which might be his in relation to aircraft and to have it clear that as from the date of this new agreement he had no other interest in the company than the share consideration.

On Dec. 3, 1919, the company presented two claims to this Royal Commission on awards to inventors, one relating to the design for the "O" type of aeroplane and the other relating to the design for "V" type of aeroplane. Each claim was in the same form, mutatis mutandis. Each claim showed the claimants to be the company and the company only. The subject of the claim was stated to be the design of the Handley Page "O" type (or "V" type) twin engine aeroplane, with minor features protected by specified patents and registered designs. Under heading 4 of the claim, "particulars of any other parties interested in the patents," the respondent's name was mentioned with the words, pursuant to an assignment by him to the claimants dated Oct. 21, 1919. Under heading 7 of the claim, "particulars of the alleged user," the company set out (inter alia) the following:

> "7. (*a*) The claimants are the designers and constructors of aeroplanes registered as a limited liability company in June, 1909, and since that date have been engaged in experimental work designing improved types of aeroplanes. At the outbreak of war they were specialising in the development of large weight carrying aeroplanes, and in 1915, a small contract was placed with them by the Air Department of the Admiralty for the supply of large machines for bombing purposes.
>
> "(*b*) In the middle of the year 1917, the Aircraft Production Department of the Ministry of Munitions received demands from the Forces for a large number of bombing machines and orders were placed with other contractors for the supply of large quantities of Handley Page aeroplanes. The claimants, at the request of the Department of Aircraft Production and in order to increase the output of these machines, imparted the special knowledge they had acquired in the construction of bombing machines to other government contractors, handed over to them all the necessary drawings, &c., and dispatched trained staffs of engineers and others to all parts of the country to instruct fully the other contractors in the art of constructing Handley Page aeroplanes. For these services the claimants have received no payment whatsoever."

The claims were proceeded with under head 3 of the Royal Warrant, the patent rights in the minor features being waived.

On the same date the company lodged two further claims in respect of the American Government's user. The company was the sole claimant. Particulars of the invention were set out in the following terms:

> "(3) The subject of this claim is the design of the Handley Page 'O' type (or 'V' type as the case might be) twin engine aeroplane—the only really successful large bomb carrying machine produced either in Great Britain or by any of the allied and associated powers. The only really successful large bomb carrying machines produced by the opposing belligerents was the German Gotha, the design of which was copied from an 'O' type aeroplane which accidentally landed in German territory."

Particulars of patents, patent applications and registered designs protecting minor features of this design were also set out. Particulars of this alleged user were given as follows:

> "(7) The British Government handed over the drawings of the Handley Page 'O' type (or 'V' type) aeroplane to representatives of the Government of the United States of America, and these were thereupon used by American contractors in the construction in America of Handley Page aeroplanes. The claimants were

> A moreover entirely prohibited from constructing these machines in the United States and thereby lost a considerable revenue both in profits on sales and in royalties on machines not constructed by them. Furthermore, the claimants have lost a considerable goodwill in the United States as their designs and trade secrets have been handed over to trade competitors in the United States. The reputation of the claimants has also suffered by the fact that machines made by other firms B in America may have proved faulty owing to inferior materials and workmanship which the claimants would not have permitted had they supervised the manufacture thereof."

In each case the claimants claimed as compensation for the past, present and future user for this type of machine by the Government of the United States of America and C for the losses which the company had suffered the lump sum of £250,000.

On May 15, 1922, the Royal Commission made one award in respect of the two claims of the company in relation to the user of the designs of the two types of machines by the British Government. The award so far as material was in the following form:

> "The commission having inquired into the circumstances of the case recommend to the Lords Commissioners of His Majesty's Treasury that the sum of D £30,000 (thirty thousand pounds) is proper to be paid by way of remuneration to the applicants, Messrs. Handley Page, Ltd., in respect of user by the Crown of all 'O' type twin engine aeroplanes and 'V' type four engine aeroplanes, which down to May 1, 1922, had been or were being manufactured for the service of the Crown by companies, firms or persons other than the applicants and of all parts or appliances of or in connection with the said aeroplanes including those protected by E the letters patent or applications therefor set out in the schedule hereto."

The letters patent or applications set out in the schedule were the seventeen patents or applications for patents to which I have already referred.

Difficulties arose in connection with the claims arising out of the American user and as a result of an agreement with the American Government dated Jan. 11, 1923, these claims were dealt with by a body consisting of the Royal Commission and the American F Commission for the Adjustment of Foreign Claims sitting together and new particulars of claim were put in on Jan. 25, 1923. On this occasion the respondent's name was joined with the company as one of the claimants apparently because the claim was now in part based upon an alleged contract made by the British Government with the respondent to be responsible for compensation in respect of the user by the American Government.

G On March 21, 1923, the joint body made one award on the claims in respect of American user in the following terms:

> "The Royal Commission on Awards to Inventors and the Commission for the Adjustment of Foreign Claims appointed by the War Department, United States of America (hereinafter called the Joint Commission) having taken into consideration H the matters referred to them by the memorandum of agreement dated Jan. 11, 1923, and made between Handley Page, Ltd., and Frederick Handley Page (hereinafter called the claimants) of the first part the President of the Air Council of the second part and the Assistant Secretary of War of the United States of America of the third part and having heard the respective parties therein award and determine that the amount proper to be paid by His Majesty's Government to the claimants I in respect of the communication to and (or) user by or on behalf of the Government of the United States of the invention or inventions design or designs in the said Memorandum of Agreement mentioned is the sum of nine thousand pounds sterling (£9,000).
>
> "The said sum is awarded and is to be taken in full satisfaction of all claims by the claimants which are mentioned in the said agreement down to the date hereof."

The sum of £30,000 recommended for payment by the Royal Commission by their award of May 15, 1922, was paid to the company in October, 1923, by means of a settlement in account with the Treasury under an agreement dated Oct. 17, 1923. The

£9,000 awarded by the joint body by the award of March 21, 1923, was paid to the company in the course of the year ending April 5, 1924.

The question whether as between the respondent and the company the former was entitled to be paid anything by the company in respect of the £39,000 received by the company under the awards does not appear to have been dealt with until some years later.

The minutes of a board meeting of the directors of the company held on Feb. 14, 1927, contain the following entry:

> "Mr. Handley Page's proposals for a settlement of his claims against the company in regard to the 'O' and 'V' and 'American User' awards were discussed and subject to his undertaking to meet any claim against the company for income tax payable in respect of the value of the awards now agreed to be due to him it was resolved that his claim for approximately £30,400 in respect of compensation for sale of assets by disclosure of plans be admitted in full in consideration of which he would release to the company the sum of approximately £2,400—the company in turn agreeing to bear tax on the latter amount should it be assessed against them. It was further resolved that the net amount of approximately £28,000 due be paid to him over a period of five years, bearing in the meantime interest at the rate of six per cent. per annum; such interest to commence from the date of this arrangement subject to the scheme for reorganisation going through."

It is admitted that the respondent under this minute received from the company the sum of £30,483 though there is nothing to show how this amount was arrived at. This is the sum in respect of which the respondent has been assessed to income tax under Sched. D for the year ending April 5, 1924.

At first sight it seems paradoxical that the respondent should be assessed for tax for the year ending April 5, 1924, for a sum of £30,483 as being a sum awarded by the Royal Commission when in fact no sum was ever awarded to him by the Royal Commission (except so far as he may be said to have been one of the claimants to which the £9,000 was awarded by the joint body) and such sum as he did receive was paid to him not by the Treasury under any award but by the company in 1927 "in settlement of his claims against the company." The appellant, however, says that all the claims were made by the company on behalf of themselves and the respondent and their receipt in 1923 of the amounts awarded were receipts, so far as the respondent was entitled to the money, as agent for him, and were therefore receipts by him in 1923, and that the fact of there being a dispute between the company and the respondent as to the amount of the latter's share remaining unsettled till 1927 makes no difference to the position. Further, the appellant says that the amounts awarded were taxable items of receipts under Sched. D, relying upon the decision in *Constantinesco* v. *R.* (1), where an award under head 1 of the Royal Warrant was dealt with.

The respondent, on the other hand, denies the agency of the company, contends that the £30,483 was paid to him in satisfaction of a contractual claim against the company, and was not received under any award and cannot be treated as received before it was actually received by him, and in any case further contends that any sum receivable as the result of an award under head 3 of the Royal Commission is a matter of bounty and is also of a capital nature and is not therefore assessable to income tax under Sched. D.

The general commissioners gave no reason for affirming the assessment. Finlay, J., dismissed the appeal from the general commission, holding, as I understand, that the company were the agents of the respondent and must be treated as having received the sum of £30,483 for him in 1923 and that the same was in the nature of a profit assessable to tax under Sched. D. The Court of Appeal, without considering the relations between the company and the respondent, held that the assessment must be discharged. The Master of the Rolls took the view that any payment made in respect of an award under head 3 of the Royal Warrant was voluntary and not taxable under Sched. D, and all three members of the court held that such a payment was in the nature of a capital payment and not taxable under Sched. D.

Now I confess that I do not think it possible to dispose of this case without first reaching a conclusion as to the rights inter alia of the company and the respondent and as to the character in which the claims were put forward by the company. This is not easy to do by reason of the obscurity of some of the documents, and the difficulty of reconciling some of the passages contained in them with the findings of the Case Stated.

No doubt until the company became a public company and issued shares to the public the respondent and the company, though in law separate entities, were for practical purposes the same. The respondent controlled the company, he was its whole-time manager, and probably mainly its inventive mind. So far as actual patents or applications for patents standing in his name are concerned, they may well have been his property though used by the company in its business. But the claims against the government were in respect of designs for types of aeroplanes worked out in the company's shop, with the company's material and by the company's staff including, of course, the respondent. These designs were not registrable as designs and were not covered (except in minor details) by patents. In such a design so far as not covered by registrable design or patent there is no legal monopoly or property. There is property no doubt in the drawings and plans in which it is embodied, and if the design is kept secret it may be protected by those remedies which are available against breaches of confidence. Bearing these conclusions in mind and having regard to all the circumstances and documents which I have related and set out, I think that there is no substantial irreconcilability between the documents and the findings in the Case Stated.

It seems to me that the respondent had, so far as the subject of the claims is concerned, no property in the designs except to the extent that minor features were covered by patents in his name and when he affected to sell all his rights and interests in (inter alia) the drawings mentioned in part four of the schedule to the agreement of April 11, 1919, he was only in effect saying so far as those drawings embody features covered by any patents you are to have any rights after Dec. 31, 1918. I think that the designs of the "O" and "V" types (so far as they can be the subject of property and subject to the respondent's claim in respect of the patented minor features) belonged to the company, and that throughout the period covered by the claims the company had the right to the designs and the right to use under their agreements with the respondent the patented features. The forms of the claims before the Royal Commission make it plain that the designs in their entirety were regarded by the company as theirs to use, and that the company was claiming on the footing of the damage suffered by the company and on no other footing and were claiming on their own behalf and not on behalf of or as agent for the respondent.

Nevertheless, under the agreements the respondent had, I think, a definite contractual right against the company to an appropriate payment by the company for user in respect of those features which were covered by patents belonging to him prior to Dec. 31, 1918, but this was an unliquidated contractual claim. In no sense had he any right to any part of the actual moneys paid to the company by the Treasury. The fact that £30,000 was paid by a settlement in account with the Treasury without apparently the respondent requiring any provision to be made for him out of it seems in accordance with this view. I think that the company could do what they liked with the money payable to them by the Treasury.

I do not think that the joinder of the respondent in the American claims makes any difference to the position. He was in my judgment joined pro forma only because of an allegation of an agreement made between the British Government and him acting on behalf of the company.

If this be, and I think it is, the right view, the question of the agency of the company disappears and the Attorney-General candidly and fairly admitted before your Lordships' House that if the plea of the agency of the company could not be sustained the appeal must fail. I think that the sum of £30,483 was only received by the respondent when it was paid to him in 1927 by the company in discharge of its contractual obligation to him.

This conclusion renders it unnecessary to consider the questions passed upon in the Court of Appeal, and I do not desire to give any indication of opinion one way or the other in regard to them.

In my opinion this appeal fails and should be dismissed with costs.

LORD MACMILLAN.—I agree.

LORD WRIGHT.—I also agree.

LORD ATKIN.—I am asked by my noble and learned friend, **LORD RUSSELL OF KILLOWEN**, to say that he also agrees.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue*; *Kimber Bull, Howland, Clappé, & Co.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., and EDWARD J. M. CHAPLIN, ESQ., *Barristers-at-Law.*]

BIBL. LONDIN